

zone population. The Center on Budget Policy and Priorities estimates that from 2006 to 2008, the law will provide approximately \$57 million in added LIHTC for Louisiana, \$35 million for Mississippi, and \$15 million in Alabama. In addition, for 2006 only, the Act provides for \$3.5 million in LIHTC each for Texas and Florida.³³ Importantly, the Act designates the newly defined Gulf opportunity zone and zones designated as disaster areas due to Rita and Wilma as "difficult development areas."³⁴ In such areas, the eligible basis of a new building and the eligible rehabilitation costs for an existing building may be increased by 30%.³⁵ Thus the tax credits may cover more of the cost of the unit, allowing the tax credits to make the units more affordable.

Unfortunately, the Act requires that the special tax credits must be allocated to developments in the year in which they are given to the state. The regular LIHTC rules allow credits to be carried over into later years under some circumstances.³⁶ The time limit on the use of the LIHTC will place a lot of pressure on states to put the LIHTC into use. The legislation also makes a modification to the income limits for rural jurisdictions in the Gulf opportunity zone, i.e. the Katrina area.³⁷ ■

³³*Id.* at 2579 (to be codified at 26 U.S.C.A. § 1400N(c)(2)).

³⁴*Id.* at (§ 1400N(c)(3)). See also 26 U.S.C.A. § 42(d)(5)(C)(iii)(I) (West, WESTLAW through P.L. 109-169 (excluding P.L. 109-162,109-163) approved 01-11-06).

³⁵26 U.S.C.A. § 42(d)(5)(C)(i) (West, WESTLAW through P.L. 109-169 (excluding P.L. 109-162,109-163) approved 01-11-06).

³⁶*Id.* § 42(h)(3)(C) and (D).

³⁷Pub. L. No. 109-135, 119 Stat 2577, 2578 (Dec. 21, 2005) (to be codified at 26 U.S.C.A. § 1400N(c)(4)).

District Court Infers Private Right to Enforce Enhanced Voucher Statute

Late last year in a resounding victory for residents of federally assisted housing, the United States District Court for the Eastern District of New York found congressional intent to create a private right of action to enforce the enhanced voucher provisions of the United States Housing Act, 42 U.S.C. § 1437f(t). The case, *Estevez v. Cosmopolitan Associates LLC*, 2005 WL 3164146 (E.D.N.Y. Nov. 28, 2005), involved a challenge by residents of a Section 8 Moderate Rehabilitation landlord's refusal to accept enhanced vouchers.

In 2003, Defendant Cosmopolitan Associates opted out of its Project-Based Section 8 contract. Plaintiff tenants were issued enhanced vouchers by the New York City Department of Housing Preservation and Development, which Cosmopolitan accepted. In June 2005, Cosmopolitan informed the plaintiffs that it would not offer new enhanced leases and demanded that the tenants pay full contract rents for their units.¹

The tenants filed suit, alleging that Cosmopolitan's actions violated 42 U.S.C. § 1437f(t). The tenants also moved for a preliminary injunction to bar Cosmopolitan from refusing to renew their leases and require it to accept their enhanced vouchers. The district court granted the tenants' motion in its November 2005 decision.²

Enhanced Vouchers

The enhanced voucher provision of the United States Housing Act authorizes the issuance of enhanced vouchers to residents of HUD-assisted housing upon the occurrence of certain "eligibility events," such as a decision of a development owner to opt out of a project-based Section 8 housing assistance payments (HAP) contract. The basic purpose of enhanced vouchers is to prevent involuntary displacement of assisted housing residents.

Enhanced vouchers are largely equivalent to typical tenant-based housing choice vouchers except that the payment standards for these vouchers may be higher (up to the contract rent of the resident's formerly HUD-assisted unit).³ In addition, the statute provides that with an enhanced voucher an "assisted family may elect to remain in the same project in which the family was residing

¹*Estevez v. Cosmopolitan Assocs. LLC*, 2005 WL 3164146, at *2 (E.D.N.Y. Nov. 28, 2005).

²*Id.* at *1. Plaintiffs were represented by Oda C. Friedheim and Judith Goldiner of the Legal Aid Society, New York.

³See generally NHLP, HUD HOUSING PROGRAMS: TENANTS' RIGHTS § 15.4.2.4 (3d ed. 2004).

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.

on the date of the eligibility event for the project”⁴ The plaintiffs in *Estevez* contended that Cosmopolitan’s refusal to renew their leases and accept their enhanced vouchers violated the “elect to remain” provision of the statute.

Cosmopolitan also argued that the plaintiffs had no private right of action to enforce § 1437f(t).

District Court’s Implied Right of Action Analysis

In its consideration of the plaintiffs’ preliminary injunction motion, the district court examined the familiar factors: likelihood of irreparable injury to the plaintiffs if the injunction is not granted and the plaintiffs’ likelihood of success on the merits of their claims. Cosmopolitan effectively conceded that the plaintiffs faced a likelihood of irreparable injury.⁵ Regarding likelihood of success, the district court, examining the text of § 1437f(t) and the legislative history prior to the provision’s enactment in 1999, rejected various arguments raised by Cosmopolitan and concluded that Cosmopolitan’s course of action violated the statute.⁶

However, Cosmopolitan also argued that the plaintiffs had no private right of action to enforce § 1437f(t). The court resolved this issue by applying the four-factors implied right of action test set forth by the Supreme Court in *Cort v. Ash*.⁷ Emphasizing, *inter alia*, that § 1437f(t) contains “specific and enforceable requirements,” that private enforcement was consistent with the statutory

⁴42 U.S.C.A. § 1437f(t)(1)(B) (West 2003).

⁵*Estevez* at *3.

⁶*Id.* at *7 (“Cosmopolitan may not refuse to accept plaintiffs’ enhanced vouchers or attempt to evict plaintiffs on grounds of non-payment of the voucher portion of the rent.”).

⁷422 U.S. 66 (1975). The district court restated the four factors as follows:

(1) whether the plaintiff is one of the class for whose “especial” benefit Congress enacted the statute, “that is, does the statute create a federal right in favor of the plaintiff”; (2) whether there exists “any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one”; (3) whether it remains “consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff”; and (4) whether the cause of action is “one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law.”

Estevez at *7 (citing *Cort*, 422 U.S. at 78).

scheme,⁸ and that vouchers are not an area traditionally relegated to state law, the district court “f[ou]nd that Congress intended to create a private right of action under § 1437f(t).”⁹

Conclusion

The *Estevez* decision is an important victory both for the plaintiffs in the case and for residents of HUD-assisted developments throughout the country. The decision is all the more noteworthy for the successful showing regarding private enforceability requirements, which courts have increasingly applied more rigidly in recent years. ■

New York City Enacts Preservation Purchase Law

Resoundingly overriding a mayoral veto by a 44-3 vote, the New York City Council has adopted legislation that requires private owners exiting federal affordable housing programs to provide purchase rights for tenant associations or their designees. Enacted as Local Law 79 after an eighteen-month community campaign, the Tenant Empowerment Act amends the city’s administrative code to give tenants time-limited purchase opportunities when landlords seek market-rate conversion of federally assisted housing.¹ New York City thus joins Illinois² in restricting owner choice as the determining factor in whether subsidized privately owned affordable rental homes will be preserved.

State and Local Right of First Refusal Laws

In the absence of a mandatory and robust federal preservation program, state and local right of first refusal laws, or similar laws, address the threat that owners will choose

⁸The court also noted that § 1437f(t) does not expressly provide for administrative enforcement. *Id.* at *9.

⁹*Id.* at *9-10.

¹Tenant Empowerment Act, New York, N.Y., Local Law 79 (Aug. 17, 2005), available at http://www.nyccouncil.info/pdf_files/bills/law05079.pdf. The Act (formerly Intro. No. 186-A) creates a new Chapter 9, entitled “Right of First Refusal and First Opportunity to Purchase,” in Title 26 (§§ 26-801 to 26-810) of the Administrative Code of the City of New York. Citations to the Act herein will be to these Administrative Code sections.

²See NHLP, *Illinois Establishes Tenant Purchase Option for Properties*