Housing Law Bulletin

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HUD SUBMITS PROMISING FY 2001 HUD BUDGET REQUEST TO CONGRESS[1]

President Clinton submitted his Fiscal Year 2001 (FY 01) budget request to Congress on February 7. For the fiscal year beginning October 1, 2000, HUD seeks total budget authority[2] for Department of Housing and Urban Development (HUD) programs of around $32 billion, a figure that appears at first to be a bold increase of about $6 billion.[3]

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Of this proposed $6 billion increase, however, approximately $2.37 billion is required to renew higher numbers of expiring Section 8 contracts, and another $1.69 billion is for miscellaneous "adjustments." Hence, less than $2 billion represents absolute dollar increases in HUD programs. About one-third of this increase is for new vouchers to meet growing housing needs and additional funds to improve voucher program operation. The rest of the requested FY 01 funding increase, about $1 billion, would provide marginally higher funding levels for most HUD programs, about the amount necessary to adjust for inflation.

For programs assisting very low-income individuals and families, such as public housing and Section 8, absent the proposed increase for 120,000 incremental vouchers, HUD's budget provides nominally increased funding levels. Without much more information, it is difficult to determine whether these increases would even be sufficient to maintain current services.

Section 8 Funding ("Housing Certificate Fund")

For the Section 8 program, the request covers both full funding to renew all expiring contracts, as well as funding for 120,000 new vouchers, totalling $14.13 billion. The renewal component provides funding to renew all expiring tenant- and project-based Section 8 contracts, requiring about $13 billion in new budget authority, net of approximately $1.3 billion in recaptures, to cover 2.6 million expiring units,

[1]With permission, this article draws heavily upon one prepared by the National Low-Income Housing Coalition in its February 11, 2000 edition of its weekly Memo to Members (Vol. 5, No. 6).

[2]In federal government accounting, "budget authority" refers to permission to make outlays (actual expenditures) in the future, but not necessarily just in the year in which the budget authority is made available.

[3]Readers can obtain HUD's FY 01 Budget Summary entitled *HUD: Back in Business*, containing much of the information reviewed here, from the following address: www.hud.gov/budget01/backinbus/01.pdf.

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out of a program total of about 3 million. Of these expiring units, 1.76 million are tenant-based assistance and moderate rehabilitation units within the jurisdiction of the Office of Public and Indian Housing (budgeted at an average annual per unit cost of $5,733, a total of $10.09 billion), including those new vouchers first provided last year. About 760,000 are for project-based assistance administered through the Office of Housing (budgeted at an average cost of $4,969, a total of $3.78 billion). For the first time, HUD proposes to renew through the Housing Certificate Fund those expiring Section 8 contracts originally funded out of the Shelter Plus Care program authorized under the McKinney Act. This year, there are only 6,500 such units, budgeted at $37 million.

Beyond the total Section 8 budget requirement for FY 01, an additional $4.2 billion was pushed forward into this year by the use of the "advance appropriation" technique in the FY 00 Appropriations Act. The Administration seeks to offset the burden of that maneuver by proposing to replicate the technique for FY 01, pushing $4.2 billion of this year's contract renewal burden into FY 02. So long as Congress continues to employ the technique, the one-time benefit in reducing FY 00's budget authority requirements can carry no real price tag. Every subsequent year's price tag can simply be pushed forward into the following year by another advance appropriation of the same amount. Thus, each year's Housing Certificate Fund needs are essentially unaffected when the effects of the advance appropriation technique are netted out.

More incremental vouchers are another highlight of this budget, with 120,000 new rental assistance vouchers requested, at an annual cost of $690 million. Of these, 60,000 are "fair share" vouchers allocated through ordinary channels and not targeted to any specific population. Another 32,000 are for families transitioning from welfare to work, and 18,000 are for people who are currently homeless (funded through the Homeless Assistance account). The remaining 10,000 are for a new "housing production voucher" program. The proposal also seeks $50 million for a "voucher success fund" to promote voucher utilization in areas where the program is experiencing operational problems. It would provide additional resources to housing authorities to help families with mobility counseling, create funds to assist with security deposits and provide technical assistance and outreach to landlords.

Under the proposed "production voucher" program, 10,000 of these incremental vouchers would be allocated to states along with their low-income housing Tax Credits to improve the affordability of newly produced units for extremely low-income renters. Existing income targeting guidelines require that at least 75 percent of vouchers be used by families with incomes less than 30 percent of their area's median income. Because the proposed new vouchers are limited to no more than 25 percent of the units in any new development, HUD projects that the program will encourage the construction of up to 40,000 units of mixed-income housing. The voucher-occupied Tax Credit units could also obtain Federal Housing Administration insurance. In addition to the vouchers and the FHA insurance linked to the Tax Credits, HUD is also requesting $8 million for one-time incentive payments to developers who build units targeted to specific needs, such as large families.

In reality, these units would be produced anyway under the Tax Credit program, regardless of the presence of the voucher assistance. However, the voucher could actually increase the affordability of the units produced *if* the program ultimately enacted ensures that voucher holders will continue to have reserved access to the units once the original voucher tenant decides to move.

Public and Indian Housing Funding

The primary public housing accounts receiving appropriations are the Operating Fund, to cover the difference between operating costs and tenant rent contributions, and the Capital Fund, for project rehabilitation. For FY 01, the Administration requests only $3.19 billion for the Operating Fund, and $2.95 billion for the Capital Fund, increases of less than 2 percent over last year's funding levels.

Within public housing, HUD's request would move the $55 million Resident Opportunity and Self Sufficiency program from a Community Development Block Grant set-aside into the Public Housing Capital Fund. The budget proposes to allow public housing authorities to collect a one-month security deposit from all public housing residents beginning October 1, 2000 "to improve incentives for resident upkeep of units" and to parallel management practices in HUD's Section 8 program and the private rental market. Housing authorities will have discretion to decide how the security deposit will be paid, either in monthly installments, up-front, or a combination of the two.

GUIA PARA LOS RESIDENTES (RESIDENTS' GUIDE) AVAILABLE IN SPANISH

The Public Housing National Residents Organizing Campaign and the Center for Community Change (CCC) released a 16-page Spanish version of the "red book," the Residents Guide to PHA Plans. This booklet has excerpts from the longer 60-page English version which focus on what the plans are and what residents rights are to participate through the RAB.

To obtain copies contact Beverly Jackson at CCC at (202) 342-0159.

HUD FY2001 BUDGET CHART FOR SELECTED PROGRAMS

DOLLARS IN MILLIONS

HUD Program (set-asides indented)	FY98 Enacted	FY99 Enacted	FY00 Enacted	FY01 Request
Housing Certificate Fund	$9,373	$10,326	$11,376	$14,128
Contract Renewals	9,030	9,599	10,640	13,010[1]
New Section 8 Vouchers	—	283[2]	346[3]	690[4]
Voucher Success Fund	—	—	—	50[5]
Shelter Plus Care Renewals	—	—	—	37
Contract Administration	—	—	194	209
Housing Production Incentives	—	—	—	8[6]
Public Housing Capital Fund	2,500	3,000	2,900	2,955
Resident Opportunity and Self Sufficiency	—	—	55[7]	55
HOPE VI	550	625	575	625[8]
Public Housing Operating Fund	2,900	2,818	3,138	3,192
Drug Elimination Grants	310	310	310	345
Indian Housing Block Grants	600	620	620	650[9]
Elderly Housing (Section 202)	645	660	710	779[10]
Disabled Housing (Section 811)	194	194	201	210
HOME Investment Partnership Program	1,500	1,600	1,600	1,650
Housing Counseling Assistance	20	18	15	24
Community Development Block Grants	4,674	4,750	4,800	4,900
Self Help Homeownership	—	28	20	18
Youthbuild	35	43	42.5	75
Economic Development Initiative	138	225	256	100
Homeless Assistance Grants	823	975	1,020	1,200[11]
Housing for Persons with AIDS	204	225	232	260
Rural Hosing and Economic Development	—	25	25	27
Brownfields Redevelopment	25	25	25	50
America's Private Investment Prog. (APIC)	—	—	20	37
Fair Housing Assistance Program	15	16.5	20	21
Fair Housing Initiative Program	15	23.5	24	29[12]
Lead-Based Paint Hazard Reduction	60	80	80	120[13]
Emergency Food and Shelter Program (FEMA)	100	100	110	140

[1]This amount fully funds contract renewals. This amount includes funds for amendments Section 8 subsidy contracts and enhanced vouchers. Like the FY00 budget, the FY01 budget request includes a $4.2 billion advance appropriation.
[2]In FY99, 50,000 vouchers were authorized for families moving from welfare to work.
[3]In FY00, 60,000 vouchers were authorized for "fair share" distribution, not targeted to any specific population.
[4]For FY01, the request seeks a total of 120,000 vouchers to be distributed in this way: 60,000 fair share, 10,000 for the new housing production program, 18,000 for people who are currently homeless, 32,000 for people transitioning from welfare to work. Of the 60,000 fair share vouchers, 5,000 will be for non-elderly disabled housing units and 2,000 will be for the Family Unification Program.
[5]This program shares some attributes of the Regional Opportunity Counseling program which was funded at $10 million in FY99 but not funded in FY00.
[6]For one-time incentive payments to developers who build units targeted at special needs (e.g., large families) under the vouchers/ low income housing tax credit/ FHA-insured housing production proposal in the FY01 budget request.
[7]In FY99, ROSS program was a set-aside within CDBG. ROSS is now a set-aside within the Public Housing Capital Fund.
[8]Includes $180 million to address public housing subject to the mandatory conversion law that requires public housing to convert to tenant-based assistance if it would cost more to operate and modernize the units than to voucher out the subsidy.
[9]The FY01 request changes the name of this program from Native American Housing Block Grants to Indian Housing Block Grants.
[10]Includes $50 million for conversion of Section 202 housing to assisted living facilities and $50 million for service coordinators.
[11]This amount includes $105 million for the 18,000 new rental assistance vouchers.
[12]Of the $29 million requested, $7.5 million will be used to fund the final year of a three-year study. And, $2.5 million will be used to fund the Project for Training and Technical Assistance that will provide training and technical assistance to housing providers on designing and constructing properties to be in compliance with the accessibility requirements of the Fair Housing Act. Finally, $1 million of the $29 million for FHIP will be used to establish an academy to conduct HUD-approved training, primarily in the areas of testing and self-monitoring, to fair housing organizations and industry groups.
[13]$10 million of which will be used to continue the Healthy Homes Initiative.

Provided courtesy of the National Low Income Housing Coalition

The budget requests $625 million for HOPE VI, the federal grant program for "revitalizing" severely distressed public housing, a $50 million increase over last year. Of this amount, up to $180 million would be set aside to cover the costs of mandatory conversions of public housing into tenant-based assistance required by a 1996 law, outside of the regular HOPE VI program. The request also would provide $1.2 million for an Urban Institute study on the long-term effects of HOPE VI on former residents of targeted developments.

Homeless Assistance Programs

The budget request seeks an increase from $1.02 billion to $1.2 billion for homeless assistance programs, including Emergency Shelter Grants, Supportive Housing, Section 8 Single Room Occupancy units, and Shelter Plus Care. Of this amount, $105 million would fund 18,000 new rental assistance vouchers for people who are currently homeless. The request shifts Shelter Plus Care renewal costs into the mainstream Section 8 program. The Shelter Plus Care program provides rent subsidies that enable local governments and their nonprofit partners to provide housing linked to supportive services for extremely low-income, formerly homeless persons with disabilities, including mental illness, chronic substance addiction and HIV/AIDS. Shelter Plus Care renewal costs in many communities are eating away the majority of Shelter Plus Care funding; communities are forced to choose between forgoing the renewal of peoples' rent subsidies or developing needed new homeless programs. Shifting the renewal costs into the Section 8 program is supported by many advocates as a solution to this local dilemma. The budget request also would continue to require that all funding for services be matched 25 percent by grantees, while removing the existing requirement that 30 percent of funds be used for permanent housing.

CDBG and HOME funding

The budget requests $4.9 billion for the Community Development Block Grant (CDBG) program, an increase of $119 million over last year. Included is an Optional Entitlement Communities (OEC) proposal, permitting cities as small as 25,000 (that are not currently part of an entitlement county) and urban counties as small as 100,000 to choose "entitlement" status within a three-year period. These new OECs would receive formula grants directly from HUD, rather than as subgrantees from states.

The CDBG level also includes a new $20 million Community and Interfaith Partnerships Initiative to assist community-based nonprofit organizations (including faith-based ones) in their efforts to supply affordable housing, create economic opportunity, promote the goals of fair housing and increase the effectiveness of other programs and initiatives administered in distressed high poverty areas. These funds will be distributed through a competitive grant process.

The HOME program would receive $1.65 billion, an increase of $50 million over last year, to support a projected program level of 92,000 units through acquisition, rehab, or new construction, and about 10,900 units of tenant-based rental assistance.

Other Housing Programs

The request seeks an increase from last year's $232 million to $260 million for the Housing Opportunities for People with AIDS (HOPWA) program, supporting approximately 48,000 units.

Funding for elderly housing (Section 202) programs would increase $69 million to $779 million under the proposal, including:

- $50 million in new grants to states and localities to subsidize new, mixed-income assisted living units;
- $50 million for capital grants to convert units in existing Section 202 properties to assisted living units; and
- $50 million for an expanded service coordinator program to serve primarily Section 202 residents.

Funding for disabled housing (Section 811) programs would increase $9 million to $210 million. The request language would require from 25 to 50 percent of these funds to be earmarked for tenant-based rental assistance under five-year contracts.

HUD proposes raising the Federal Housing Administration's loan limits for single-family mortgages. The proposed higher limits would allow FHA single-family insurance to cover loans up to the same level as the Fannie Mae and Freddie Mac limits. Currently, FHA can only insure up to 87 percent of Fannie's and Freddie's limits in high-cost areas and up to 48 percent in low-cost areas.

Outside of the HUD budget, the President's budget also calls for increasing the Low-Income Housing Tax Credit from $1.25 to $1.75 per capita at a five-year cost of $5 billion in tax expenditures, and indexing it to inflation. HUD claims that this increase will support production of at least an additional 150,000 units (apparently at Tax Credit rents) over the next five years.

The budget process now turns to the Congress. The House and Senate Budget Committees hope to have a budget resolution completed by March 15, a month earlier than required. This budget resolution sets general budget guidelines and, theoretically, acts as a blueprint for the next step of distributing funds to appropriations subcommittees. These subcommittee allocations are critical to housing and community development program funding, and form the framework under which the actual annual appropriations decisions are made during the period between the late spring and fall, for the fiscal year commencing October 1, 2000. ■

PRESIDENT'S RURAL HOUSING SERVICE BUDGET IS A DISAPPOINTMENT FOR THE POOR

The President's FY 01 budget proposes a significant increase of nearly $790 million for the Rural Housing Service (RHS) programs. Most of that increase, however, comes in the programs serving moderate-income households. The programs serving low-income households are by and large scheduled for only very modest increases or, in some cases, decreases in funding.

The biggest proposed increase comes in the guaranteed single family home loan program, which will increase from $3.2 billion to $3.7 billion. Because this program merely guarantees market rate loans made by private lenders for the purchase and construction of single family homes in rural areas, it serves predominantly moderate-income households. The Section 502 direct loan program, which serves low- and moderate-income households through the use of an interest subsidy, is scheduled to receive a $139 million increase, from $1.161 billion to $1.3 billion. At least 40 percent of the funds appropriated for the program must serve households with incomes at or below 50 percent of area median income.

The Section 515 Rural Rental Housing Program, which serves mostly low- and very low-income households, is scheduled to receive only a $6 million increase in appropriations, going from $114 million to $120 million. The primary subsidy mechanism associated with the program, the Rental Assistance Program, is slated to increase by $40 million from $640 million to $680 million. Most of that increase, however, will be used to renew expiring Rental Assistance contracts and to finance preservation equity or transfer loans.

By contrast, the Section 538 guaranteed multi-family rental housing loan program, which serves moderate-income households, is scheduled to double in size from $100 million to $200 million under the President's proposed budget. In addition, the budget signals the Administration's intention to eliminate a statutory provision that requires that a shallow interest subsidy be provided to 20 percent of the projects financed by the program because "in most cases, the tenants this program serves have incomes high enough to guarantee sufficient cash flow to borrowers to allow them to pay back the loan." [1]

The remaining RHS programs are slated for modest increases or cuts, with most of the cuts occurring in programs that received a special supplemental appropriation in FY 00 to assist families who were residing in areas that suffered from Presidentially declared natural disasters. If should be noted that, overall, these programs are so modest in size that the funding increases or decreases are not overly significant in the RHS budget. One such program, the Section 504 home repair loan program for very low-income homeowners, will decrease in size from $48 million in FY 00 to $40 million in FY 01. This is due to the fact that the program, originally funded at nearly $33 million in FY 00, received a $15.6 million supplemental appropriation in FY 00 for disaster assistance loans. The companion Section 504 home repair grant program, which is limited to elderly households and is funded from an account that includes other RHS grant programs for compensation for construction defects and supervisory and technical assistance grants, is also scheduled for a decrease in funding from $38 million in FY 00 to $30 million in FY 01. This is also due to the fact that the program received a $12 million infusion in FY 00 for grants to individuals who were affected by natural disasters. If the special disaster appropriation is excluded, the program will increase from $26 million in FY 00 to $30 million in FY 01.

The Section 514 and 516 farm labor housing loan and grant programs will be combined under the administration's proposal into a single flexible account of $50 million that will enable the administration to decide how to expend the funds between the programs. Nominally, the budget proposes that $30 million be made available in Section 514 loans, $15 million in Section 516 grants and $5 million in migrant farmworker hardship grants. This is only a $3 million increase over the FY 00 appropriations that provided $30 million for Section 514 loans, $14 million for Section 516 grants and $3 million for domestic farm labor disaster grants.

The Section 523 and 524 site development loan programs will both be held at FY 00 levels of $5 million each. The rural housing preservation grant program, authorized by Section 533, will increase from $6 million to $8 million while the supervisory technical assistance grant program will decrease from $2 million to $1 million.

The only other program slated for a significant budget increase is the Section 523 Self Help Technical Assistance Grant Program. The administration is proposing to increase the appropriations for the program, which has enjoyed widespread support due to its capacity to assist very low-income households through its sweat equity component, from $29 million to $40 million dollars.

Since the President's budget is only the opening move in a protracted budget process that will play out in Congress over the next 10 months, it is premature to predict how the RHS programs will ultimately fare. This is particularly true in an election year. While it is gratifying to note that the agency's overall budget is supported by the Administration and is slated for a significant increase, it is very disappointing that only one of the programs directly serving low- and very low-income households is proposed to receive a significant increase in funding while all the rest are slated to remain at effectively the FY 00 levels. ■

[1] The Budget for Fiscal Year 2001, at 133.

NINTH CIRCUIT PANEL UPHOLDS "ONE-STRIKE" EVICTIONS

In a potentially far-reaching decision for legal claims surrounding HUD's "one-strike" strict liability eviction policy for tenants in public and assisted housing, a panel of the United States Court of Appeals for the Ninth Circuit has reversed a 1998 federal court ruling. *Rucker v. Davis*, __ F. 3d __, 2000 WL 149415 (9th Cir., Feb. 14, 2000), *reversing* No. C 98-00781 CRB (N.D. Cal. June 19, 1998), 1998 WL 345403. In that ruling, a district court judge had granted a preliminary injunction against one housing authority's application of the policy against four elderly and disabled tenants.[1] The PHA had sought to evict the tenants due to the alleged criminal conduct of their household members on or near the project premises, with no showing of the tenants' knowledge or participation.

While the lower court had found that the tenants had demonstrated a likelihood of success on their claims that HUD's policy conflicted with the governing statute and possibly constitutional guarantees, the Ninth Circuit panel disagreed, in a two-to-one decision, over a strong dissent from newly confirmed Circuit Judge Fletcher. It reversed the granting of the injunction, finding HUD's policy of holding tenants strictly liable for the conduct of all household members and guests to be a permissible interpretation of the statute and constitutional.

If this ruling stands after any further appeals, many public and assisted housing tenants will find it more difficult to prevail on claims presented in judicial eviction proceedings that they are not liable for others' conduct of which they have no knowledge, although they will certainly be able to present those issues to any available administrative hearing process. Those within the jurisdiction of the Ninth Circuit will find it practically impossible. Absent any provisions in state or local law that establish additional standards for such evictions, tenants will essentially be at the mercy of the PHA or housing provider's discretion. Once the provider's decision is made, obtaining *de novo* judicial review of whether the alleged conduct constitutes "good cause" will be rare.

The tenants will probably file a petition for rehearing and suggestion for rehearing *en banc* by a larger panel by the 45-day deadline around the end of March.

Legal background

HUD's so-called "one-strike" lease provisions, which prohibit any drug-related criminal activity on or near the premises by a resident, any member of the household, guest, or another person under the resident's control, originated in the Anti-Drug Abuse Act of 1988. There, Congress found, among other things, that "the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs," and that "public and other federally assisted low-income housing in many areas suffers from rampant drug-related crime."[2] Congress required that PHAs use leases which:

> (5) provide that a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.[3]

In 1990, Congress revised the language of the statute, without substantive effect.[4] Congress amended this statute again in 1996, replacing the phrase "on or near such premises" with "on *or off* such premises" (emphasis added).[5]

In 1991, HUD issued regulations implementing the statute. One regulation, 24 C.F.R. § 966.4(f)(12), requires the lease to include language that obligates the tenant

> (i) [t]o assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
>
> . . . .
>
> (B) Any drug-related criminal activity on or near such premises. Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.[6]

HUD rejected comments opposing the "strict liability" policy in developing these rules,[7] providing PHAs the

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[1]*See Housing Authority Enjoined From Evicting Innocent Residents for Violations of "One Strike" Lease Provisions By Household Members*, 28 HOUS. L. BULL. 119 (July 1998).

[2]42 U.S.C. § 11901(1)-(2).

[3]42 U.S.C. § 1437d(l)(5) (1989). Congress also defined the term "drug-related criminal activity" as "the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in section 802 of Title 21)." 42 U.S.C. §1437d(l).

[4]The statute was revised to read: "Each public housing agency shall utilize leases which ...(5) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy..." 42 U.S.C. §1437d(l)(5) (1991).

[5]42 U.S.C. § 1437d(l)(5) (1997). In 1998 the section was unchanged but redesignated as subsection 6 (l)(6) of the United States Housing Act, 42 U.S.C. §1437d(l)(6) (West Supp. 1999).

[6]Another regulation similarly provides that any drug-related criminal activity on or near such premises by the tenant, any member of the household, a guest, or another person under the tenant's control, shall be cause for termination of tenancy. 24 C.F.R. §966.4(l)(2)(ii)(B) (1999).

[7]56 Fed. Reg. 51,560, 51,566 (Oct. 11, 1991).

discretion to evict a tenant whose household members or guests use or sell drugs on or near public housing premises regardless of whether the tenant knew or should have known of such activity. In exercising that discretion, the rules also recognize the importance of giving each case individualized consideration in light of the equities presented and evaluating the propriety of alternative remedial measures.[8]

In his 1996 State of the Union speech, President Clinton gave new emphasis to enforcement of this policy, and HUD followed up with issuance of its "one strike" notice soon afterwards.[9] In 1998, Congress elsewhere added other duplicative provisions requiring leases to permit eviction for drug use by household members that threatens other tenants' health and safety.[10]

Many cases involve not the offenders but the remaining tenants, who are faced with the loss of their homes due to the conduct of former household members.

The facts

The facts are not unfamiliar to legal services and public interest advocates representing tenants or to PHAs, who see these kinds of cases all too often. Many cases involve not the offenders themselves, who are often gone or incarcerated, but the remaining tenants, who are faced with loss of their homes and usually precious housing assistance due to the offending conduct of invitees or former household members. Under "one strike," in addition to the well-publicized drug cases, tenants have faced eviction for the criminal or illegal acts of others. These incidents have included rape perpetrated by outsiders, violent physical assault or physical or sexual abuse by current or former spouses, domestic or sexual partners, or guests, and reportedly even the suicide of a family member.

In *Rucker*, the PHA terminated the leases and initiated eviction proceedings in state court against the four tenant plaintiffs for violating the "one-strike" provisions of the lease, adopted pursuant to HUD's regulations and 1996 "one strike" policy. In three of the cases, the violations occurred outside the tenants' apartments and were carried out by members of the resident's household without the knowledge of the resident. Two of these involved arrests of grandsons for marijuana use in the parking lot of the property; the other involved an arrest of another tenant's disabled daughter three blocks away, for possession of cocaine and paraphernalia. In the fourth case, the partially paralyzed resident's caregiver was arrested for possession of cocaine in the unit, apparently without his knowledge or consent, and the Oakland Housing Authority's [OHA] personnel subsequently found drug paraphernalia in the unit on two subsequent inspections over a two-month period. The tenant then fired the caregiver.

The legal claims

After the OHA filed judicial eviction proceedings, the residents initiated federal court proceedings against OHA and HUD, seeking to enjoin the evictions. Their complaint contended that the lease provisions and the HUD regulations, when applied to "innocent" tenants, are contrary to statutory provisions which prohibit housing authorities from using leases that contain unreasonable terms and conditions and which authorize evictions for certain drug-related and criminal activity.[11] In addition, the tenants contended that the lease provisions violate their due process rights and First Amendment rights to freedom of association, as well as the Excessive Fines Clause of the Eighth Amendment. Finally, they claimed that the attempted eviction of the disabled resident and one resident with a disabled daughter violated the Americans with Disabilities Act (ADA).[12] Many of the claims against HUD were brought pursuant to the Administrative Procedure Act (APA)[13] and against the housing authority via Section 1983.

The lower court decision

After rejecting the defendants' standing and abstention arguments, the district court judge had refused to dismiss many of the statutory and constitutional claims. It further found that, while both the statute and the legislative history failed to answer whether the eviction of "innocent" tenants was permissible, HUD's regulatory policy violated the statutory provision prohibiting the use of "unreasonable" lease terms.[14] The ruling had found "serious questions" and a fair chance of success with respect to innocent tenants for

[8]*See* 24 C.F.R. § 966.4(l)(5)(i) (1999).

[9]*See* HUD Notice PIH 96-16, "One Strike and You're Out" Screening and Eviction Guidelines for Public Housing Authorities (May 13, 1996).

[10]42 U.S.C. §13662 (West Supp. 1999), created by §577 of Pub. L. No. 105-276 (Oct. 21, 1998).

[11]Section 6(l) of the United States Housing Act, 42 U.S.C. §1437d(l)(5).

[12]42 U.S.C. §12101 *et seq.*

[13]5 U.S.C. §§701-706 (West 1994).

[14]The district court had relied primarily on *Richmond Tenants Organization, Inc. v. Richmond Redevelopment and Housing Authority*, 751 F. Supp. 120 (E.D. Va. 1990) (lease provision prohibiting tenants from illegal use, sale or distribution of drugs and alcoholic beverages off-premises was unreasonable).

EARNED INCOME TAX CREDIT CAMPAIGN OUTREACH KIT FOR 2000

The Center on Budget and Policy Priorities has just released its Earned Income Tax Credit (EITC) Campaign outreach kit for 2000. The kit provides materials to assist organizations in informing workers in their communities about the EITC. You can download the entire kit, including posters in English and Spanish, at the Center's website, http://www.cbpp.org/eic2000/index.html. You also can order a paper copy by e-mailing the Center at eickit@cbpp.org. If you have questions about EITC outreach, please contact John Wancheck or Rosa Maria Castañeda at the Center: 202-408-1080 (ph), 202-408-1056 (fax).

off-premises drug-related criminal activity, finding the strict liability policy irrational because it will not reduce drug-related criminal activity. Further, the lower court had found that the only apparent rationale for the policy—that household members are discouraged from engaging in drug-related criminal activity by knowing that their conduct would lead to the eviction of the entire household—violates the First Amendment's guarantee of freedom of association. The person penalized "is not being punished for his own conduct and failure to police his own apartment or home, but rather because he lives with someone who committed a drug-related crime while outside the apartment or home." Accordingly, the court preliminarily enjoined OHA and HUD from evicting innocent residents for off-premises drug activity they had no reason to know about.

The district court's injunction had not, however, extended to prohibit evictions for others' drug activity within the leased units, because there the tenant's ability to exercise control makes a policy of responsibility at least reasonable. An exception to in-premises liability was provided for the disabled tenant who was dependent on his caregiver and was physically incapable of conducting a search, where the lower court found support for an ADA "reasonable accommodation" claim against the PHA for failure to modify the lease for persons with disabilities.

The appellate panel ruling

The majority of the Ninth Circuit panel rejected the reasoning of the District Court judge and the tenants' claims that HUD's rule violated the public housing statutes, the ADA or the constitution. While the appellate standard of review of the lower court's injunction is review for "abuse of discretion," a disagreement about the proper interpretation of the law suffices to justify reversal.

On the first statutory claim that HUD's strict liability rule violated the statute, the majority first noted the broad deferential standard of judicial review under the Supreme Court's *Chevron*[15] decision. Beginning with the express language of the statute, the court found that, under "basic rules of grammar," the phrase "under the tenant's control" applies only to the "guests and other persons" category of offenders, not to tenants themselves (of course) or to household members who commit drug-related criminal acts. The statute's language, in the court's view, thus "evinces a clear congressional intent to authorize termination" regardless of tenant knowledge or fault. Prior conflicting judicial decisions were of little consequence to the court's "clarity" finding.[16]

In addition, the appellate court reasoned that, under the "plain language" rule of statutory construction, Congress' use of the word "any" to modify the term "drug-related criminal activity" relieves any need for further specification of what kind of activity is intended to be covered. Thus, HUD's rule constitutes a permissible interpretation of the broad statute.

Attempting to deflect claims of possible injustice, the court stated that the statutory and regulatory authorization of eviction would not automatically produce evictions whenever the legal conditions are met, as PHAs still have discretion to make individual decisions in applying the rules. But in the court's view, that discretion is reserved for PHAs, not for courts called on to review PHA decisions to proceed with termination, whose review should be confined to claims of "abuse of discretion."

The majority also found support for its conclusion that Congress intended no "innocent tenant" requirement in two other federal statutes. First, it pointed to Congress' 1990 enactment of the mandatory three-year ban on eligibility for federal admission preferences for those previously evicted from public housing for drug-related activities, which contained a required exception for innocent family members.[17] Second, it cited the "innocent owner" exception contained in the federal civil forfeiture law.[18]

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[15]*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984).

[16]*Compare City of South San Francisco Hous. Auth. v. Guillory*, 41 Cal.App. 4th Supp. 13, 18-19 (Cal. App. Dep't Super. Ct. 1995) (drug-related activity by household member is cause *per se* for eviction), *with Charlotte Hous. Auth. v. Patterson*, 120 N.C. App. 552, 464 S.E. 2d 68, 72 (N.C.Ct. App. 1995) (finding legislative intent that eviction is appropriate only if the tenant is personally at fault for the breach).

[17]42 U.S.C. §1437d(c)(4)(A)(iii) (1999).

[18]21 U.S.C. §881(a)(7) (1999).

Finally, the majority rejected the lower court's ruling that the one-strike policy constituted an "unreasonable" lease term, primarily through the proposition that general provisions (the statute's "reasonableness" requirement) cannot "trump" more specific provisions (the strict liability provision). Here the court cited a number of policy concerns that supported its view of what Congress could have "reasonably" decided in permitting strict liability evictions. These included fears about "hamstringing" PHAs by requiring trials to determine facts germane to liability under a "fault[t]" principle, and society's "routine" imposition of liability without fault elsewhere, as in the tort liability of parents for the torts of their children and property owner liability for a prior owner's toxic deposits on land.

Most disturbing is the majority's refusal to evaluate the legislative history of the statute, mostly driven by its general skepticism of legislative history as a useful tool.

Most disturbing is the majority's refusal to evaluate the legislative history of the statute, mostly driven by its general skepticism of legislative history as a useful tool. The Senate Banking Committee, in a report accompanying the 1990 statutory revision, specifically stated that:

> The Committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.[19]

Even if this report were relevant because of a statutory ambiguity, the majority characterized it too as "ambiguous," although this assertion holds little water.

The majority also quickly rejected the tenants' two constitutional claims, including their First and Fourteenth Amendment rights to free and intimate associations and their Eighth Amendment right to be free from Excessive Fines. On the free association claim, the majority found that tenants are not being evicted due to their association with drug offenders, but because they violated their lease agreement. Rejecting the intimate association claim, the court found no undue burden on family living arrangements. Finally, the majority found no applicability of the Excessive Fines Clause since the punishment of eviction resulted in no cash or in-kind payment to the government.

[19] S. REP. NO. 101-316, *reprinted in* 1990 U.S.C.C.A.N. 5941.

Concerning the ADA argument, the majority found that the disabled tenant's claim for a lease modification to waive the strict liability policy is not reasonable, and thus outside of the statute's requirements.

Circuit Judge Fletcher authored a thoughtful and lengthy dissent. He disputed the majority's central statutory interpretation analysis as promoting absurd results and found sufficient ambiguity in the statute to require resort to the legislative history supporting the tenants. The dissent also advocates that the eviction provisions of the 1988 Anti-Drug Abuse Act be interpreted consistently with the anti-forfeiture revisions to the federal civil forfeiture statute contained in the same Act. These interpretations would avoid the substantial constitutional questions under the Due Process and Excessive Fines Clauses. Finally, the dissent pointed out that the lower court did not abuse its discretion in issuing an injunction on the ADA claim on the facts before it. ■

Regulatory Note: HUD issued a proposed rule on one-strike evictions in July of 1999, 64 Fed. Reg. 40,262 (July 23, 1999), but no final rule has yet been issued as of press time.

TERMINATION OF 30-YEAR PUBLIC HOUSING TENANCY HELD UNDULY HARSH

The New York Supreme Court, Appellate Division, recently unanimously reinstated the 30-year public housing tenancy of an elderly woman who breached a stipulated agreement with the New York City Public Housing Authority to exclude her 29-year-old son from the apartment that she shared with her daughter and grandchild.[1] The son had been excluded from the premises by the stipulated agreement after he had been found there with marijuana. More than two years after the agreement was entered into, during which time the authority had conducted nine investigatory inspections of the apartment, the son was found visiting while his mother was away from the apartment. After a hearing the authority terminated the tenancy for breach of the stipulated agreement. The appellate division reinstated the tenancy. It found that in "view of the absence of evidence that the tenant had consciously or intentionally violated the stipulation, the *de minimus* nature of the violation, and especially considering the drastic consequences to this particular petitioner who is an elderly woman and purportedly in ill health, the penalty imposed is unduly harsh under the unique circumstance presented for our review."[2] ■

[1] *Cardona v. Franco*, 699 N.Y.S. 2d 383 (N.Y. Appel. Div. 1st Dept. Dec., 9, 1999).

[2] *Id.*

ARKANSAS APPELLATE COURT UPHOLDS LOWER COURT'S REFUSAL TO EVICT UNDER "ONE-STRIKE" RULE

The Housing Authority of Trumann, Arkansas, brought an unlawful detainer action against one of its residents for failing to pay rent and for violating her lease on the grounds that the father of her two minor children, a Mr. Stracener, who was not listed as a resident of the unit, sold drugs from the residence to an undercover police agent on two occasions. The two incidents occurred one month before the authority amended its lease to incorporate the so-called "one-strike and you're out" policy, which authorizes lease terminations for criminal or drug activity on or near the premises, and four months before the tenant actually signed the lease incorporating that policy. Apparently, the authority did not become aware of the criminal activity until eight months after it occurred and four months after the tenant signed the new lease. Moreover, it did not commence the eviction proceedings until nearly five months later, after the tenant failed to pay her rent. The notice of termination to the tenant did not specify whether the authority was seeking to evict her under the old or new lease provisions.

By the time of the trial, the tenant had paid all her past due rent and the issue of nonpayment was not pursued by the authority. However, it did present evidence that Mr. Stracener regularly listed the apartment as his residence. The tenant testified that Mr. Stracener stayed with her periodically up to a week at a time, and that she often left him alone on the premises, but that he did not reside at the apartment. She also denied any knowledge of the incidents at the time they occurred and there was no evidence introduced that she knew of or participated in any of the drug offenses. The Authority did submit rebuttal evidence that on one occasion she informed an officer serving subpoenas that Mr. Stracener lived at her apartment.

After trial without a jury, the trial court held that the authority had failed in its burden of proof and dismissed the unlawful detainer. The authority filed an appeal challenging the sufficiency of the evidence to support the judgment.

The appellate court affirmed the decision on the grounds that the lower court's decision was not clearly erroneous when the evidence is viewed in the light most favorable to the tenant. *Housing Authority of Trumann v. Lively*, No. CA 99-543, 1999 WL 1203731 (Ark. App., Dec. 8, 1999). The appellate court noted that the trial court did not elaborate on its finding; however, based on the evidence viewed in the light most favorable to the tenant, the perpetrator of the crime was not a resident of the premises and the tenant had no knowledge of the activity taking place on the premises. Moreover, the court noted that once she became aware of the crimes, she no longer allowed Mr. Stracener to remain unsupervised on the premises or to remain overnight. Furthermore, the court noted that the authority did not serve the eviction notice until after the tenant became delinquent in her rent, nearly five months after it became aware of the criminal activity. Under these circumstances, the court of appeals could not conclude that the decision of the trial court was clearly erroneous and affirmed the decision. ■

CALIFORNIA LEADS THE WAY: FIRST STATE TO PROVIDE NONPROJECT-BASED SECTION 8 TENANTS A 90-DAY NOTICE OF CONTRACT TERMINATION

California law now requires a landlord who terminates participation or fails to renew a tenant-based Section 8 contract (or other government rent subsidy) to give a 90-day written notice to the tenant.[1] As of January 1, 2000, the provisions of the statute are an implied term of the lease and Housing Assistance Payment (HAP) contract for all Section 8 tenant-based program participants.[2]

The statute provides that the contract that is terminated must be a contract with "rent limitations," which includes the HAP contract under the tenant-based Section 8 program.[3] Under the Section 8 program, the PHA approves the rent and any rent received in excess of the approved rent must be returned to the tenant.[4] At all times, both during the

[1]Cal. Civ. Code section 1954.535. The tenant is not obligated to pay more than the tenant's portion of the rent for the 90 days. Owners of project-based Section 8 housing and/or federally insured multifamily housing are required by California law to provide tenants with a nine-month notice of termination of a subsidy contract or prepayment of the federally insured or federally held mortgage indebtedness. Cal. Gov. Code § 65863.10. Other states have also placed special notice requirements on project-based Section 8 owners (as contrasted with tenant-based Section 8 owners) who no longer want to participate in the Section 8 program. *See Preserving Federally Assisted Housing at the State and Local Level: A Legislative Tool Kit*, 29 HOUS. L. BULL. 183 (Oct. 1999).

[2]*See Merrill Tenant Council v. United States Department of Housing and Urban Dev.*, 638 F.2d 1086 (7th Cir. 1981).

[3]*See Legislative History of SB 1098*, Senate Judiciary Committee, SB 1098 (Burton), as amended April 7, 1999, page 3 (which implicitly refers to tenant-based Section 8 by discussing termination of month-to-month tenancies)http://info.sen.ca.gov/pub/bill/sensb_10...sb_1098_cfa_19990414_1007704_sen_comm.html; 24 C.F.R. § 982.503 redesignated § 982.507 by 64 Fed. Reg. 26,632, 2,648 (May 14, 1999); Housing Assistance Payments Contract, Part B, ¶ 8 and Tenancy Addendum; Section 8 Tenant-Based Assistance Housing Choice Voucher Program, ¶ 4.

[4]Housing Assistance Payments Contract, Part B, ¶ 8.

initial term and during any extensions, the rent cannot exceed the "reasonable rent" for the unit or the rent charged by the owner for comparable unassisted units.[5] The owner may not demand or accept rent from the tenant in excess of the approved rent. During the initial term, the rent may not be raised above that initially approved by the PHA.[6] When a rent increase is proposed, the PHA must review it and disapprove increases that are unreasonable.[7] The owner certifies that the rent charged the holder of the Section 8 voucher is comparable to the rent charged by the owner for other comparable units.[8]

At all times, both during the initial term and during any extensions, the rent cannot exceed the "reasonable rent" for the unit or the rent charged by the owner for comparable unassisted units.

Claims that the statute is preempted by federal law cannot be sustained. Although there are several theories under which a state statute may be preempted, preemption is not easily presumed.[9] There are three circumstance in which federal law may be found to preempt state law under the Supremacy Clause of the Constitution. First, Congress can clearly express the intent to preempt state law. In this case, there is no evidence that the federal government has acted to preempt state law that provides for a 90-day notice. Second, preemption may be implicit if Congress intended the federal government to exercise exclusive regulatory authority.[10] Again this is not the case, as the Section 8 program is a funding program that contemplates substantial state participation.[11]

Finally, preemption may be implied when state law actually conflicts with federal law. Conflict preemption includes situations where it is a physical impossibility to effectuate the purposes of both state and federal law and where state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress."[12] Again there is no conflict, as both the state law and federal law may be implemented. Moreover, the state law does not interfere with the purposes of the Section 8 program, which are "aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing."[13] The purpose of the 90-day notice provision is consistent with that goal. It provides advance notice during which a tenant can determine why the landlord wants to get out of the Section 8 program and work to resolve those problems.[14] Alternatively, the extended notice allows the tenant to save the necessary funds for a move (first month's rent and a security deposit) and search for and obtain a decent place to live.[15] In other words, the 90-day notice assists the tenant in avoiding homelessness and the filing, by the landlord, of an unlawful detainer action. HUD recognizes the need for more time to find a unit and recently amended the Section 8 regulations so as to allow PHAs to increase the search time beyond 120 days.[16] Moreover, the time is needed, as it is well-documented that discrimination in the market place is common and substantially interferes with a Section 8 tenant's ability to locate decent housing, especially in locations that are not areas of poverty concentration.[17] The increased time will enable the tenant to locate a landlord willing to accept Section 8 vouchers and avoid a break in subsidy while

[5]*Id.* and Tenancy Addendum; Section 8 Tenant-Based Assistance Housing Choice Voucher Program, ¶ 4.

[6]24 C.F.R. § 982.503 redesignated § 982.507 by 64 Fed. Reg. 26,632, 2648 (May 14, 1999); Housing Assistance Payments Contract, Part B, ¶ 8 and Tenancy Addendum; Section 8 Tenant-Based Assistance Housing Choice Voucher Program, ¶ 4.

[7]*Id*.

[8]*Id*.

[9]*California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987); *see also Franklin Tower One, L.L.C. v. N.M.*, 775 A.2d 1104 (N. J. 1999) (landlord refusal to accept Section 8 voucher violated statute prohibiting source of income discrimination and there is no preemption).

[10]HUD, in the subsidized housing programs, has preempted state law but has not done so for the Section 8 program. See 24 C.F.R. § 850.153 (preemption of local rent control laws).

[11]*See e.g.* 42 U.S.C. § 1437f(o)((7)(E) (termination of tenancy requires a written notice and "any relief shall be consistent with State and local law....").

[12]*Michigan Canners & Freezers Ass's v. Agricultural Mktg. & Bargaining Bd.* 467 U.S. 461, 470 (1984).

[13] 42 U.S.C. § 1437f(a).

[14]For example, if the landlord wants more rent, the tenant could agree to the new rent and seek the Housing Authority's approval. Alternatively, if the tenant should choose to remain without using a Section 8 voucher, the notice provides the tenant with time to adjust her finances so as to afford the increased rent.

[15]*See* Legislative History of SB 1098, Senate Judiciary Committee, SB 1098 (Burton), as amended April 7, 1999, page 5 (discussing the tight housing market and the minimal burden on the landlord).

[16]*Compare* 64 Fed. Reg. 26,644, § 982.303 (May 14, 1999) (limiting the voucher search time to a maximum of 120-days) with 64 Fed. Reg. 56,913, § 982.303 (removing the 120-day limitation).

[17]It is well-documented that it is very difficult for a Section 8 tenant who has to move to find a unit within 30 days—the time traditionally provided to a tenant whose lease is terminated. The difficulty is compounded when the tenant is working and/or disabled. *See CHAC Section 8 Program: Barriers to Successful Leasing Up* by Susan J. Poplin and Mary K. Cunningham (Urban Institute, Washington D.C., April 1999). This study can be accessed at http://www.urbaninstitute.org/housing/chac.html. *See also Equal Housing Opportunity in New York: An Evaluation of Section 8 Housing Programs in Buffalo, Rochester, and Syracuse*, New York State Advisory Committee to the U.S. Commission on Civil Rights (October 1999). The New York study is available at http://www.usccr.gov/nysec8/main.htm.

simultaneously furthering housing goals of economically mixed housing. The state statute is harmonious with the Section 8 statute.

The statute is effective January 1, 2000. California advocates should bring the new statute to the attention of their PHA in the Annual and Five-Year Planning process. The Annual Plan or the Section 8 Administrative Plan should provide that the PHA inform participating tenants and landlords of the new statute and insert into the lease and Housing Assistance Payment (HAP) contract the new 90-day notice provision. ■

DISCRIMINATION BASED ON SOURCE OF INCOME PROHIBITED IN CALIFORNIA

In California, as in many other jurisdictions, tenants are denied housing because they receive welfare or they are participants in the Section 8 rental assistance program. The fact that Section 8 tenants are unable to find landlords who will rent to them is well-documented. A recent study explored the barriers that prevented Section 8 recipients in Chicago from utilizing the rental assistance.[1] The Chicago report is based on information gathered from focus groups with Section 8 participants who were unsuccessful in their search for housing and as a result lost their subsidies. These tenants reported that a common problem was discrimination by landlords. The Chicago report concluded that

> [o]ur findings suggest that discrimination against Section 8 holders appears to be disturbingly common; discriminating against Section 8 has become a more "socially acceptable" way to discriminate against low-income, minority families.[2]

This finding is particularly troubling because the City of Chicago has a Human Rights Ordinance which forbids discrimination based on "source of income."[3] Due to this discrimination, tenants are deprived of the full range of choice as to where to live, and the full potential of the Section 8 program is not realized.[4]

The California legislature took steps last fall to begin to address the problem of discrimination against the poor. It amended the state fair housing law, the California Fair Employment and Housing Act (FEHA), to include "source of income" as a protected class.[5] Source of income is defined as lawful, verifiable income paid directly to a tenant or paid to a representative of a tenant.[6]

The amendment, if effectively enforced, bars landlords from adopting and implementing admission standards that refuse to consider applications from prospective tenants who receive welfare benefits. It also bars landlords from failing to take into account other "verifiable income" such as child support, unemployment or disability benefits. In the past, tenants have challenged "no welfare" policies under the Federal Fair Housing Act when the restrictions had an adverse impact upon a protected class such as families with children or members of racial minorities.[7] Now the right not to be discriminated against on the basis of source of income is available to all tenants.

The prohibition against discrimination based upon source of income may also be used to challenge landlords, including public housing authorities and Section 8 landlords, that adopt preferences in admission for applicants who work. HUD rules which are applicable to the Section 8 Tenant-based Assistance Program provide that a PHA may adopt a preference in admission for working families provided that an applicant who is disabled or elderly will also be given the benefit of the working family preference.[8] If a California

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[1]*See CHAC Section 8 Program: Barriers to Successful Leasing Up* by Susan J. Poplin and Mary K. Cunningham (Urban Institute, Washington D.C., April 1999). This study can be accessed at http://www.urbaninstitute.org/housing/chac.html.

[2]Id. at 26 (citations omitted). The study also found that "Our focus group participants reported a range of different types of discrimination including: racial discrimination, biases against families with children, refusal to accept Section 8, and prejudices against CHA residents." Participants also reported discrimination based upon receipt of public assistance. *Id*. at 16. *See also Housing Discrimination Against Section 8 Families Call for Creative Advocacy* by Adam Culbreath, 22 Youth Law News 1 (March-April 1999). This article is an excellent summary and analysis of the cases that have sought to challenge landlords "no Section 8" policies on the basis of state law statutes prohibiting discrimination upon source of income and on the basis of violations of the state and federal fair housing laws. *See also Equal Housing Opportunity in New York: An Evaluation of Section 8 Housing Programs in Buffalo, Rochester, and Syracuse*, New York State Advisory Committee to the U.S. Commission on Civil Rights (October 1999). The New York study available at http://www.usccr.gov/nysec8/main.htm undertook to look at whether the Section 8 tenant-based program in upstate New York provided improved housing opportunities for minorities. The Report concluded that for the areas studied the Section 8 program "succeeded in assisting many minorities in affording their homes, but failed in helping minorities to move out of areas of high poverty and minority concentration." *Id*. at Chapter 8.

[3]*Id*. at 25.

[4]The purposes of the Section 8 program include "aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing." 42 U.S.C. § 1437f(a).

[5]*See* Senate Bill 1098, amending Cal. Gov. Code § 12955(a). The amendment is effective January 1, 2000 and is effective for five years, until January 1, 2005. Inquiries regarding a person's source of income, however, are not prohibited. Cal. Gov. Code § 12955(b).

[6]*Id*. at 12955(o).

[7] *See Gilligan v. Jamco Development Corp*. 108 F 3d 246 (9th Cir. 1997) (failure to affirmatively plead that welfare recipient "had enough money to pay the rent" insufficient ground for dismissal); *HUD v. Ross*, HUDALJ01-92-0466-8 (HUD Office of Admin. Law Judges, July 7, 1994) (landlord's no welfare policy violated the federal Fair Housing Act because of the disparate impact upon protected classes (Latino- and female-headed households) and landlord could show no justifiable business necessity).

[8]64 Fed. Reg. 56,893, 56912 (Oct. 21, 1999) amending 24 C.F.R. § 982.207.

PHA implements a working preference, it will undoubtedly be in violation of the prohibition against discrimination based on source of income. Moreover, any admissions preference for families and individuals who work should be evaluated to determine if it significantly perpetuates segregation.[9]

It is likely that many PHAs are unaware of the new law or have not fully considered its implications. Many PHAs will seek to adopt a preference for those who work because HUD has authorized it and because the HUD Template used by PHAs in their planning process directs PHAs to the issue.[10] Advocates should inform PHAs in the PHA Plan process that preference for applicants who are working or even a distinction based on whether an applicant is working or source of income (such as welfare or unemployment) will violate the state statute.[11] PHAs who fail to heed the warning could be sued for violation of the state statute.

In addition to prohibiting source of income discrimination, FEHA now also prohibits the use of an income standard that fails to account for the aggregate income of persons residing together or intending to reside together in the unit.[12] Under this provision, a landlord must consider the income, for example, of two single mothers who are intending to reside together in the same way that the landlord would consider the income of both spouses. Significantly, for a tenant with Section 8 (or any other government rent subsidy), the new law prohibits the use of an income standard for purposes of determining the eligibility of the applicant that is not based on the portion of the rent to be paid by the tenant.[13]

These amendments will have an impact upon landlords' implementation of the California Supreme Court's decision in *Harris v. Capital Growth Investors XIV*, 278 Cal. Rptr. 614 (1991). In that case, the court upheld a landlord's admission policy that required prospective tenants to have a monthly income of at least three times the rent. With these amendments, a landlord who accepts Section 8 will now have to calculate eligibility using an equation that is based on the tenant's portion of the rent, rather than the full contract rent for the unit,[14] thus mitigating the harsh effects of *Harris* for some tenants. ■

[9]*See Public Housing Working Family Preference Thwarts Desegregation Efforts*, 29 HOUS. L. BULL. 166 (Sept. 1999)

[10]See HUD Template, HUD Form 50075 (expires 03/31/02) at http://www.hud.gov/pih/pha/plans/phaps-templates.html

[11]64 Fed. Reg. 56,843 (Oct. 21, 1999) (Public Housing Agency Plans)

[12] Cal. Gov. Code § 12955(m).

[13]*Id.* at 12955(n).

[14]Thus, for example, if the tenant's share of the rent is $300, any income eligibility standard will have to be based upon that rent—not the full rent for the unit, which may be substantially higher.

RECENT HOUSING-RELATED REGULATIONS AND NOTICES

The following are significant housing-related regulations and notices that HUD or USDA have recently issued. 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 website 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.

Federal Housing Finance Board Regulation

Amendment of Affordable Housing Program Regulation; Final Rule
65 Fed. Reg. 203-204 (Jan. 4, 2000)

Summary: Makes final, with no revisions, certain technical revisions to regulations governing operation of the Affordable Housing Program that were proposed as an interim final rule on May 5, 1999.

Effective Date: January 4, 2000.

[1]At http://www.access.gpo.gov/su-docs.

[2]At http://www.hudclips.org/cgi/index.cgi.

[3]To order Notices and Handbooks from HUD, call (800) 767-7468 or fax (202) 708-2313.

[4]At http://www.rdinit.usda.gov/regs/.

2000 HOUSING POLICY CONFERENCE MARCH 27-29 WASHINGTON D.C.

The National Low Income Housing Coalition (NLIHC) will hold its "2000 Housing Policy Conference" in Washington D.C. on March 27-29, 2000. The Conference is organized around NLIHC policy priority areas—preservation, vouchers, public housing, production, and housing plus services. Workshops and Institutes will be held on these as well as other topics.

For more information and registration materials visit NLIHC's website at www.nlich.org/conference.htm.

HUD Regulations

Public Housing Assessment System (PHAS) Amendments; Final Rule
65 Fed Reg. 1,711-1,754 (January 11, 2000)

Summary: Amends PHAS regulation at 24 C.F.R. part 902 to provide additional information and revise certain procedures and establish others for the assessment of the physical condition, financial health, management operations and resident services and satisfaction with PHA services in public housing, including the technical review of physical inspection results and resident survey results, and appeals of PHAS scores. Also implements certain recently enacted statutory amendments.

Effective Date: February 10, 2000.

Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Housing Receiving Federal Assistance and Federally Owned Residential Property Being Sold; Correction
65 Fed. Reg. 3,386-3,387 (January 21, 2000)

Summary: Makes several minor technical corrections to HUD's September 15, 1999 final rule implementing Sections 1012 and 1013 of the Residential Lead-Based Paint Hazard Reduction Act of 1992.

Effective Date: January 21, 2000

HUD Federal Register Notice

Announcement of Funding Awards for the Youthbuild Program, Fiscal Year 1999; Notice
65 Fed. Reg. 4,617-4,619 (Jan. 31, 2000)

Summary: Notifies the public of funding decisions made by the Department in a competition for funding under the Super Notice of Funding Availability (SuperNOFA) for the Youthbuild Program. This announcement contains the names of the awardees and the amounts of the awards made available by HUD.

HUD Notices

Exclusion of Earned Income as Census Takers
Notice PIH 00-1 (January 3, 2000)

Summary: Informs Housing Agencies (HAs), Tribes, Tribally Designated Housing Entities (TDHEs) and residents of low-income housing that income earned as temporary census takers can be excluded from eligibility determinations.

Customer Survey of Section 8 Tenant-Based Program Participants
PIH 00-02 (Jan. 4, 2000)

Summary: Informs public housing agencies (PHAs) and HUD field staff of the January 2000 commencement of a customer survey to assess the quality of housing leased under the Section 8 tenant-based program. The customer survey is intended to provide feedback to HUD and PHAs concerning participants' satisfaction with their housing units and neighborhoods.

Rural Housing Service Regulation

Notice of Funding Availability (NOFA) for the Section 515 Rural Rental Housing Program for Fiscal Year 2000; Correction
65 Fed. Reg. 4,560 (January 28, 2000)

Summary: Corrects scoring in notice published December 21, 1999 (64 Fed. Reg. 71,604).

Effective Date: January 28, 2000.

Rural Housing Service Notice

Maintaining Acceptable MFH Project Management
AN 3511 (1930-C) (Jan. 20, 2000)

Summary: This Administrative Notice (AN) is issued to provide examples of requirements for determining acceptable management and implement streamlined servicing guidelines in individual Multi-Family Housing (MFH) projects. This AN replaces FmHA AN No. 3265 (1930-C) issued July 19, 1996.

Internal Revenue Service Regulation

Compliance Monitoring and Miscellaneous Issues Relating to the Low-Income Housing Credit; Final Rule
65 Fed. Reg. 2,323-2,329 (January 14, 2000)

Summary: Procedures for compliance monitoring by state and local housing agencies (Agencies) with the requirements of the low-income housing credit; the requirements for making carryover allocations; the rules for Agencies' correction of administrative errors or omissions; and the independent verification of information on sources and uses of funds submitted by taxpayers to Agencies.

Effective Dates: These regulations are effective January 1, 2001, except that the amendments made to Sections 1.42-5(c)(5) and (e)(3)(i), and 1.42-13 are effective January 14, 2000, and the amendment made to Section 1.42-6(d)(4)(ii) is effective January 1, 2000. ■

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