

# Federal Court Rules that Enhanced Voucher Tenant Has Right to Remain

In a case of first impression, a federal district court in New York has recently ruled that federal law requires owners leaving the project-based subsidy programs to accept the replacement subsidies provided by Congress. *Jeanty v. Shore Terrace Realty Ass'n*, No. 03 Civ. 8669 (BSJ), 2004 WL 1794496 (S.D.N.Y. Aug. 10, 2004). Last November, after a hearing but without an opinion, the court had issued a preliminary injunction that required the owner to accept a tenant's voucher. In this ruling, the court relied both on a federal statute establishing the enhanced voucher program<sup>1</sup> and other HUD policies to permanently enjoin the owner from refusing to accept the tenant's voucher and to renew her lease so long as she remained eligible for the voucher and complied with the terms of her lease. This ruling provides clear and direct support to the position that Congress itself has required owners to accept these subsidies, joining the position long espoused by tenant advocates and even by Department of Housing and Urban Development (HUD) since 2000.

## Background

When private owners leave HUD's multifamily housing programs, either by opting out of their project-based Section 8 contracts or by prepaying their HUD-subsidized loans, many tenants are eligible to receive enhanced vouchers, pursuant to annual appropriations acts during the late 1990s and permanent legislation passed in 1999.<sup>2</sup> These new vouchers can usually cover the entire amount of any new higher market rent for the unit, if that amount is determined reasonable by the public housing authority (PHA).

For many years, some owners have disputed any duty to accept these vouchers to avoid tenant displacement, despite HUD's repeated policy statements. Owners, HUD and PHA staff, and tenants alike have also been uncertain about the duration of the duty to accept. For some of this time, Congress' lack of explicit direction was part of the problem,<sup>3</sup> but Congress soon acted,<sup>4</sup> clarifying the

enhanced voucher statute by restoring the inadvertently omitted language. The Conference Report explicitly stated that this revision was a clarification of law, not new law.<sup>5</sup> Subsequently, in its Section 8 renewal policy guide, HUD reiterated that tenants receiving enhanced vouchers have the right to remain in their units as long as the property remains available for rental use, meets housing quality standards, and rents for an amount approved as "reasonable" by the local PHA.<sup>6</sup> This protection is not time-limited, but extends beyond the first lease following conversion, lasting until the owner has good cause to terminate the tenancy for noncompliance with the lease.<sup>7</sup> HUD policy seeks to implement this requirement by requiring owners to certify on their "opt-out" or renewal form that they will comply with the tenants' right to remain, as well as through language containing this commitment in the one-year notice form.<sup>8</sup> Despite these policies, and despite issuing numerous letters informing specific owners of these duties, occasional owner resistance persists, giving rise to enforcement litigation like *Jeanty*.

## The Case and Decision

After opting out of its project-based contract in 2003, project owner Shore Terrace offered all but four of its tenants leases and agreed to accept their enhanced vouchers. However, while it was willing to sign unassisted leases for the four, and did so, it refused to accept their vouchers, allegedly because they were chronically late in paying rent or had refused access for repairs. The PHA informed the tenant that the owner had refused to sign the assistance contract, and indicated that it was issuing her a voucher to move.

The tenant filed suit against the owner challenging its refusal to accept her enhanced voucher as a violation of the enhanced voucher statute. The PHA was sued as well. Although strongly supporting the tenant's legal position under federal law, the PHA believed it lacked the power to force the owner to accept the voucher assistance.

The court found that the statute was clear on its face, rejecting as "illogical" the owner's claim that while the tenant has the right to remain, the owner has no duty to

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United States Housing Act, 42 U.S.C. §1437f(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 . . ."

<sup>5</sup>[The report] 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.R. REP. NO. 106-710 (2000).

<sup>6</sup>HUD, OFFICE OF MULTIFAMILY HOUSING, SECTION 8 RENEWAL POLICY: GUIDANCE FOR THE RENEWAL OF PROJECT-BASED SECTION 8 CONTRACTS, ¶ 11-3B (2001) [hereinafter SECTION 8 RENEWAL POLICY GUIDE], available at <http://www.hudclips.org> (click shortcut link on left to "Section 8 Renewal Policy Guide"). See also Section 8 Tenant-Based Assistance (Enhanced and Regular Housing Choice Vouchers), PIH 2001-41 (Nov. 14, 2001).

<sup>7</sup>SECTION 8 RENEWAL POLICY GUIDE, *supra* note 6.

<sup>8</sup>*Id.* at ch. 8.

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<sup>1</sup>42 U.S.C.A. § 1437f(t) (West 2003).

<sup>2</sup>Pub. L. No. 106-74, § 538, 113 Stat. 1047, 1122 (1999) (establishing Section 8(t) of the United States Housing Act and codified at 42 U.S.C. § 1437f(t)).

<sup>3</sup>In Fiscal Year (FY) 1999, Congress inadvertently omitted the tenants' "election to remain" from the Appropriations Act. Pub. L. No. 105-276, 112 Stat. 2461 (1998). However, HUD set forth the policy in its implementing Notice H 99-36 (Dec. 29, 1999).

<sup>4</sup>See FY 2001 Military Construction and FY 2000 Emergency Supplemental Appropriations Act, Pub. L. No. 106-246, § 2801, 114 Stat. 511, 569 (2000) (was H.R. 4425). This provision amended Section 8(t) of the

## Federal Court Rules that HUD Violated Federal Disposition Act

accept the voucher.<sup>9</sup> In the court's words, "[i]f a landlord's obligation to accept enhanced vouchers upon opt-out was merely voluntary, then § 1437f's grant to the tenant of the right to remain would be illusory," noting that the right to elect to remain appears within the enhanced voucher subsection of the statute and hence cannot be divorced as the owner contended.<sup>10</sup> The court also found unpersuasive the owner's attempt to rely on the generally voluntary nature of an owner's participation in the voucher program, distinguishing the additional protections afforded by the entirely separate enhanced voucher statute.

Although because of the statute's clarity it was unnecessary to do so, the court also pointed to HUD's reasonable interpretation in the Section 8 renewal policy guide and in a separate notice that owners are obligated to accept the vouchers, to which it would defer. Additional support came from the court's view of the statute's legislative history.

An additional question raised by the litigation was the duration of the owner's duty to accept the enhanced voucher, specifically at the point of lease expiration. Employing a similar analysis as used for the duty to accept, the court found it illogical to provide a right to remain but not recognize a duty to offer a lease renewal, referring to the absence of any time-limit language in the statute as further support. Buttressing this conclusion, the court pointed to HUD's reasonable interpretation in the Section 8 renewal policy guide.<sup>11</sup>

After issuing the declaration that the refusal violated the statute and the permanent injunction requiring acceptance of the voucher, the court reserved plaintiff's claim for attorney's fees and costs. The owner has since filed an appeal of the judgment with the United States Court of Appeals for the Second Circuit, but no stay of the injunction has been issued. ■

Residents of a large HUD-owned multifamily property have successfully challenged HUD's sale of the property to the City of Baltimore for demolition and redevelopment as middle-income housing. *Dean v. Martinez*, 366 F. Supp. 2d 477, 2004 WL 2115605 (D. Md. Sept. 21, 2004). Although their complaint raised many other significant claims and related issues, this is the first judicial decision in more than a decade that has found that the Department of Housing and Urban Development (HUD) violated the federal property disposition statute. The court also kept alive the tenants' Fair Housing Act claims against HUD and the city, leaving them for later resolution.

### Factual and Legal Background

At issue in the case was HUD's proposed disposition of the Uplands, a 979-unit property in western Baltimore that was originally insured and subsidized by HUD under the Section 236 program, and subsequently assisted under the Section 8 Loan Management Set-Aside program for almost all of the units. After default, the mortgage was assigned to HUD and HUD assumed control of the property as mortgagee-in-possession (MIP). When the default was not cured, HUD scheduled a foreclosure sale for June of 2003, as part of a plan to acquire title and immediately transfer the property to the city for demolition and redevelopment. The city's redevelopment plan proposed that only a small portion of the replacement units, funded in part with up-front grants from HUD totaling \$36 million, would be affordable to very low-income families like those who formerly resided in the property. Tenants were to be receive vouchers to find housing on the private market.

While it was in control as MIP for more than two years prior to foreclosure, HUD moved to vacate the property, offering most tenants vouchers to move, along with some relocation assistance. Most residents moved without vouchers and relocation assistance. Many moved to surrounding counties due to the tight rental market in the city. Prior to relocating tenants or encouraging them to leave, HUD did not conduct a market analysis to determine the availability of affordable housing to voucher holders or the voucher success rate, which reportedly had hovered below 50% in the city. Prior to the foreclosure, about forty tenant families, primarily African-American, senior, disabled, and single-parent households, did not move. Many had been denied vouchers by the PHA or could not use them to lease up in the market due to poor credit. Even those with vouchers faced the prospect of relocation to areas of concentrated poverty or substandard housing. HUD then informed the remaining residents they would be moved to a hotel, and offered time-limited relocation assistance.

<sup>9</sup>*Jeanty*, 2004 WL 1794496, at \*3 (citing 42 U.S.C. § 1437f(t)(1)(B): "the 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.").

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* at \*5 (citing SECTION 8 RENEWAL POLICY GUIDE, *supra* note 6, at ¶ 11-3B).