

HUD Finally Recognizes Right to Remain for Over-Housed Enhanced Voucher Holders

In 1999 Congress passed unified authority requiring the Department of Housing and Urban Development (HUD) to provide “enhanced vouchers” for all tenants facing housing conversion actions in many privately owned, federally supported properties, including owner opt-outs and prepayments.¹ Unfortunately, the law as passed and implemented by HUD failed to clearly protect tenants. Despite Congress’ attempt to clarify its intent that enhanced voucher holders be allowed to remain in their homes after conversion,² HUD had never issued regulations and its sole notice on the topic,³ issued in 2001, failed to implement that intent.

Under HUD’s 2001 policy, enhanced voucher holders faced three major threats to their housing security:

- the owner’s obligation to accept the voucher and terminate the tenancy only for tenant misconduct;
- the PHA’s authority to screen these previously assisted tenants and deny assistance; and
- family/unit size mismatches, which can result in tenant displacement.

At long last, after hundreds of thousands of units have been converted during the decade since Congress enacted the protection, HUD has issued a new Notice, PIH 2008-12 (Feb. 15, 2008), which provides real protection to those families that are “overhoused” at the time of conversion.⁴

¹Pub.L. No. 106-74, § 538, establishing a new Section 8(t) of the United States Housing Act, 42 U.S.C. § 1437f(t). According to HUD, “Enhanced vouchers are primarily provided in the case of preservation prepayments and Section 8 project-based contract opt-outs. Preservation prepayments are cases where the owner of a preservation eligible property (generally section 236 and section 221(d)(3) projects) is prepaying the mortgage or voluntarily terminating the mortgage insurance. Section 8 project-based opt-outs are situations where an owner chooses to end participation in certain programs by either opting-out of or not renewing certain expiring Section 8 project-based contracts.” HUD, Notice PIH 2008-12 (Feb. 15, 2008).

²Pub. L. No. 106-246, § 2801 (July 13, 2000) (H.R. 4425, FY 2001 Military Construction and FY 2000 Emergency Supplemental Appropriations) (amending Section 8(t) to state that “the assisted family may elect to remain in the same project in which the family was residing on the date of the eligibility event...”). The Conference Report states that this is a clarification of law: “inserts language as proposed by the House and the Senate clarifying the intent of title V, subtitle C, section 538 of Public Law 106-74.” H. Rep 106-710 (June 29, 2000).

³HUD, Notice PIH 2001-41 (Nov. 14, 2001) (now long past scheduled expiration date).

⁴The Notice does not address the “under-housed” side of this problem. Tenants residing in units that are too small for their family size under the local PHA’s occupancy guidelines must apparently move in order to receive any voucher assistance at all. *Id.*, pp. 36-37.

Tenants facing housing conversion, especially elderly tenants remaining after other household members have moved or died, sometimes reside in units that are too large for their current family size under normal voucher program occupancy requirements. Years ago, in Notice PIH 2001-41, HUD adopted a policy that enhanced voucher recipients living in inappropriately sized units must, if an appropriate unit is unavailable at the property, search for a unit elsewhere (with only a regular local payment standard).⁵ Only if an appropriate unit could not be found could a tenant remain in her home. But even in that case, two limitations imposed by HUD forced tenants to move or pay more than they should. HUD required the tenant to pay the full amount of the rent accruing during the search period (with no subsidy), and limited any higher subsidy payments for the “oversized” unit to one year, after which the subsidy was reduced and the tenant was forced to pay the difference or move.⁶ HUD’s new Notice (PIH 2008-12) repeals these harmful policies for overhoused families who want to remain in their homes.⁷

Under the new notice, if the family chooses to remain in the converted project, the PHA must determine whether a family is over-housed, and notify the family and the owner of that fact, as well as the appropriate unit size.⁸ The owner must then identify all appropriately sized units available in the project,⁹ and the family must move if one is available. If not, the family may remain in the over-sized unit and the assistance payment will be based on the reasonable rent for that unit.¹⁰ If an appropriate size unit later becomes available in the project, the family must move to that unit and must execute a new lease, and the assistance payment will be reduced to the reasonable rent for the smaller unit.¹¹ Families refusing to move to an appropriately sized unit on the premises when one becomes available will experience a reduction to the lower payment standard, and must pay any rent not covered by the assistance.¹² If an enhanced voucher family is appropriately housed at the time of the conversion, but later becomes over-housed, then the same process applies.¹³ It remains unclear whether HUD’s new policy will protect residents still living at the property with enhanced vouchers more than a year after conversion, but

⁵*Id.*, pp. 28-30.

⁶*Id.* at pp. 27-29.

⁷If an over-housed family chooses to move from the converted project, that family receives a normal housing choice voucher and will be subsidized based upon the payment standard for the number of bedrooms appropriate for the family. HUD, Notice PIH 2008-12; 24 C.F.R. § 982.402(c) and (d) (2007).

⁸HUD, Notice PIH 2008-12.

⁹To be “available,” a unit must be vacant and ready for occupancy, must meet applicable housing quality standards, must be rent reasonable and must meet any other voucher program requirements.

¹⁰*Id.* at p. 3.

¹¹*Id.*

¹²*Id.*

¹³*Id.*

who experienced a reduced payment standard under the old policy and thus pay substantially higher rents.

The PHA must establish a process for choosing which families will be required to move if there are more over-housed enhanced voucher families than available appropriately sized units. Suggested criteria include a lottery process, length of time the family has been living in the oversized unit, and age or frailty of the family.¹⁴

Notice PIH 2008-12 is a welcome new policy to protect over-housed tenants' right to remain. However, unless HUD acts to implement similar protections for tenants being denied continued assistance because of PHA re-screening or because owners fail to honor the enhanced voucher's good cause eviction feature, Congress must act soon to further clarify that tenants must receive continued assistance to remain in their homes when they have done nothing wrong.¹⁵ ■

Congress Considers Overdue Preservation Agenda

In order to address the increasing shortage of affordable housing, Congress must enact stronger legislative policies to preserve hundreds of thousands of units of existing privately owned federally assisted affordable housing. Because the current policy framework allows many owners to convert to market-rate and the costs of acquisition and rehabilitation are substantial, major changes to existing budget and policy decisions are needed. The National Preservation Working Group (NPWG), a network of national, state and local public and nonprofit organizations working on the housing preservation problem over the past two decades, has developed a package of legislative proposals that would address many of the obstacles to preserving affordable housing. These proposals are being considered by both the House and the Senate as their housing leadership drafts a comprehensive preservation bill to be introduced in Congress later this year. This article briefly reviews the major components of the NPWG preservation proposals.

Maintain Housing at Risk of Market-Rate Conversion

A number of different strategies can help prevent affordable housing from being converted to market rents. While Congress should affirm that HUD has a duty to maximize preservation when making discretionary decisions, there are many specific steps that can be taken to maintain the current housing stock. First, Congress should appropriate the amount of funds necessary each year to renew existing Section 8 contracts, rather than cutting them below needed levels as the current Administration proposes. This will enable retention of many units covered by current contracts, as well as retention of those expiring contracts with below-market rents that require higher rents in order to encourage owners to remain in the program.

Another vital change is reforming the mark-to-market program by making a broader range of properties eligible for mark-to-market debt restructuring, increasing the cap on HUD's authority to approve rents in excess of 120% of Fair Market Rent (FMR), and expanding the base of previously restructured properties that could benefit from not-for-profit purchase incentives. Specifically, both Section 8 properties in presidentially declared disaster areas and otherwise-eligible properties with rents at or below market eligible (not just those with rents exceeding market) should be eligible for debt restructuring. Marking up to market should also be allowed to enable preservation of Section 8 Moderate Rehabilitation properties, which are currently prohibited from doing so. Regarding approving rents above 120%, HUD's current authority is exhausted because it is capped at 5% of the restructured portfolio. The cap should be increased to 9%.

¹⁴*Id.* at pp. 3-4. Tenants and advocates could decide to negotiate this process with the PHA in the Annual Plan.

¹⁵The lack of clear policies has required tenants to litigate some of these issues. See, e.g., *Jeanty v. Shore Terrace Realty*, No. 03-Cv. 8669 (BSJ), 2004 WL 1794496 (S.D.N.Y. Aug. 10, 2004) (enjoining owner from refusing to accept enhanced voucher); *Estevez v. Cosmopolitan Assocs. LLC*, 2005 WL 3164146 (E.D.N.Y. Nov. 28, 2005) (enjoining evictions for nonpayment of rent based on owner's refusal to renew voucher assistance); *Feemster v. BSA Ltd. P'ship*, 471 F.Supp.2d 87 (D.D.C. 2007) (requiring acceptance of enhanced vouchers); *Barrientos v. 1801-1825 Morton, LLC*, No. CV 06-6437-ABC (FMOx) (C.D.Cal., orders Sept. 10 and Oct. 24, 2007) (enjoining owner's attempt to terminate all enhanced voucher tenancies at the property).