can produce and what President Obama can accomplish. Reasonableness and moderation are important attributes for all of us to pursue. Yet if Barack Obama had resisted the ideal of hope, if he had listened to those who said not now, be realistic, he would not be poised to become the 44th President of the United States. Therefore one of the gifts he gave to all of us is the right to dream again. To hope for, advocate for, and work hard for a brighter future.

In conclusion, those of you gathered here are the key chasers of the justice dream in the housing arena. Your commitment to housing advocacy has placed you at the center of this profession's quest for the dream of justice. I realize that you face enormous barriers and obstacles. There is limited funding, and federal restrictions that limit what you can do and how you do it. There are personal sacrifices that you are being asked to make each day. But you do this work because you are dreamers. You understand intuitively that without the dream, there is very little reason to live. Without the chase, there are only empty tomorrows. In your moments of doubt, when you wonder whether it is all worth it, remember that you follow in the footsteps of great dreamers. You are a dreamer like Martin Luther King and Harriet Tubman. You are a dreamer like all of those brave souls who left the comfort of their northern homes and went south to help those whom injustice had trapped and lynched. You walk in the footsteps of housing advocates who envisioned affordable housing and resident co-ownership models when others said it was impossible to achieve.

One day we must give account not of the difficulty of our chase, but whether we continued to chase the dream. For if you stop chasing this dream of justice, then this nation will never be the type of place it could and should be. There are people in this city and this country who will suffer greatly if you stop chasing the dream. They need you more desperately than you will ever understand. And you need them more than you presently realize. For it is this wonderful partnership between two dreamers that creates this symphony of justice. So we come today to lift high this housing justice dream that you have nurtured. But let not our lifting occur only today in the midst of those we know embrace the dream. Let this broad dream of justice be lifted so the President and Congressional leaders and policy makers hear it and embrace it as well. No matter what they say, no matter how some may dismiss your efforts.

Chase this justice dream my friends. Chase it with your head and with your heart. Chase it as if your life depended upon it, because it does. For our lives will be ultimately measured by the good we do in the world and by the love and service that we give, especially to those in need. Chase this dream not only in the courtrooms and law offices, but chase it in every aspect of your life, in every waking hour. Chase it even in your dreams. If we do that, then when we wake, we will have become a dream catcher. ■

D.C. Circuit Enforces Protections for Enhanced Voucher Holders Under Federal and Local Law

The United States Court of Appeals for the District of Columbia Circuit has decided that an owner converting federally assisted property to market rate must accept the tenants' enhanced vouchers, as required both by the federal enhanced voucher statute and by local law prohibiting discrimination based upon source of income.[1] In *Feemster v. BSA Limited Partnership*, the court affirmed the lower court's interpretation of the enhanced voucher statute and reversed its decision that the local source of income protection law did not prohibit the owner's refusal to accept the vouchers. As a result, the tenants may remain in occupancy until their tenancy is lawfully terminated under local law, and the lower court will now determine other available remedies for the local law violations.

Background

Since the early 1980s, BSA has owned and managed the Bates Street Townhomes, a development of thirty-seven residential units spread across thirty buildings on five streets in Washington, D.C. Until 2004, BSA participated in the HUD project-based Section 8 rental assistance program, which limited rents to 30% of adjusted income, and HUD also provided BSA with mortgage insurance. All nine tenant plaintiffs had received rental assistance through the Section 8 program at Bates Street Townhomes, and several have lived there for over twenty years.

When its Housing Assistance Payments Contract expired, BSA decided to opt out of the Section 8 program. It prepaid its HUD-insured mortgage, sent a one-year notice to tenants on September 30, 2003, and allowed its final contract extension with HUD to expire on September 30, 2004. In the summer of 2004, BSA employees began to encourage tenants to vacate their units, offering financial compensation to those who agreed to leave. Although its initial proposed sale to a third-party developer fell through, BSA continued efforts to sell the properties and in 2005 found a new buyer. That sales contract expressly conditioned the purchase of individual units on their vacancy at the time of closing. BSA has not accepted new tenants at the Bates Street Townhomes since January 2003.

The enhanced voucher provision of the United States Housing Act authorizes the issuance of enhanced vouchers to residents of HUD-assisted housing upon the

[1]Feemster v. BSA Limited Partnership, 548 F.3d 1063 (D.C.Cir. Nov. 14, 2008).

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 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).[2] 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 on the date of the eligibility event for the project . . . ."[3]

Pursuant to HUD's standard form one-year notice for Section 8 opt-outs, BSA's September 2003 opt-out letter to its tenants stated:

> Federal law allows you to elect to continue living at this property provided that the unit, the rent, and we, the owners, meet the requirements of the Section 8 tenant-based assistance program. As an Owner, we will honor your right as a tenant to remain at the property on this basis as long as it continues to be offered as rental housing, provided that there is no cause for eviction under Federal, State or local law.[4]

The local housing authority determined that the tenants were eligible for enhanced vouchers. However, when tenants tried to use their vouchers for rental payments, BSA either refused to accept them or to execute the necessary lease agreements. After expiration of the one-year notice period in September 2004, BSA wrote letters to the tenants declaring that it would not sign the paperwork required for use of the vouchers, but stated that, "provided you pay the rent charged and otherwise abide by the terms of your tenancy, you may continue to reside in the property which you currently lease until such time as [you] may be required to vacate upon appropriate notice,"[5] and each letter specified the "current rent" for that tenant's unit. The tenants continued to pay rent each month to BSA, either at the full market amount or at the lower amount established by the project-based Section 8 program.

Since market rents were not sustainable for most tenants, on November 2, 2004, the tenants filed a federal complaint and an application for a temporary restraining order (TRO). The district court granted a TRO quickly, requiring BSA to initiate the process of accepting the tenants' enhanced vouchers, including executing and submitting any necessary papers to DCHA to begin the "lease-up" process, so that the tenants could use their enhanced vouchers at their current homes.[6] Although BSA initiated the lease-up process with DCHA as ordered, it refused to complete the paperwork required to pay the rent subsidy on behalf of the tenants.

Shortly after issuance of the TRO, BSA offered the tenants the opportunity to buy their homes, in accordance with the District of Columbia's Tenant Opportunity to Purchase Act.[7] With assistance from a local nonprofit housing developer, four tenants negotiated contracts for sale. However, on the day before closing, BSA informed the tenants that it would not complete the sales unless they reimbursed it for approximately $37,000 in rent allegedly unpaid since the commencement of the litigation—rent that would have been covered by the enhanced vouchers had BSA accepted them. To allow the sales to go forward, the district court facilitated an arrangement under which the tenants agreed to place the disputed sum in an escrow account.[8]

In January 2005, BSA served the remaining tenants with 180-day eviction notices. When they then refused to move out, BSA brought an eviction action in local court. That court found BSA's eviction notices legally inadequate,[9] and BSA filed an appeal that remains pending.

In their federal complaint, the tenants claimed that BSA must accept their enhanced vouchers until their tenancies are validly terminated under local law and that its refusal to do so violated both federal housing statutes[10] and the District of Columbia Human Rights Act.[11] The district court granted summary judgment for the tenants on their federal claims, finding it "clear that 'families renting at the time of the termination of [a] project-based subsidy contract [have] the right to remain in their units, using enhanced vouchers, for so long as the tenant remains eligible for the vouchers or until the tenant is evicted.'"[12] On the D.C. Human Rights Act claim, however, the district court granted summary judgment in favor of BSA, finding that the plaintiffs failed to show that an impermissible

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[2]*See generally* NHLP, HUD Housing Programs: Tenants' Rights § 15.4.2.4 (3d ed. 2004).

[3]42 U.S.C.A. § 1437f(t)(1)(B) (West 2003).

[4]*Feemster* at 1065.

[5]*Id.*

[6]Feemster v. BSA Ltd. P'ship., No. 04-1901, TRO at 2, 2004 WL 2884434 (D.D.C. Nov. 2, 2004).

[7]D.C.Code § 42-3404.02 *et seq.*

[8]Although conceding that the injunctive relief claims of these homebuyers and any other tenants who moved were thereby mooted, these tenants continued to press their damages claims.

[9]Hawkins v. BSA Ltd. P'ship, No. 04-6839, Order at 4 (D.C.Sup.Ct. Aug. 28, 2007).

[10]In addition to the enhanced voucher statute, 42 U.S.C. § 1437f(t), the tenants also alleged, and the district court held, that BSA's actions violated the National Housing Act, which directs HUD to assure that Section 8 "project owners not interfere with the efforts of tenants to obtain rent subsidies or other public assistance." 12 U.S.C. § 1715z-1b(b)(2). The appellate court did not consider this issue because it was not briefed and violation would not yield a different remedy.

[11]D.C.Code § 2-1402.21(a)(1) and (2). *See* discussion of the local law claim, *infra*.

[12]Feemster v. BSA Ltd. P'ship, 471 F.Supp.2d 87, 98 (D.D.C.2007), *quoting* Jeanty v. Shore Terrace Realty Ass'n, No. 03-8669, 2004 WL 1794496, at *3 (S.D.N.Y. Aug.10, 2004).

factor played a motivating or substantial role in BSA's refusal to accept their enhanced vouchers.[13]

The Enhanced Voucher Claim Under Federal Law

The tenants in *Feemster* contended that the owner's refusal to accept their enhanced vouchers violated the "elect to remain" provision of the federal enhanced voucher statute, 42 U.S.C. § 1437f(t)(1)(B). By its express terms, that statute provides a family that receives an enhanced voucher the right to "elect to remain in the same project in which the family was residing on the date" that the project owner's Section 8 contract expires. Unlike other owners who have unsuccessfully resisted tenants' enhanced voucher claims,[14] BSA did not dispute that § 1437f(t) gives tenants the right to remain in their units despite an opt-out, nor that a covered owner must permit its tenants to use enhanced vouchers for rent, nor that tenants may sue to enforce their statutory rights in federal court. On the enhanced voucher claim, BSA limited its defense to the sole issue of whether its units were being "offered for rental housing"[15] at the time it refused the tenants' enhanced vouchers. In BSA's view, whether a unit is offered for rental housing is a question of the landlord's subjective intent. Because it sought to exit the rental business and offer its units for sale rather than for rent, BSA argued that it is not "offer[ing]" its units for rental housing, and thus its actions fall outside the statute.

Because BSA sought to enforce the language in the Guide, the D.C. Circuit first had to determine the legal status due HUD's pronouncement. After stating that "[t]he degree of deference that we owe to such a policy guide is uncertain,"[16] the court opined that HUD's policy is at least allowed to claim respect according to its persuasiveness, but that even if HUD's statement received full *Chevron* deference,[17] BSA's position would not be strengthened. Rather than disputing the legality or status of HUD's policy, the tenants opposed the owner's position that this is a question of its subjective intent. The tenants acknowledged that, once their tenancies were lawfully terminated under local law, their federal enhanced voucher rights would not compel BSA to accept them to avoid their eviction. What they disputed, however, was that the owner's subjective intent controlled their right to remain in their homes and their related right not to be regarded as in default merely because they tendered vouchers rather than cash. Their argument was that whether a unit remains a rental property is determined by the law of the local jurisdiction and that the local courts had so far determined that the tenants have the right to continued occupancy.

To resolve this question, the court analyzed the text of HUD's policy statement. Characterizing the "units are offered" text as "amibiguous," the court looked to the context to reject BSA's interpretation, citing the next sentence: "Owners may not terminate the tenancy of a tenant who exercises this right to remain except for cause under Federal, State or local law,"[18] as well as several other HUD statements.[19] The court concluded that HUD's issuances use the phrase "offered for rental housing" as synonymous with "remains a rental property" and "used for rental housing," and prohibit termination of tenancies without cause, eschewing any reference to the landlord's intent:

> Taken together, HUD's statements make clear that it considers a property to be "offered for rental housing" until it is withdrawn from rental use in accordance with the law of the local jurisdiction. *Accord Jeanty* [*v. Shore Terrace Realty*], 2004 WL 1794496, at *4 ("HUD has interpreted 42 U.S.C. § 1437f to mean that families who receive enhanced vouchers have the right to remain, and that a landlord *must* accept their enhanced vouchers unless the landlord evicts them through the court system." (citing the HUD Policy Guide)). This is an objective inquiry tied to the legal status of the property, not to the owner's intentions. In light of the statute's plain text, its anti-displacement purpose, and HUD's reasonable and persuasive interpretation, the district court correctly determined that the tenants' right under § 1437f(t) to remain in their homes and to pay their rent with enhanced vouchers is secure unless and until their tenancies are validly terminated under D.C. law.
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> 548 F.3d at 1069.

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[13] *Id.* at 102.

[14] Jeanty v. Shore Terrace Realty Ass'n, No. 03-8669, 2004 WL 1794496 (S.D.N.Y. Aug.10, 2004); Estevez v. Cosmopolitan Assocs., 2005 WL 3164146 (E.D.N.Y. Nov. 28, 2005); Barrientos v. 1801-1825 Morton, LLC, No. 06-6437, slip ops. (C.D. Cal. Sept. 10, 2007 and Oct. 24, 2007) (the latter order grants motion to reconsider and clarifies prior order), *appeal docketed*, No. 07-56697 (9th Cir. Nov. 21, 2007).

[15] This "rental use" limitation appears only in HUD's guidance, not in the statute. *See* HUD, SECTION 8 RENEWAL POLICY, § 11-3.B (2001), which states: "Tenants who receive an enhanced voucher have the right to remain in their units *as long as the units are offered for rental housing....*" *Id.* (court's emphasis).

[16] Feemster v. BSA Ltd. P'ship, 548 F.3d 1063, 1067 (D.C.Cir. Nov. 14, 2008)(citing cases).

[17] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), under which courts generally will uphold an agency's reasonable interpretation of ambiguous statutory language.

[18] *Feemster* at 1068, citing HUD Policy Guide, § 11-3.B.

[19] The court referenced several sources, 548 F.3d at 1068-69. HUD requires owners to certify "that they will comply with the requirement to allow families receiving enhanced vouchers who elect to remain to do so *as long as the property remains a rental property,* unless the owner has just cause for eviction," HUD Policy Guide, § 1-6.I (court's emphasis), and to "agree not to terminate the tenancy of a tenant who exercises [his or her] right to remain, except for cause under State or local law," *id.* Attachment 3A-1, at 6. A contemporaneous HUD Notice governing enhanced vouchers contains similar language. HUD Notice PIH 2001-41, § II.B, at 26 (2001).

The court also rejected the owner's claim that this interpretation would ensnare owners in an "endless lease," stating that owners may terminate tenancies on any ground permitted by local law, concluding that "One thing that BSA may not do, however, is refuse to accept payment by voucher and then contend that eviction is warranted for nonpayment of rent."[20]

The Local Source of Income Claim

The District of Columbia Human Rights Act makes it unlawful to refuse to "conduct any transaction in real property," to "require different terms for such transaction," or to "include in the terms or conditions of a transaction in real property" any condition or restriction "wholly or partially for a discriminatory reason based on" any one of a list of specified factors, including an individual's "source of income."[21] The Act expressly recognizes Section 8 assistance as a source of income, and that those harmed may sue for damages and other remedies.[22]

BSA did not dispute that it demanded that the tenants pay rent from their own funds and not through the Section 8 voucher program. However, the owner claimed that this was not "source of income" discrimination, because it was not motivated by anti-voucher animus but rather by the desire to vacate the units for sale. In dismissing the local law claim, the district court had accepted BSA's argument that motive was dispositive. The D.C. Circuit rejected this analysis because it has generally looked to Title VII cases in interpreting the Act, and "under Title VII, when a policy is "discriminatory on its face," the defendant's motive is irrelevant."[23] When BSA expressly refused to accept the tenants' vouchers, it committed a facial violation of the local law. At oral argument, BSA had suggested that the voucher program's requirements are burdensome, particularly the requirement that the landlord execute an initial lease with the tenant, to which the court responded:

> Were we to accept that excuse, however, we would render the Human Rights Act's definition of "source of income" nugatory. The Act expressly defines "source of income" as encompassing the Section 8 program; indeed, Section 8 vouchers are the source-of-income provision's paradigm case…Permitting BSA to refuse to accept Section 8 vouchers on the ground that it does not wish to comply with Section 8's requirements would vitiate that definition and the legal safeguard it was intended to provide.
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> 548 F.3d at 1070-71.[24]

[20]*Feemster* at 1069.
[21]D.C.Code § 2-1402.21(a)(1) and (2).
[22]*Id.*, §§ 2-1402.21(e) and 2-1403.16.
[23]548 F.3d at 1070 (citing several U.S. Supreme Court cases).
[24]*See also* NHLP, *Courts Consider Landlord Defenses to Source of Income Laws*, 38 Hous. L. Bull. 239 (Nov.-Dec. 2008).

Conclusion

Feemster marks another important victory in protecting the federal right of HUD-assisted tenants facing housing conversion actions to remain in their homes, despite the various creative attempts of owners to avoid its coverage. The D.C. Circuit's resounding decision also reinforces the utility of local laws establishing source of income protections. This strong precedent can help advocates ensure that such protections can and will be upheld in the future. ■

HUD Publishes Violence Against Women Act Interim Rule

In late November, the Department of Housing and Urban Development (HUD) took its first step toward adopting regulations to implement the housing provisions of the Violence Against Women Act of 2005 (VAWA).[1] HUD published an interim rule[2] that would amend existing subsidized housing regulations, including those governing the public housing and Section 8 programs, to incorporate VAWA's protections for survivors of domestic violence, dating violence, and stalking. For the most part, the interim rule parrots VAWA's statutory language, frustrating advocates, public housing agencies (PHAs), and owners who had hoped that the regulations would clarify some of VAWA's ambiguities. However, some provisions differ from the statute and, in fact, could be problematic for advocates representing survivors. Although the interim rule became effective December 29, 2008, HUD considered comments on the interim rule until January 27, 2008. It has not indicated when it plans to publish a final rule.

The Interim Rule's Structure

The interim rule would place the bulk of the regulatory language implementing VAWA in 24 C.F.R Part 5, the regulations that currently set forth HUD's general program requirements. The interim rule adds a new Subpart L titled "Protection for Victims of Domestic Violence in Public and Section 8 Housing" to 24 C.F.R Part 5.[3]

[1]Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006). For more information on VAWA and HUD's implementation, see NHLP, *HUD Continues VAWA Implementation*, 37 Hous. L. Bull. 7 (Jan. 2007); NHLP, *PHAs and Advocates Begin Early Efforts to Implement VAWA*, 37 Hous. L. Bull. 193 (Dec. 2007); NHLP, *HUD Issues VAWA Guidance for Project-Based Section 8 Owners*, 38 Hous. L. Bull. 220 (Oct. 2008).
[2]HUD Programs: Violence Against Women Act Conforming Amendments, 73 Fed. Reg. 72,336 (Nov. 28, 2008) [hereinafter "VAWA Interim Rule"].
[3]*Id.* at 72,340.