Although HUD is willing to accept comments on the interim rule, it is implementing the Section 302 pilot program without the formal solicitation of public comment or issuance of a proposed rule, citing good cause "to omit advance notice and public participation" because "prior public procedure is 'impracticable, unnecessary, or contrary to the public interest.'"[48] HUD made its determination of good cause based on the assertion that the regulatory language is largely a reiteration of the statutory provisions mandated by Congress under Section 302. HUD also declared that immediate implementation of Section 302 will permit disabled families to expeditiously access the homeownership program.

Lastly, as noted above, the interim rule makes several additional technical or clarifying changes to the existing Section 8 homeownership option. These changes include:

- clarification of the term "present homeownership interest;"[49]
- clarification that the PHA cannot require a participant to secure financing from any specific lender;[50]
- a highlighting of the efforts PHAs must make to constrict predatory lending and abusive loan practices, including an expansion of the examples of the ways by which borrowers can be protected against predatory loans;[51]
- clarification that under the existing recapture requirement, the PHA, rather than HUD, is responsible for preparing lien documents that are consistent with state and local requirements and protect the PHA's recapture interest in the property;[52] and
- a relaxation of the requirements that must be met before a family participating in the Section 8 homeownership program will be allowed to return to tenant-based assistance following default on a FHA-insured mortgage.[53] ■

[48]*See id.* at 33,612 (June 22, 2001).

[49]*Id.* at 33,613 (June 22, 2001) to be codified at § 982.4(b).

[50]*Id.* to be codified at § 982.632(a).

[51]*Id., see also* 65 Fed. Reg. at 55,159 (Sept. 12, 2000) (Section 8 Homeownership Program Final Rule).

[52]*Id.* at 33,613 (June 22, 2001) to be codified at § 982.640(b). As noted above, however, this clarification is inconsistent with the DAG Program Proposed Rule which provides for removal of the entire recapture requirement under the existing Section 8 Homeownership Program.

[53]*Id.* to be codified at § 982.638(d)(2).

Opt-Out and Prepayment of Four Section 8 Projects Preliminarily Enjoined

Tenants in four Department of Housing and Urban Development (HUD)-insured and project-based Section 8 assisted properties located east of Sacramento, California, recently obtained a preliminary injunction that prevents the owners from selling the properties and terminating their Section 8 contracts. The injunction was issued by a federal district court on the grounds that the owners failed to comply with California law requiring notice to the tenants and others and failed to grant a right of first refusal to purchase the properties to specified public and private entities. *Kenneth Arms Tenant Association v. Martinez*.[1]

The properties, which are insured and subsidized in part by HUD under the Section 236 program, are all owned by separate limited partnerships controlled by Apartment Investment Management Company (AIMCO).[2] Collectively, they proposed to prepay their loans and to sell the four developments, containing a total of 351 units, to U.S. Housing Partners (Bridge Partners).[3] As part of the transaction, the parties involved contemplated that the project-based Section 8 contracts, covering 168 of the units, would not be renewed upon expiration. In addition, Bridge Partners proposed to accept enhanced vouchers for eligible tenants and, in an effort to comply with California law, agreed to an affordability restriction limiting occupancy to families earning less than 80 percent of area median income (AMI) through a restrictive-use agreement entered into with HUD.

Plaintiffs, consisting of four low-income disabled residents in each of the developments, tenant associations composed of residents in each of the developments and the California Coalition for Rural Housing Project, brought suit against HUD and the owners seeking to enjoin the proposed prepayment and termination of the project-based Section 8 assistance (opt-out). The plaintiffs claimed that the owners failed to comply with state law by giving the residents and others adequate notice of their intent to opt-out[4] and by fail-

[1]No. Civ. S-01-832 LKK/JFM (E.D. Cal. order July 3, 2001). A scanned version of the opinion is available *at* www.nhlp.org.

[2]In 1997, AIMCO purchased a controlling interest in the National Housing Partnership (NHP) and subsequently merged NHP into AIMCO, giving it control over all former NHP properties. *See* www.aimco.com.

[3]The general partner for U.S. Housing Partners is "Bridge Partners II, LLC," a real estate investment and development company headquartered in Walnut Creek, California.

[4]Cal. Gov't Code § 65863.10. The owners' notices failed to do the following: give nine months advanced notice of the intent to prepay; state the rent at the time the notice was given and the resulting rent after prepayment; advise tenants that the state and county officials were receiving such notices; advise tenants of the contact information for the state and county officials; or advise tenants of the possibility of remaining in the federal program after prepayment. Plaintiffs also alleged failure by the owners to send notices to public entities, and failure to include information that must be provided to those entities.

ing to grant qualified purchasers a right of first refusal to purchase the properties prior to the sale to Bridge Partners.[5] Further, the plaintiffs claimed that HUD violated various federal laws by failing to require the owners to:

- comply with the state notice requirement;
- require more stringent affordability restrictions as part of the prepayment and sale of the projects; and
- enforce its obligations to affirmatively further fair housing.

The court dismissed all the plaintiffs' claims against HUD with prejudice. It found that since 1996 there is no federal statute or HUD regulation, other than certain notice requirements which the owners had met, that restricts owners' right to prepay their mortgage or opt-out of the Section 8 program. The court rejected the plaintiffs' contention that a HUD notice,[6] which states that the owner has an obligation to comply with state notice requirements, placed an affirmative obligation on HUD to enforce state laws. It concluded that the statements in the HUD notice do not place any obligations on HUD but are mere reminders to the owners of their obligations to follow state law.[7]

The owners did not dispute the plaintiffs' claims that they failed to give proper notice to the tenants and others as required by California law.

The court also rejected the plaintiffs' claim that HUD could place restrictions on the sale by virtue of its statutory power to place conditions on the sale of subsidized projects. The court reasoned that the owners in this case intended to first prepay their mortgages and then sell the projects. Since, at the time of sale, the projects will no longer be subsidized, the court concluded that HUD has no authority to place restrictions on the sale.[8] It used similar reasoning to reject the plaintiffs' other claims (including their fair housing claims), finding that HUD had no approval authority over either the prepayment or opt-out, thus limiting its authority to impose any restrictions with respect to the owners' decision.

In considering the plaintiffs' state claims against the owners and weighing whether the plaintiffs are likely to succeed on the merits of their claims to warrant issuance of a preliminary injunction, the court first addressed the owners' contention that with respect to prepayments the California statute was explicitly preempted by a provision in the *Low-Income Housing Preservation and Resident Homeownership Act of 1990*[9] (LIHPRHA) and that the statute was, by implication, preempted by virtue of its frustrating the Congressional determination to move from project-based to tenant-based subsidies. The court rejected both arguments. It rebuffed the express-preemption argument based on the fact that Congress abandoned the preservation scheme set out in LIHPRHA when it adopted the *Housing Opportunity Program Extension Act of 1996* (*1996 Act*).[10] Since the owners never participated in the LIHPRHA preservation program and were following the prepayment scheme authorized by the *1996 Act*, the court concluded that LIHPRHA's did not explicitly preempt the California statute.[11] The court also found that the doctrine of implied or conflict preemption was inapplicable to the case because no federal law restricts prepayments or requires HUD approval. Accordingly, the court concluded that there is no inconsistency or competition between federal and state requirements. In addition, regardless of the merit of the owners' argument that federal law favors tenant-based vouchers, the court ruled that California law does not favor tenant-based assistance over project-based assistance but attempts "to insure that any transfer preserves affordable housing, however achieved."[12]

The owners did not dispute the plaintiffs' claims that they failed to give proper notice to the tenants and others as required by California law. However, they argued that they materially complied with the law and that that was sufficient. The court rejected the argument, finding that the California statute is a "notice statute" which "explicitly requires the communication of detailed information to specified persons and entities."[13] Under those circumstances, the court concluded that substantial performance requires actual compliance with every reasonable objective of the statute. A notice that contains only major ideas or concepts is not sufficient.[14] Thus, the court held that the plaintiffs established a probability of success on the merits due to the owners' failure to comply with the state law notice requirements to tenants and public entities.[15]

[5]*Id.* § 65863.11.

[6]HUD Notice H 99-36. See ¶ XVI-G. The notice is available *at* www.hudclips.org/sub-nonhud/cgi/pdfforms/99-36h.doc. It expired in 2000 and was replaced by the *Section 8 Renewal Guide*, which contains similar language. See Section 11-4, ¶ E. The guide is available *at* www.hud.gov/fha/mfh/exp/guide/s8guide.html.

[7]Slip op. at 10.

[8]*Id.* at 11.

[9]Preemption language is contained at Section 232 of LIHPRHA, codified at 12 U.S.C. § 4122 (West Supp. 2000).

[10]Pub. L. No. 104-120, § 2(b), 110 Stat. 834 (Mar. 28 1996).

[11]Slip op. at 19. The court's conclusion was buttressed by a HUD letter to the court stating that, with the exception of properties that were involved in the LIHPRHA preservation program prior to its partial repeal by HOPE, HUD no longer has the authority to administer the LIHPRHA program.

[12]Slip op. at 21.

[13]*Id.* at 24.

[14]*Id.* at 24.

[15]*Id.* at 24-25.

The owners also conceded that they had not given a right of first refusal to the entities specified in the statute. They argued, however, that they were not required to do so because they had entered into a purchase agreement with Bridge Partners which, in their view, was a "qualified purchaser" under the statute and thus specifically exempted them from having to offer the right of first refusal to anyone else. The owners based their claim on the use agreement which they had executed with HUD[16] and which obligated them to rent the units to tenants whose incomes did not exceed 80 percent of AMI for the areas in which each of the properties is located and to charge no more than 30 percent of that 80 percent figure for rent. The plaintiffs countered that while the agreements would protect current tenants who were eligible for enhanced vouchers, they effectively convert the properties to moderate-income properties with respect to new, incoming tenants who were not eligible for vouchers. The plaintiffs maintained that the agreements thus violate the statutory provision that requires buyers to maintain the developments as affordable housing for either moderate and very low-income families or low-income families. The court agreed and found that the use agreement executed by Bridge Partners did not appear to protect either class of tenants. Thus, the court concluded that the plaintiff met their burden for the issuance of a preliminary injunction.[17]

It is expected that the affordability protections adopted for these properties will be more favorable than the protections that the owners had entered into and which the court preliminarily enjoined.

Whether the owners will proceed with the prepayment, opt-out, or sale of the properties is unclear. Regardless of the outcome, it is expected that the affordability protections adopted for these properties will be more favorable than the protections that the owners had entered into and which the court preliminarily enjoined.

Anne Pearson and Mona Tawatao of Legal Services of Northern California co-counseled the case together with The Minnesota Housing Preservation Project. Both were assisted by the National Housing Law Project. ■

[16]Although HUD signed the use agreements with Bridge Partners, HUD claimed, during the litigation, that the official who signed the use agreements did not have authority to enter into such agreements and that consequently the agreements were void *ab initio*. The court, having found ground to dismiss HUD from the action altogether, declined to reach this issue. *Id.* at 12.

[17]*Id.* at 31.

Virginia Court Reverses Conviction for Trespass on Privatized Streets Surrounding Public Housing

The Decision

A deeply split Virginia Court of Appeals, upon a rehearing *en banc*, recently reversed the trespass conviction of a visitor barred from entering "privatized streets" surrounding a Richmond public housing development. *Hicks v. Commonwealth of Virginia.*[1] In doing so, the court struck down an effort by the City of Richmond and the Richmond Redevelopment and Housing Authority (RRHA) to bar unauthorized access to the development, Whitcomb Court, by privatizing heretofore public streets around the development and authorizing the city police department to cite anyone who trespasses on the streets after receiving a notice of barment.

Whitcomb Court is owned by the RRHA. In 1997, the City of Richmond deeded the streets surrounding Whitcomb to the RRHA in an attempt to prevent criminal activity at the development. After the transfer, the RRHA posted red and white "private property, no trespass" signs every one hundred feet on each block. However, the streets were in no way closed or physically restricted to public, vehicular or pedestrian traffic. The RRHA next authorized the Richmond police to serve notice of permanent barment to any unauthorized person, defined as "all nonresidents who cannot demonstrate that they are on the premises visiting a lawful resident or conducting legitimate business." A barred person who returns to the property is deemed to be a trespasser regardless of whether she has a legitimate purpose or an invitation from a resident.

Hicks, the convicted defendant in this case, had been previously convicted of trespassing and damaging property at Whitcomb Court. In April of 1998, he was barred from the streets surrounding Whitcomb Court. On two subsequent occasions he sought permission to return to the project explaining that his mother, baby, and the baby's mother were all residents of the development. His requests were denied. In January of 1999, Hicks was on the privatized streets when a police officer issued the trespass summons that gave rise to the present case. At the time, Hicks and his baby's mother explained to the officer that he was there only to bring diapers to his baby.

Hicks' conviction on trespass charges in a general district court was affirmed by a circuit court despite the fact that Hicks sought to dismiss the charge on the ground that the RRHA's trespass-barment policy violated the *First* and *Fourteenth Amendments* of the Constitution. When the conviction was also affirmed by a panel of a Virginia Court of Appeals, Hicks sought and obtained a rehearing *en banc*.

[1]2001 WL 744,170, 548 S.E.2d 249, (Va. App., July 3, 2001).