NATIONAL HOUSING LAW PROJECT
advancing housing justice

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August 5, 2016 (*Updated* September 29, 2016)

TO: Affordable Housing and Tenant Advocates, National Alliance of HUD Tenants
RE: Assessing Need for Tenant Protection Vouchers for Unassisted Tenants Facing Mortgage Maturity or Expiring Use Restrictions
FROM: Jim Grow, Stephen Knight & Michaeljit Sandhu

Tens of thousands of units in certain HUD properties are experiencing or facing mortgage maturity or the expiration of use restrictions or assistance. Unassisted tenants in these properties face the serious risk of a rent increase. For FYs 2015 and 2016, Congress has again targeted $5 million for tenant protection vouchers in each year to address this issue. HUD has issued implementing guidance (Notice H 2016-07 (also PIH 2016-12) (August 18, 2016), described on Attachment A.

In prior years, as of May 2016, HUD implementation data shows approval of about 25 properties and about 1000 tenants for assistance. In recent FYs, HUD has apparently used only a small portion of these annually reserved funds. NHLP has heard multiple stories of vacancy-area adjustments and/or fiscal year overlap leading to disqualification of otherwise eligible projects in mid-processing.

This year we are pleased to be able to present the information in graphical form as a Google map, so you can easily zoom in and find properties in your area. (Click here for the map.) The map and attachment are also further sorted this year to identify those that are within a low-vacancy area.

NHLP has identified more than 32,274 unassisted units in 314 properties in 45 states at risk of mortgage maturity or the expiration of use restrictions or assistance in the FY 2015 -17 window. (Tenants remain eligible despite the expiration of restrictions prior to FY 2015, subject to owner application.) Of this total, 16,831 unassisted units in 150 properties are at risk and eligible for tenant protections because they are located in low-vacancy areas as defined by HUD in 2015 under the statute. A further 15,708 unassisted units in 164 properties are also at risk, but are not eligible for tenant protection vouchers, because they are not located in HUD-defined low-vacancy areas.[1]

Because not all of these properties present an actual risk of rent increases upon expiration, NHLP is requesting your assistance in identifying specific properties that may warrant tenant protections. Note that some properties owned by nonprofits may not be at risk for significant rent increases, but may be able to benefit from obtaining assistance in the form of project-based vouchers both to support modest repairs and possibly to decrease unassisted tenant rent burdens.

[1] HUD's definition and application of "low vacancy areas" may change for FY 2016 and 2017, when revised guidance is finally issued.

<u>How to Identify and Assist Tenants in Need</u>

1. Scan the map and/or the list of properties and *please let us know if you recognize any of them as presenting a risk of rent increases or a need for a modest preservation recapitalization*;
    a. Compare any information you might already have to determine whether further investigation of possible need for tenant protections is warranted.
    b. Contact any tenants at the property or community organizations in the area, the owner and the local HUD office to explore possible needs for tenant protections at a particular project;
    c. Find out whether the owner has increased the rents (if restrictions have already expired), has issued any notice of any near-term plans to do so, or whether market conditions in the neighborhood might support a rent increase for unassisted tenants when restrictions do expire.
2. Determine whether the owner of the property is eligible to prepay the mortgage *before expiration* without HUD approval. Such a prepayment triggers enhanced vouchers for all unassisted tenants, providing tenant protection without having to compete for funding under the $5 million set-aside:

    a. Determine whether the property is "eligible low-income housing" under LIHPRHA (24 C.F.R. §248.101);
    b. Confirm that prepayment would be in the tenants' best interests;
    c. If prepayment is determined advantageous, encourage owner to pursue prepayment immediately with HUD to secure enhanced vouchers.[2]

Please also share the memo, map and list with others who might be able to help identify tenants at risk of rent increase due to mortgage maturity or expiration of use restrictions, or properties in need of modest repairs.

For assistance and more information, please contact: Jim Grow at jgrow@nhlp.org, (415) 546-7000 x3104, or Jessica Cassella at jcassella@nhlp.org, (415) 546-7000 x3116.

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[2] Note that, even if the mortgage expiration date is within the next 150 days and the owner would not necessarily be able to provide the statutorily required minimum notice, the notice statute (Pub. L. No. 105-276, Admin. Prov'ns, §219, 112 Stat. 2487-88 (1998)) provides an exception for projects whose owners agree to operate on the same terms and conditions until the mortgage maturity date. Thus, a simple use agreement extending the term of the regulatory agreement until maturity could permit a prepayment and enhanced vouchers without a 150-day notice.

Attachment A: Summary of [Notice H 2016-07 (August 18, 2015)]

Below are the important elements of the HUD policy covering expirations prior to Sept. 30, 2016:

- The full $5 million authorized by Congress should fund between 500 and 700 vouchers for affected properties.
- Tenant protections are controlled by the *owner's application to HUD* (no deadline, but funds are going to be distributed on a rolling basis until exhausted). HUD will no longer rank owner applications by maturity or expiration date.
- Tenant eligibility requires that the property:
    - Experienced one of the following qualifying events before or during FY 16 (i.e., *before Sept. 30, 2016*, although properties with later expirations are reportedly being processed into a queue, subject to further eligibility review once HUD issues guidance for FY 2017):
        - The maturity of a HUD-insured, HUD-held, or Section 202 loan that required HUD approval prior to prepayment;
        - The expiration of a rental assistance contract for which tenants were not eligible for enhanced voucher or tenant protection assistance under other laws;
        - The expiration of affordability restrictions accompanying a HUD-administered mortgage or preservation program;
    - Be located in a low-vacancy area (as defined by HUD).[3]
- HUD's August 2016 Notice – issued just six weeks prior to its expiration with the new fiscal year on Oct. 1 – directly addresses the treatment of post-FY2016 applications that may be submitted prior to issuance of the next fiscal year's Notice (to be issued "as soon as practically possible"). While HUD encourages owners to apply by stating that "applications will also be accepted on a rolling basis after FY 2016," the Notice adds that "owners with eligible applications will be required to amend their applications to comply with the current year's program" once such guidance becomes available. Vacancy area determinations are also subject to change.
- This year, HUD has added new required information needed from owners, and additional details on Multifamily Housing's internal process for verifying any owner's request, and checklists for the determination by owners of at-risk households
- The tenants must:
    - Be in residence at the time of the maturity or expiration;
    - Be low-income; and
    - Have a rent burden after expiration of restrictions, including mortgage maturity, rental assistance contract expiration, or affordability restriction expiration, of more than *30% of adjusted income*.
- Tenant protection assistance can be used as either Enhanced Vouchers (with a minimum

[3] "Low-vacancy area" was defined for the purposes of this assistance as a county with a rental vacancy rate below a defined threshold that is determined by its rate of annual population growth (slow, moderate or rapid). All insular areas are deemed included, with the exception of Puerto Rico.

rent equal to the rent burden prior to the expiration) or Project-Based Vouchers. Project-Based Vouchers offer the possibility of preserving the affordability of the development for future tenants, while also providing current tenants who choose to remain at the property with deeper affordability (30% of income) than enhanced vouchers (minimum rent equal to pre-expiration rent) and mobility rights.

Attachment B: Notes re Map and List of Potentially Affected Properties

NHLP has prepared this map and the attached list of properties that have expired or will expire between Oct. 1, 2014, and Sept. 30, 2017, where at least two unassisted tenants might be eligible for special tenant protection assistance. Because the policy protects only unassisted tenants, this list does not include projects that HUD's separate Section 8 database lists as having rental assistance for all of the units (except management units). Thus, it contains projects that are listed as having no project-based rental assistance, as well as those listed as having at least two unassisted units.

This map and list is only a starting point for determining actual need for assistance and potential eligibility of properties and tenants under the statutory authority and HUD policy:

Under-inclusiveness. Beyond inaccuracy of the data, potentially eligible properties may not be included for many reasons, including that the project:

- Was a state-financed loan receiving Section 236 IRP (which might be eligible if the IRP or accompanying Use Agreement terminates);
- Had a HUD-held mortgage that matured or was prepaid; or
- Was already prepaid with HUD approval (under Section 250 of the National Housing Act).

Over-inclusiveness: The properties may not ultimately prove to be eligible, or the number of potentially unassisted units may be inflated for many reasons, including:

- The property may not be located within what HUD may ultimately designate as a low-vacancy area used to limit tenant protections;
- The tenants already received enhanced vouchers, tenant protection vouchers, or project-based vouchers due to an earlier:
    - Expiration of a Rent Supplement or Section 236 RAP contract;
    - Unilateral prepayment of the mortgage by the owner (where permissible, for "eligible low-income housing" under Pub. L. No. 105-276, Admin. Prov'ns § 219); or a
    - Preservation transaction of a property that had Flexible Subsidy;
- The property has a Use Agreement under LIHPRHA that may be interpreted to preclude eligibility (each Use Agreement must be analyzed under a definitive HUD policy, which has not yet been issued);
- The property has a Rent Supplement or Section 236 RAP contract that covers all the units, or will be interpreted to trigger tenant protections under existing law for all units upon expiration or termination;
- The property has more units receiving project-based Section 8 than indicated by HUD's data; or
- The property is a Section 202 senior/disabled property and recently received a Senior Project Rental Assistance Contract (SPRAC) to permit rehabilitation with rental assistance for the unassisted tenants.

Because project eligibility and tenant eligibility will usually differ, many potentially eligible projects may not have eligible unassisted tenants in all of the units because the post-conversion rents do not exceed the HUD-determined excessive rent burden of 30% of adjusted income.