NATIONAL HOUSING LAW PROJECT

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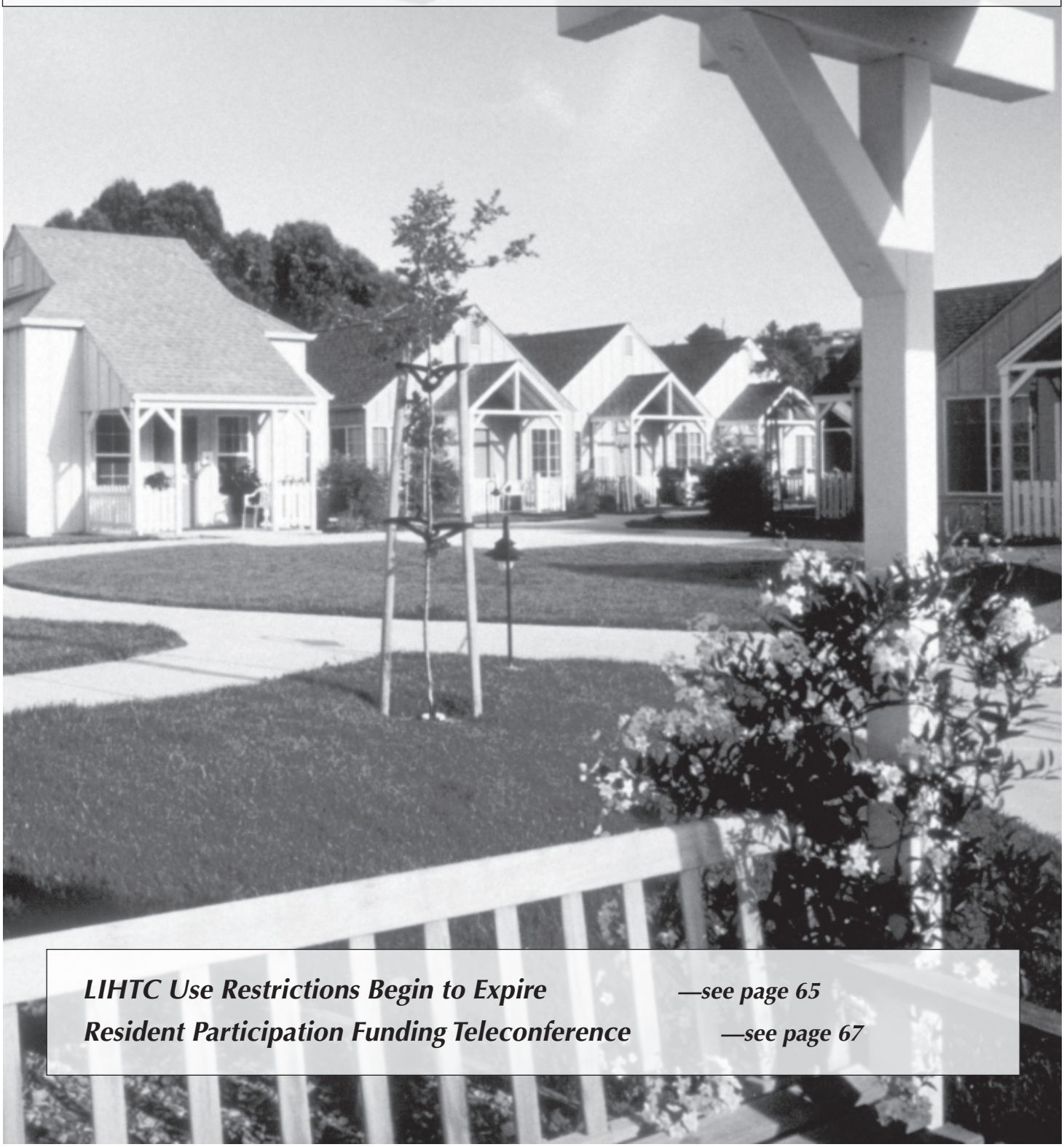

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Cover: Cecilia Place, a LIHTC and Tiburon Redevelopment Agency financed 16-unit senior housing development in Tiburon, CA, that is owned and operated by EAH Inc. *Photo courtesy of EAH.*

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Tax Credit Projects' Use Restrictions Begin to Expire

Introduction

Over the last 15 years, the Low Income Housing Tax Credit (LIHTC) program has been the primary method for production of new affordable housing, creating about 1 million subsidized units[1] since its inception as part of the *Tax Reform Act of 1986*.[2] Without further subsidy, tax credit subsidies alone provide only a moderate level of affordability, so the income targeting is much higher than most Department of Housing and Urban Development (HUD) or Rural Housing Service (RHS) multifamily housing programs.[3] However, one study finds that nearly three-quarters of all residents of LIHTC units benefit from some other form of subsidy and almost 40 percent receive a rental subsidy, resulting in an average income of 25 percent of area median income (AMI) for the rent-subsidized tenants.[4] Income and rent restrictions for these developments guarantee lower rents for hundreds of thousands of families, and they will soon begin to expire in relatively large numbers. The California Housing Partnership Corporation (CHPC), a nonprofit consulting and training organization, recently released a Web-published study detailing the risk of properties within the state of California.[5] The report serves as a wake-up call to help advocates focus on the issue of the tax credit expirations, and examines the immediate impact on California.

The federal LIHTC program provides tax credits to each state on a per-capita basis,[6] and broadly outlines program requirements, allowing decentralized management and

[1] *See e.g.* Florence W. Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1012, n. 3 (1998)(reviewing various estimates and concluding 500,000 units were placed in service prior to 1994), and *Annual Housing Credit Utilization Charts* available online from the National Council of State Housing Agencies *at* www.ncsha.org (totaling over 420,000 units from 1995 to 2000).

[2] 26 U.S.C.A. § 42. Added by Pub. L. 99-514, Title II, § 252(a), Oct. 22, 1986, 100 Stat. 2189.

[3] Tax credit rules require that a project contain either 20 percent of units affordable to families earning 50 percent of AMI or less, or 40 percent of the units affordable to families earning 60 percent of AMI or less. 26 U.S.C.A. § 42(g)(1)(West, WESTLAW through Pub. L. 107-56 (Oct. 26, 2001)).

[4] The study surveyed housing units placed in service from 1992 through 1994. *See General Accounting Office, Tax Credits: Opportunities to Improve Oversight of the Low-Income Housing Program* (Mar. 1997), pg. 6. Available online at www.gao.gov.

[5] *California Housing Partnership Corporation, The Tax Credit Turns Fifteen: Conversion Risk in California's Early Tax Credit Portfolio* (Nov. 2001). Available online at www.chpc.net/pages/taxcredit.html.

[6] For calendar year 2002, the amount of the credit is set at $1.75 per person, with a $2 million minimum per state. *See Congress Increases Caps on Low-Income Housing Tax Credits and Private Activity Bonds*, 31 HOUS. L. BULL. 49 (Feb. 2001). Beginning in calendar 2003, these amounts will be adjusted for inflation. 26 U.S.C.A. § 42 (h)(3)(C)(West, WESTLAW through Pub. L. 107-56 (Oct. 26, 2001)).

implementation by the states.[7] To tailor the use of credits for local needs, each state has designated a state agency responsible for federal tax credit allocation, and has adopted a Qualified Allocation Plan (QAP) which describes the priorities and standards for credit awards. The process for awards often consists of a competitive application process whereby low-income housing developers apply to the state tax credit agency, which awards available credits for both new housing construction or substantial rehabilitation projects which score highest according to the state's QAP criteria. The housing developer typically forms a partnership with large corporate investors who invest equity funds in the project and use the credits to offset taxes otherwise owed, for a 10-year "credit period." This equity investment reduces the project's need for capital funding, which otherwise would typically come in the form of a long-term loan. It thus has the effect of reducing rents by the amount it would have taken to amortize the loan. Redemption of the credits by the investor depends upon the operation of the housing project in accordance with the commitments made by the developer in the tax credit application and program requirements. In order to enhance affordability, many states have also adopted a state tax credit to supplement federal credits, and these may have other additional regulatory elements.

The Expiration Problem

As originally adopted in 1986, the LIHTC program required use restrictions on rents and the income level of occupants for a period of 15 years.[8] In 1989, due to strong demand for tax credits and efforts of affordable housing advocates, Congress extended the use restrictions to 30 years, though this supplemental "extended low-income housing commitment" has substantial loopholes.[9] In addition, states began giving funding preference to projects that guaranteed a longer affordability period, either through their QAP or by law.[10] For the first few years of the LIHTC program, however, the 15-year use agreement was often the only restriction, and projects developed during this early period are now reaching their expiration dates. Once a project reaches the end of the restricted affordability period, the rents may rise to market levels, and the income level of the occupants is no longer controlled.[11]

The CHPC study examines the tax credit housing stock in California from 1987 to 1989, and outlines steps for housing preservation and tenant protection. CHPC found that 50 percent of the 15,235 early units were at some risk of conversion, and 30 percent of the units were at high risk.

The California Study and a Preservation Agenda

The CHPC study examines the tax credit housing stock in California from 1987 to 1989, and outlines steps for housing preservation and tenant protection.[12] The assessment performed by CHPC found that 50 percent of the 15,235 early units were at some risk of conversion, and 30 percent of the units were at high risk of conversion. The timing of the conversions requires that advocates act now to plan for solutions. The use restriction on only about 2 percent of the California units will expire in 2002 and 2003. After a moderate increase in 2004, the use restriction of the vast majority, 85 percent of these early units, will expire between 2005 and 2006.[13] To

[7]This summary of the LIHTC process is outlined in a number of general background guides available for the tax credit program. *See e.g.* Barry G. Jacobs, *Housing Development Reporter, Handbook of Housing and Development Law* (2002); Joseph Guggenheim, *Tax Credits for Low Income Housing (11th ed. 2000);* Internal Revenue Service, *Low-Income Housing Credit* (Oct. 1999), available online *at* www.irs.gov/prod/bus-info/mssp/lihc.pdf.

[8]26 U.S.C. § 42(i)(1)(West, WESTLAW through Pub. L. 107-56 (Oct. 26, 2001)).

[9]Pub. L. No. 101-239 (Dec. 19, 1989), § 7108(c)(1), added 26 U.S.C. § 42 (h)(6). For projects placed into service after 1989, this section requires the tax credit allocating agency to enter into an "extended use period" for an additional 15 years beyond the original 15-year use-restricted period. However, unless otherwise restricted by the use agreement or state law, an owner may offer the project for sale for continued low-income use and terminate the restrictions if no buyer is found, though the tax credit allocating agency must be notified one year in advance of such opt-out. In addition, a project which is acquired by foreclosure may also lose the extended restriction, if no purchaser agrees to retain the restrictions and the foreclosure was not arranged for purpose of terminating the low-income use. *Id.* Furthermore, the California Housing Partnership study notes that the "return of equity" provision, for such preservation purchases governed by the LIHTC statute, 26 U.S.C. § 42 (h)(6)(F), can provide a windfall for investors. *The Tax Credit Turns Fifteen*, *supra* note 5, at note 1.

[10]For example, in addition to restrictions in the QAP, California imposes restrictions on state tax credits and the operation of the California Tax Credit Allocation Committee by Health and Safety Code §§ 50199.4, *et seq.*, Rev. & Tax Code §§ 12206, 17058, 23610.5 (West, WESTLAW, through ch. 2 of 2002 Reg. Sess. urgency legislation & ch. 1 of 3rd Ex. Sess.).

[11]Tenant protections are only available when a development subject to the post-1989 15-year "extended" commitment period terminates its use restrictions, in which case tenants are protected from rent increase or eviction for three years, after which no further assistance appears to be available. 26 U.S.C. §42(h)(6)(E)(West, WESTLAW through Pub. L. 107-56 (Oct. 26, 2001)). Since the pre-1990 projects were not subject to the "extended" commitment, this leaves no tenant protections and no program for the continued affordability of these early projects, unless imposed by the QAP or a Use Agreement.

[12]In California, most units placed in service after 1989 are at lower risk of immediate conversion due to 1990 amendments to the QAP that give preference for projects that accept an extended use agreement of up to 55 years, and require a 30-year minimum period of affordability for units with higher levels of tax credits.

[13]*The Tax Credit Turns Fifteen*, *supra* note 5, p. iii-iv.

$25/UNIT/YEAR RESIDENT PARTICIPATION FUNDING TELECONFERENCE

The National Housing Law Project and ENPHRONT (Everywhere and Now Public Housing Residents Organizing Nationally Together) are offering a one and one half hour audio teleconference program on the HUD funding for public housing resident participation which is calculated at $25 per unit per year. The teleconference will provide public housing residents, advocates and practitioners with a review and analysis of the public housing resident participation funding (what it is, what it can be used for, what to negotiate for, etc.), copies of sample documents (agreements with public housing authorities, budgets, HUD forms, etc.) and the experiences of public housing residents and advocates who have negotiated for and are now using the public housing resident participation funding. The format of the teleconference allows you to listen to the presenters, but you will not be able to ask questions. If you have a particular question, you may fax it to us (510-451-2300) before the call and we will try to answer it in the teleconference.

The date, time and registration deadlines for the teleconference are as follows:

DATE:	**MAY 30, 2002**
TIME:	**7:00–8:30 PM (EASTERN)** **6:00–7:30 PM (CENTRAL)** **5:00–6:30 PM (MOUNTAIN)** **4:00–5:30 PM (PACIFIC)**
SCHOLARSHIP APPLICATION DEADLINE:	**MAY 1, 2002**
REGISTRATION DEADLINE:	**MAY 21, 2002**

Who Should Participate?

Public housing resident-leaders, public housing residents, housing advocates, organizers and attorneys and others working with public housing residents.

Cost

Public Housing Residents: The cost for residents is $15.00 for registration which covers the cost to NHLP for the conference call plus an additional $5.00, if the materials are mailed. In addition, public housing residents will have to pay the long distance telephone charges for the 90 minute call. If you do not have a reasonable long distance telephone service, you should consider purchasing a phone card to cover the cost of the call. There are no limits on the number of people that may listen in on the same line. You may use a speakerphone and invite other residents to attend.

Scholarship: Public housing residents may apply for a limited number of scholarships to cover the costs of registration and mailing materials. If you are not awarded the scholarship, you will be notified in sufficient time to make a full payment or some other arrangement to participate in the call. The scholarship will ***not*** cover the cost of the long distance call or for a copy of an audio tape of the teleconference.

All other participants: In addition to bearing the long distance charges, there is a registration charge of $25 plus other charges if materials are mailed. Persons who register before the deadlines will receive, or be able to download, materials prior to the teleconference.

Registration

Persons interested in participating in this teleconference session must register with the National Housing Law Project and will receive dial-in instructions by e-mail or regular mail the day before the teleconference. ***Please note that there is a late fee for registration and payments received after May 21, 2002.***

A registration form for the teleconference is in the back of this issue of the *Bulletin* and is also available from the NHLP Web site at www.nhlp.org. Please copy or download the form and mail it in, by the appropriate date, with the appropriate payment or scholarship application. Applications for a scholarship may be faxed to (510) 451-2300 by May 1, 2002.

put these figures in perspective, the tax credit program from 1999 to 2000 placed 10,656 units into service in California; loss of "early" units could reach 6,500 units in the 2005 to 2006 period.[14]

To get a picture of the LIHTC stock outside of California, a useful interactive database is available from HUD User which permits analysis of the LIHTC stock anywhere in the country.[15] The Web site allows users to either download the entire nationwide database, or query the data by a number of fields through the online search function. Information available includes project size, date placed in service, sponsor type (nonprofit or for-profit general partner) and some project financial characteristics.

While a nonprofit general partner may have expected to acquire the project at the end of the compliance period, absent a partnership agreement granting such a right, this may be difficult in California's strong real estate market.

In order to understand how the housing may be preserved, the CHPC study reviews a typical tax credit ownership structure, where the limited partner tax credit investor usually has an interest of 99 percent or more.[16] The general partner has the remaining ownership interest, 1 percent or less, but bears all management and regulatory compliance responsibilities. At the expiration of the 15-year use restricted compliance period, the typical limited-partner tax credit investors may vote to sell the project free of restrictions at market rate, often at a substantial gain over their original investment. Where the general partner is a for-profit entity and there are no other subsidies or restrictions on the property, such a sale is highly likely. In such cases, an unrelated developer interested in preservation must compete in the open market to purchase the project. While a nonprofit general partner may have expected to acquire the project at the end of the compliance period, absent a partnership agreement that grants a favorable purchase option or right of first refusal to the nonprofit (preferably at a discounted price), this may be difficult in strong real estate markets, such as California. Often, these agreements only allow for purchase at *the greater* of fair market value or the sum of the outstanding debt plus the limited partner's capital gains taxes upon exit, certainly no bargain.[17] In these circumstances, a nonprofit partner may not be able to acquire the project without substantial additional resources. Therefore, without the reallocation or expansion of affordable housing resources, these projects will not be preserved.

In order to assess and preserve these early projects, and to introduce necessary tenant protection measures, the CHPC study details a preservation agenda[18] which includes the following steps:

- Obtain rental assistance for tenants in projects which lose affordability, likely from the federal government;
- Amend notice provisions of state law to give tenants, advocates and local governments advance notice of impending expiration of rent and use restrictions;
- Publicize notice provisions so owners comply with their requirements;
- Develop and allocate state and local resources for preservation purchases;
- Encourage or require local governments to evaluate their inventory of tax credit projects, evaluate and enforce local regulatory restrictions, and consider a local preservation ordinance;
- Urge preservation purchasers to evaluate any right of first refusal they may have, and to analyze their buyout options; and
- Organize residents of affected projects, advocate for preservation legislation, evaluate the at-risk inventor, contact owners regarding their intentions, and identify preservation purchasers.

Many of these steps are familiar to those who have worked on the preservation of HUD-assisted housing for more than a decade. Those efforts will serve as a useful model for this effort, though the regulatory scheme and ownership structure is substantially different, presenting special challenges for nonprofit purchases. At this early stage, much work remains to be done to preserve the affected units in these projects, but it is time to get started. ■

[14] *Annual Housing Credit Utilization Charts, supra* note 1. Note that future production may be higher since the per-capita tax credit allocation was $1.25 in 1999 and 2000. For 2002 it is $1.75 and henceforth will be adjusted for inflation automatically annually.

[15] Available online at lihtc.huduser.org.

[16] *The Tax Credit Turns Fifteen*, *supra* note 5, p. 4-5. This discussion is largely taken directly from the CHPC study.

[17] In 1989 Congress amended the LIHTC statute to permit sale of a project to the residents or a qualified nonprofit organization for the sum of the outstanding debt plus any taxes attributable to the sale (exit taxes), even where such price is less than fair market value, without adverse impact on the validity of the tax shelter. 26 U.S.C. § 42(i)(7), added by Pub. L. 101-239 § 7108(q)(Dec. 19, 1989). Note that this statute allows but does not require that such a condition be placed on projects. Moreover, the early tax credit projects are not subject to this provision.

[18] *The Tax Credit Turns Fifteen*, *supra* note 5, pg. 20-24.

HUD Budget Just Above Flatlining[1]

On February 4, 2002, the President released his proposed budget for the Department of Housing and Urban Development (HUD) for Fiscal Year (FY) 2003.[2] Although the Office of Management and Budget (OMB) had threatened cuts to domestic programs generally, HUD was spared the knife overall, leaving the budget essentially flat in comparison to FY 2002, especially when inflation is taken into account. The result is a budget that remains inadequate to meet the nation's low-income housing needs and a proposal surprisingly devoid of new or interesting ideas or initiatives.

Although the President's budget does propose a 7 percent increase over FY 2002 in funding for HUD, Section 8 renewals account for nearly all of that increase. Each year the cost of simply maintaining the same level of Section 8 housing increases, as more and more old contracts expire and are renewed only one year at a time. Accordingly, increases in the budget bring no corresponding increases in the number of families served. Overall, HUD is requesting about $2.1 billion in additional budget authority; the increase in the Housing Certificate fund comprises nearly $1.8 billion of that amount.[3] The Administration asserts that it has provided sufficient resources for all of the renewals. The following highlights of the HUD budget should be of interest to advocates.

The Budget

The Administration proposes $204 million for new Section 8 vouchers, but only $143 million of that is reserved for fair share vouchers,[4] which are distributed by formula to housing agencies with utilization rates of at least 97 percent.[5] Of the $204 million, $15 million can be used for homeownership downpayment assistance; up to $6 million can be used to facilitate community-based living for people with disabilities, pursuant to the *Olmstead* decision;[6] up to $40 million can be used for certain non-elderly disabled families; and some vouchers will be made available to homeless veterans.[7] Once these set-asides are taken into account, the number of new vouchers remaining for ongoing rental assistance is 33,400 which, if approved, would be an increase of 8,000 over the number of new vouchers funded in FY 2002.

The Public Housing Operating Fund would receive an increase of $35 million over FY 2002, for a total appropriation of $3.53 billion.[8] This amount, however, is still less than the combined total that the Operating Fund and the Public Housing Drug Elimination Program received last year. The Drug Elimination Program remains zeroed out.[9] The Public

—continued on page 72

[1]With permission and appreciation, this article is based largely on that prepared by the National Low Income Housing Coalition in its February 11, 2002 edition of *Memo to Members* (Vol. 7, No. 6).

[2]The complete budget is available online *at* http://w3.access.gpo.gov/usbudget/fy2003/budget.html. The appendix containing the detailed HUD budget is available online through http://w3.access.gpo.gov/usbudget/fy2003/maindown.html.

[3]*Fiscal Year 2003 Budget of the U.S. Government, Appendix 3*, HUD, pg. 474 (hereinafter *Budget Appendix 3*).

[4]*Id.*

[5]*Id.*

[6]*Olmstead v. L.C. ex rel. Zimring*, ___ U.S. ___, 119 S.Ct. 2176 (1999)(The Court upheld a lower court decision finding that segregated, mentally disabled patients have a right to receive community-based treatment. However, the Supreme Court qualified their placement in the community on the availability of resources. Presumably, the Section 8 assistance will be used to provide community-based housing for the plaintiffs and similarly situated persons).

[7]*Budget Appendix 3*, pg. 474.

[8]*Id.* at 477.

[9]*Id.* at 478.

Staff Changes at NHLP

The National Housing Law Project is pleased to announce that Jennifer Jacobs and Maeve Elise Brown have recently joined its staff as Development Director and Staff Attorney, respectively. Jennifer, who recently relocated to California from New York, was a development associate at Safe Space, a youth-focused service provider in New York City. Prior to that she was the development director for High 5 Tickets to the Arts, also in New York City. Jennifer will be concentrating on individual fundraising activities including fundraising events and promotion of publications. Jennifer replaces Elaine Beale who worked for NHLP as its development director for the past two years and continues to work with NHLP as a development consultant.

Elise comes to NHLP from the East Bay Community Law Center in Berkeley, CA, where she was the Director of the Housing and Community Economic Development Units and Clinical Teacher. Prior to that she was a staff attorney with the Legal Aid Foundation of Los Angeles. Elise will be working on a variety of issues including NHLP's Section 8 Homeownership and Bay Area Voucher Utilization initiatives. She replaces Lynn Martinez who, at the end of April, will join the Western Center on Law and Poverty and head its Northern California office. NHLP extends a warm welcome to both Jennifer and Elise and wishes to thank both Elaine and Lynn for their extraordinary contribution to NHLP and the legal services and housing communities and recognize them for the accomplishments while at NHLP.

Jennifer can be reached via e-mail at jjacobson@nhlp.org. Elise can be reached at mebrown@nhlp.org. ■

HUD FY2003 Budget Chart for Selected Programs

HUD Program (set-asides indented)	FY00 Enacted	FY01 Request	FY01 Enacted	FY02 Request	FY02 Enacted	FY03 Request
	all numbers in millions					
Housing Certificate Fund[1]	$11,376	$14,128	$13,941	$15,717	$15,641[2]	$17,527[3]
Contract Renewals	10,640	13,010	12,972	15,108	15,285	16,864
New Section 8 Vouchers	346	690	453	197	144[4]	204[5]
Voucher Success Fund	—	50	0	0	0	0
Contract Administration	194	209	192	196	196	196
Housing Production Incentives	—	8	0	0	0	0
Public Housing Capital Fund	2,900	2,955	3,000	2,293	2,843[6]	$2,426[7]
Resident Opportunity and Self Sufficiency	55	55	55	55	55	55[8]
Public Housing Operating Fund	3,138	3,192	3,242	3,385	3,495	3,530
Drug Elimination Grants	310	345	310	0	0[9]	0
HOPE VI	575	625	575	574	574	574[10]
Native American Housing Block Grants	620	650	650	649	649	647
Native Hawaiian Housing Block Grant	—	—	—	—	—	10[11]
Elderly Housing (Section 202)	710	779	779	783	783	774[12]
Disabled Housing (Section 811)	201	210	217	218	241[13]	250[14]
HOME Investment Partnership Program	1,600	1,650	1,800	1,796[15]	1,846[16]	2,084[17]
Housing Counseling Assistance	15	24	20	20	20	35[18]
Community Development Block Grants	4,800	4,900	5,057	4,802	5,000[19]	4,732[20]
Self-Help Homeownership Opportunity	20	18	20	22	22	65[21]
Youthbuild	42.5	75	60	60	65	65
Economic Development Initiative	256	100	292	0[22]	294	0[23]
Homeless Assistance Grants	1,020	1,200	1,025[24]	1,023[25]	1,123[26]	1,130[27]
Shelter Plus Care Renewals	0	0	100[28]	100[29]	0[30]	0[31]
Emergency Food and Shelter	110	140	140	140	140	153[32]
Housing for Persons with AIDS	232	260	258	277	277	292
Rural Housing and Economic Development	25	27	25	0[33]	25	0[34]
Brownfields Redevelopment	25	50	25	25	25	25
America's Private Investment Program (APIC)	20	37	0[35]	0	0	0
Fair Housing Assistance Program	20	21	22	23	26	26
Fair Housing Initiative Program	24	29	24	23	20[36]	20
Lead-Based Paint Hazard Reduction	80	120	100	110	110	126
Salaries and Expenses	477	565	556	568	582	537
TOTAL (Discretionary)[37]	**$26,496**	**$32,092**	**$30,309**	**$30,404**	**$29,415[38]**	**$31,422**

Footnotes to HUD FY2003 Budget Chart

[1]Includes $4.2 billion in advance appropriations and full funding of contract renewals and enhanced voucher in all cases.

[2]Represents actual spending of $16.3 billion, using $640 million from the reduction of Section 8 reserves from two months to one month; also provides for $1.2 billion in rescissions from Section 8 recaptures.

[3]Provides for $1.1 billion in rescissions from Section 8 recaptures.

[4]Funds 26,000 new vouchers, with 18,000 available on a fair share basis for PHAs with high utilization rates and 8,000 for certain non-elderly disabled families.

[5]Funds downpayment assistance ($15 million) and approximately 33,400 new vouchers, consisting of fair share vouchers for PHAs with high utilization rates ($143 million), vouchers for community-based living opportunities for people with disabilities ($6 million), vouchers for certain non-elderly disabled families, and vouchers for homeless veterans.

[6]Includes $15 million for the Neighborhood Networks Initiative for PHAs to establish computer centers in and around public housing and $10 million in remediation funds for troubled PHAs.

[7]Represents an overall decrease in unrestricted capital funds of $441 million due to increased set-asides. HUD proposes conversion of public housing units to project-based voucher assistance to facilitate private financing for capital needs, with a set-aside of $50 million in HOPE VI for capital grants in connection with the conversion of assistance.

[8]In FY01 and FY02, ROSS was a set-aside within CDBG.

[9]The conference report noted that PHAs are allowed to use their operating and capital funds for anti-crime and anti-drug efforts.

[10]Includes a set-aside of $50 million for grants for capital costs associated with conversion from public housing to project-based voucher assistance.

[11]Authorized under the Hawaiian Homelands Homeownership Act of 2000, amending the Native American Housing and Self-Determination Act of 1996 and allocating funds for affordable housing for eligible low income Native Hawaiian families.

[12]The underlying request is for $774 million, with another $9 million if funds are recaptured, which would bring the total to $783 million; includes $44 million for service coordinators and $30 million for conversion to assisted living.

[13]Includes $23 million for the renewal of tenant-based assistance, rather than renewing under the Housing Certificate Fund.

[14]The Administration proposes that up to $62.5 million can be earmarked for tenant-based assistance.

[15]The Administration has proposed a $200 million set-aside within the HOME program for a Downpayment Assistance Initiative. This would reduce the amount of HOME funds available for formula grants.

[16]Includes $50 million set-aside for the Downpayment Assistance Initiative, subject to authorization; if there is no authorization of the program by June 30, 2002, then the funds can be used for any purpose under the HOME program.

[17]Includes $200 million set-aside for the Downpayment Assistance Initiative.

[18]This program has been a set-aside in HOME; the Administration proposes to make it a separate program.

[19]Includes $4.3 billion in CDBG formula block grants and $659 million in set-asides; makes funds available for three years, but requires a report from HUD regarding the time to obligate and expand CDGB funds, as well as recommendations on how to accelerate this process, by April 1, 2002.

[20]Includes $4.4 billion in CDBG formula block grants. Also includes a proposal to reduce by 50% the formula funds for entitlement communities that have a per capita income at least twice the national average, with the savings applied to the $16 million Colonias Gateway Initiative.

[21]SHOP funds homeownership programs by providing grants to groups such as Habitat for Humanity and other national and regional non-profits for the costs of land acquisition and infrastructure investment; homes are built through volunteer labor or sweat-equity. The three-fold proposed increase in SHOP is part of the Administration's proposal to expand homeownership.

[22]The Administration requests the termination of Economic Development Initiative funding.

[23]The Administration requests the termination of Economic Development Initiative funding.

[24]Requires use of 30% of funds for permanent housing and provides $500,000 to fund the Interagency Council on Homelessness. Shelter Plus Care renewals are funded separately.

[25]Maintains the requirement that 30% of funds be used for permanent housing. An additional $100 million is provided in a separate account for Shelter Plus Care renewals.

[26]Includes Shelter Plus Care renewals, maintains the 30% requirement for permanent housing, and provides $500,000 to staff the Interagency Council on Homelessness.

[27]Includes Shelter Plus Care renewals, maintains the 30% requirement for permanent housing and provides $1 million for the Interagency Council on Homelessness.

[28]Advocates succeeded in getting Shelter Plus Care renewals funded from a separate appropriation, so that Shelter Plus Care renewals do not compete for scarce federal homeless assistance funds.

[29]The Administration requests the funding of Shelter Plus Care renewals by a separate appropriation.

[30]Shelter Plus Care renewals are funded again under the Homeless Assistance Grants, unlike FY01.

[31]Shelter Plus Care renewals would be funded again under the Homeless Assistance Grants.

[32]This program would be transferred from FEMA to HUD, subject to authorizing legislation.

[33]The Administration is requesting the termination of this program on the basis that it duplicates USDA rural housing programs.

[34]The Administration is again requesting the termination of this program.

[35]Provides that if APIC is authorized, funds will be appropriated through a supplemental or other vehicle.

[36]FY01 funding for FHIP included $7.5 million for a study of housing discrimination; as the study is no longer being funded, these this money was allocated between FHIP and FHAP.

[37]This is the overall total for HUD's discretionary spending. As the chart shows selected programs and does not include all of HUD's programs and other expenses, the numbers in the columns, if added, will *not* total to the amounts listed at this line. In addition, there is some inconsistency from year to year within HUD's own budget documents as to the total amount requested and enacted.

[38]This total does not include $2 billion in emergency supplemental funds in connection with recovery from the September 11, 2001, terrorist attacks.

Housing Capital Fund is budgeted at $2.426 billion,[10] which would amount to a cut of $441 million when increased set-asides are factored into the equation. The Administration proposes that public housing agencies (PHAs) address some of their capital needs by project-basing units and seeking private financing.[11] While HOPE VI remains level-funded at $574 million,[12] the Administration plan would carve out $50 million of that funding for capital improvements to facilitate the conversion to project-based vouchers.[13] At a February 4 budget briefing, HUD officials noted that the private financing plan was new and untested and if it did not succeed, HUD would propose an increase in the capital fund. The Resident Opportunity and Self-Sufficiency (ROSS) program, which had been a set-aside in the capital fund in FY 2000 and then moved to become a set-aside under the Community Development Block Grant (CDBG) program in FY 2001 and FY 2002, has returned to the capital fund at $55 million.[14]

Homeless Assistance Grants funding is an estimated $93 million short of the resources necessary to continue to house long-term homeless people who already have made the transition into permanent housing.

The Administration has set a goal for itself of ending long-term homelessness in 10 years.[15] Housing and homelessness advocates have praised the Administration's intentions. But, as the National Alliance to End Homelessness points out, Homeless Assistance Grants funding, at $1.13 billion[16]—only a $7 million increase over FY 2002, flat funded once inflation is considered—is an estimated $93 million short of the resources necessary to continue to house long-term homeless people who already have made the transition into permanent housing. HUD plans to combine the competitive grant programs Shelter Plus Care, Supportive Housing, and Section 8 Moderate Rehabilitation SRO into one program.[17] The Administration also proposes shifting the Emergency Food and Shelter Program, which provides grants quickly to prevent eviction, foreclosure and hunger, from the Federal Emergency Management Agency to HUD, funding it at the level of $153 million.[18]

Following up on the President's comments in the State of the Union address, the Administration's budget increases HUD resources for homeownership. The budget allocates $200 million to the Down Payment Assistance Initiative, a set-aside in the HOME program that was funded at $50 million in FY 2002, contingent on authorizing legislation.[19] The Self-Help Home Ownership Opportunity Programs would triple under the President's plan,[20] while Housing Counseling Assistance would become a program separate from HOME and funded at $35 million,[21] compared to last year's $20 million. Overall, funding for HOME would increase by $238 million, to $2.08 billion.[22]

National media have latched onto a wind sled in Wisconsin, featured in a photo in the HUD section of the Administration's main budget document, as the epitome of government pork.[23] The photograph illustrates the Administration's criticism of Congressional earmarks in CDGB. The Administration wants to eliminate the Economic Development Initiative from CDBG funding. The Administration proposes funding CDBG at $4.7 billion, down from $5 billion in FY 2002.[24] To free up resources for an initiative in the Colonias, rural communities within 150 miles of the U.S-Mexico border that lack infrastructure and housing, HUD proposes to change the CDBG distribution formula. HUD would reduce by half the formula funds flowing to communities with per capita incomes at least twice the national average.[25] The change in formula as well as the Colonias Gateway Initiative are likely to require authorizing legislation.

The Administration again seeks to discontinue the Rural Housing and Economic Development program as duplicative of USDA's programs.[26] Congress rejected a similar proposal last year and funded the initiative at $25 million. The budget increases the Lead-Based Paint Hazard Reduction Grant Program's funding by about 15 percent, from $110 million in FY 2002 to $126 million in FY 2003.[27]

Analysis

While the Administration's focus on homelessness and the Colonias is commendable, the FY 2003 budget request for HUD on the whole lacks the ambition needed to start solving the affordable housing crisis. It does not establish significant or innovative programs, and it essentially leaves HUD in the same position it was in for FY 2002—struggling

[10] *Id.* at 476.

[11] *Id.* at 477.

[12] *Id.* at 479.

[13] *Id.* at 478.

[14] *Id.* at 477.

[15] *Id.* at 489.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 488.

[20] *Id.* at 1

[21] *Id.* at 495.

[22] *Id.* at 488.

[23] *Fiscal Year 2003 Budget of the U.S. Government*, HUD, pg.174.

[24] *Budget Appendix 3*, pg. 486.

[25] *Id.*

[26] *Id.* at 490.

[27] *Id.* at 515.

to keep up with an increasing need for services, especially for the nation's extremely low-income population. With no new production programs, minimal new Section 8 vouchers in a market where the vouchers are extremely difficult to use and an ever-increasing demand for preserving project-based Section 8 units, essentially flat-funding the agency cannot ease the housing crisis. Unfortunately, in the current budget climate, there are few people on Capitol Hill willing to stand up for more money for HUD. Representative Barney Frank (D-MA) is one exception. He has brought advocates together to ask for a $15 billion increase in the housing budget. But even he admits that this request is unrealistic and, for now, its main purpose is to raise awareness of the critical nature of the country's housing needs in the hope of improving the budget in future years.

It should also be noted that a number of experts, Mr. Frank and Martha Angle from Congressional Quarterly included, have predicted that there will be no Joint Congressional Budget Resolution this year; the House and Senate are not likely to agree on overall budget targets to submit to the appropriators and the President. If that occurs, each Chamber will adopt its own budget targets, and there will be no binding limit on the appropriators. The House would likely follow the President's proposals fairly closely, but the Senate might well propose a higher budget. The appropriators would then set the budget for each department on a bill-by-bill basis, without a fixed ceiling, giving a distinct advantage to agencies considered in the earlier stages of the process. The only effective limit to any one agency's appropriation would then be the President's veto power.

Regardless, advocates are putting forth a concerted lobby effort on Capitol Hill to make the budget committees and appropriators aware of the purpose and utility of various HUD programs and the across-the-board need for additional funds. The Campaign for Community and Development Funding has created a detailed *Briefing Book* on HUD programs and is coordinating an effort to visit as many Congress members as possible. This effort, Mr. Frank's initiative and growing support for housing production bills[28] all signify that housing is at least becoming more of a focus of discussion on Capitol Hill. But, this year at least, it seems that discussion is unlikely to lead to increased funding for HUD.

Readers are reminded that the Administration's Budget proposal is only the first step in the annual appropriations process which now heads to Congress. The final appropriations bill is typically not passed and approved until September or October, although, because this year is an election year, many observers believe that Congress will try to wrap up its business early so members can campaign. For a more complete picture of the proposed FY 2003 budget, as compared to previous years, consult the chart on pages 71 and 72 of this issue. ■

[28]*See Housing Production Campaign Gains Ground*, 33 HOUS. L. BULL. 47 (Feb. 2002) for more discussion of these bills.

RHS Budget Proposes Major Cuts in Rental and Homeownership Programs[1]

The Bush Administration's Fiscal Year (FY) 2003 Budget for the Department of Agriculture's Rural Housing Service[2] (RHS) (formerly the Farmers Home Administration (FmHA)) proposes significant reductions in funding for the agency's main housing programs: the Single Family Homeownership Loan Program (Section 502) and the Rural Rental Housing Program (Section 515). It also proposes small cuts for the agency's Self Help Housing Grant Program while proposing modest increases for the other smaller loan and grant programs, such as the Section 504 home repair program and the Section 514 and 516 Farm Labor Housing Programs. The budget proposal continues a trend of reducing overall spending for rural housing and reducing assistance to the lowest-income and neediest households. Surprisingly, the dramatic cuts in the single family housing programs are contrary to the Administration's announced efforts to increase homeownership particularly among families of color. Unexplainably, the overall proposed expenditures for RHS programs over time, which is known as the Budget Authority, actually increases even though program production levels decrease substantially.

New Rural Rental Housing Construction Slated to be Stopped

For low and very low-income households, the most significant cut in the RHS budget is the reduction in spending for the Section 515 Rural Rental Housing Program.[3] The Administration is proposing a 54 percent cut in the program from $114.1 million to $60 million by eliminating all new construction under the program and using the funds solely to repair and rehabilitate existing Section 515 housing. In effect, the proposal all but puts the last nail into the coffin of the RHS rental housing program, which has sustained funding cuts practically every year since 1979 and severe cuts after 1994 when the program was criticized by Congress for providing excessive profits to developers. Although RHS has remedied those issues, Congress has continued to rely on that criticism, as well as the program's overall cost, as an excuse to cut the program's budget. The Administration, which is looking to cut overall domestic spending, is now

[1]This article relies heavily on information published by the Housing Assistance Council, Inc. in 31 *HAC News* 3 (Feb. 4, 2002) and *Continuing Past Trends: An Analysis of the Administration's Proposed Fiscal Year 2003 Rural Housing Budget* (Feb. 2002). Both publications are available on the HAC Web site at www.ruralhome.org.

[2]The Department of Agriculture's Budget, which includes the Rural Housing Service, is available *at* http://w3.access.gpo.gov/usbudget/fy2003/pdf/app05.pdf.

[3]42 U.S.C.A. §1485 (West 1994 and 2001 Supp.).

relying on Congress' lack of support for the program to sharply reduce expenditures by eliminating all new construction. Thus, unless Congress reverses its attitude toward the program and increases its funding, or insists that part of the remaining funding be used for new construction, it appears that a very successful program that is serving very low-income rural residents and has resulted in the construction of over 500,000 units of housing over the last 40 years will effectively come to an end, at least in that it will no longer produce any new housing. The demise of the Section 515 program will take the federal government out of yet another new construction program, leaving less than a handful of boutique programs, such as the HUD elderly housing program (Section 202 housing), as the only federal efforts that address the supply side of housing that are affordable to very low-income households.

The President's budget directs RHS to undertake a review of the 515 program and of its multi-family portfolio in order to find ways to operate and manage it more efficiently. Unfortunately, while other rental housing programs have been suggested, there really is no magical way in which the costs of running a program that serves truly low-income households can be reduced or hidden. Moreover, it is doubtful that RHS can run the program more efficiently. While the program has had some problems over the years, practically all of them have been identified and addressed quickly. The program has not been plagued by scandal and has operated with a very low delinquency and default rate.

Guaranteed Rental Housing Program to Continue

RHS also guarantees loans for rural rental housing construction under Section 538 of the *Housing Act of 1949*.[4] Since 1996, nearly 7,900 units have been assisted under the program, although most of the units serve households with income between 80 and 115 percent of area median income (AMI). The program, which has been funded at just under $100 million this past year, is slated to receive another $100 million in FY 2003. This despite the fact that in FY 2001, the last full year under the program, only one loan for a 48-unit project was guaranteed under the program.

Rental Assistance to Increase But Not Enough

The Budget calls for an increase of nearly $11 million in Rental Assistance subsidies that are used to reduce the rents of residents of Section 515 rental housing and Section 514 and 516 farm labor housing.[5] Unfortunately, most of the increase in Rental Assistance funding (95 percent), which is slated to rise from $701 million to $712 million, will be used to renew Rental Assistance contracts that are expiring in FY 2003. The remaining rental assistance will be used for servicing the portfolio, for providing additional subsidies to projects with expiring use restrictions and possibly for a small number of farm labor housing units constructed under the Section 514 and 516 programs. No Rental Assistance is expected to be available to assist the over 29,000 rural rental housing residents who are severely rent-overburdened (those who are paying more than 50 percent of income for shelter), or the additional 45,000 residents who pay in excess of 30 percent of income for shelter. Thus, for all intents and purposes, the increase in funding simply holds the line for currently assisted units and does nothing to satisfy the need for additional subsidies.

Despite the Administration's emphasis on increasing homeownership, particularly among people of color, the FY 2003 budget proposes cuts in the Section 502 loan program.

Single Family Homeownership Loans Cut Back

Despite the Administration's emphasis on increasing homeownership, particularly among people of color, the RHS FY 2003 budget proposes cuts in both the direct and guaranteed components of the Section 502 loan program.[6] Under the Section 502 direct loan program, RHS makes subsidized loans to low (below 80 percent of median income) and very low-income (below 50 percent of median income) households. In FY 2002, the direct loan program had nearly $1.080 billion available for loans. The Administration is proposing to cut that by $122.5 million to $957 million. The proposed cut is particularly significant because historically nearly all of the direct loan funds have been obligated and thus the proposed cut will reduce the number of units financed by the program by 10 percent or more. Moreover, the 502 direct loan program serves a very significant number of people of color. Thus, a reduction in the program is likely to affect the Administration's goal of increasing the percentage of households of color who are homeowners.

The Budget also proposes a very substantial cut in the Section 502 guaranteed loan program. Under this program, RHS guarantees loans made by private lenders to households whose income does not exceed 115 percent of AMI. While the program serves predominantly moderate-income households, a significant portion (nearly 30 percent) of the loans have gone to low-income households. The Administration's budget proposes to cut the budget for the guaranteed loan program from the current funding level of nearly $3.138 billion to $2.750 billion, a reduction of $388 million. While this is a substantial reduction in funding, it may have little effect

[4] 42 U.S.C.A. § 1490p-2 (West Supp. 2001).

[5] The Rental Assistance Program is authorized by 42 U.S.C.A. § 1490a(A)(2)(a) (West 1994).

[6] 42 U.S.C.A. § 1472 (West 1994).

on the program itself because, in recent years, RHS has not fully expended the funds that have been appropriated for the program. Thus, this cut is not as significant as that for the direct loan program.

Other RHS Programs

RHS administers a number of smaller specialty programs that assist farmworkers or low and very low-income households construct and improve their home. Most of these programs are quite effective and popular and are slated for increased funding, although in the overall budget picture these increases are relatively insignificant. A few of the programs are slated for small cuts or are maintained at FY 2002 funding levels.

The Farmlabor housing loan and grant programs,[7] used to construct rental housing for migrant and seasonal farm laborers, will both increase under the Administration's budget. The Section 514 loan program, by which 1 percent, 33-year loans are made to farmers and nonprofit and public entities, is slated for an increase from $28.55 million to $36 million. The Section 516 grant program, used to make up to 90 percent development cost grants to nonprofit and public agencies, will increase under the Administration's budget by slightly more than $2 million, from $14.97 to $17 million. Because even 90 percent grants typically do not bring the cost of the housing down to the point that farm workers, who are among America's lowest paid workers, can afford the housing, the program has relied heavily on Rental Assistance to make the housing affordable. This is why it is critical that the RHS Rental Assistance Program be funded at a level sufficient not only to renew expiring Rental Assistance contracts but also to subsidize new units constructed under the Section 514/516 programs.

The Section 504 home repair loan and grant programs,[8] used to make up to $20,000 in loans and, to the elderly, $7,500 in grants for the removal of health and safety or code violations, are slated for minor increases. The loan program is proposed to increase by $2.7 million from $32.3 million to $35 million, while the grant program will increase more modestly from $29.34 million to $31 million. In total, approximately 10,000 loans and grants are likely to be made under the two programs.

RHS operates a rural housing preservation grant under Section 533[9] that allows nonprofit and public agencies to rehabilitate housing within a community. The program has been operating for over 10 years with a $100 million per year authorization. However, it has never been funded at more than $23 million and as little as $5.47 million was actually obligated for the program in FY 2000. Last year Congress appropriated $8 million for the program. The Administration is proposing to increase that appropriation to $10 million for FY 2003.

For nearly 40 years, RHS has also operated a self-help housing program. Under that program, low and very low-income families who qualify for a Section 502 home loan participate in the construction of their home. Typically, between 10 and 25 families work together with each family contributing up to 1,500 hours of labor towards the construction of the homes. Family groups are assisted by local nonprofit agencies that recruit and organize the families, help them identify and purchase the land and provide them with a construction supervisor to help coordinate the construction and ensure that the housing is constructed in accordance with all codes. RHS uses the Section 523 Self Help Technical Assistance Grant program[10] to fund nonprofit agencies to provide these services. In recent years, funding for the program has increased dramatically due the program's popularity. RHS and its nonprofit partners have not, however, been able to fully absorb the increased funding resulting in a substantial carryover from FY 2001 to FY 2002. As a consequence, the Administration is requesting that funding for the program be reduced by $1 million from $35 million to $34 million. RHS also operates a self-help land development loan fund, used by nonprofit and public agencies to purchase and improve land that will be used for self-help housing and an unrestricted site loan fund. Both programs were funded at $5 million in FY 2002 and are proposed to stay at the same funding level for FY 2003.

RHS Budget Authority Increases

Despite the over $530 million in RHS budget cuts, the real cost of the programs over time, which is called the Budget Authority, is increasing by nearly $18 million. Advocates are not sure why this is the case and are perplexed by the fact that the Budget Authority for the Section 502 program alone is increasing by $5 million at a time when interest rates, including federal borrowing rates, are at a relatively low rate and the program's budget will be reduced by over $100 million. Unfortunately, advocates are not able to verify the assumptions and calculations that go into determining the Budget Authority of a particular program because the formulas for calculating Budget Authority, which include extensive assumptions and purportedly as many as 35 different factors, are not included in the budget documents and are not readily available.

Conclusion

The Administration's RHS proposed budget is now under consideration by the Congressional Agricultural Appropriations subcommittees. And, while no one expects that the proposal will ultimately be adopted in its current form, neither does anyone believe that Congress will make dramatic revision in the program, at least not when compared to last year. NHLP will continue to report on the RHS budget as it winds its way through Congress. ■

[7] *Id.* §§ 1484 and 1486.

[8] *Id.* § 1474.

[9] *Id.* § 1490m.

[10] *Id.* § 1490c.

Earned Income Disregards: Practical Steps for Advocates

Last month's *Bulletin* featured a comprehensive article that outlined how the earned income disregards (EIDs) work for public housing and some Section 8 residents and described the results of negotiations with and litigation against some public housing authorities (PHAs).[1] This follow-up article discusses some of the practical steps advocates can take to identify whether their local PHA has implemented and correctly applied the EID as well as the methods they can use to help assure compliance.[2]

In short, the EID permits tenants with increased income from work to avoid rent increases based on that higher income for a period of time. The EID removes a possible disincentive to improve one's income and also provides tenants the time they need to "settle in" after getting a new job, considering all the changes and expenses that accompany new employment. Implementation of the EID is crucial because ignoring it will lead to tenants overpaying their rent and even being evicted for non-payment of rent that they should not have had to pay in the first place.

Advocates initially must identify whether improper or complete lack of implementation is a problem in their jurisdiction. Then they must address the problem on a number of fronts, including in their own offices, with the tenants and with the PHA. They must assure that any solutions that are proposed address the issue of tenants who have not received proper disregards in the past and are therefore owed money, without losing sight of those who should be getting the disregard presently and in the future.

Identifying the Problem[3]

Before attorneys and advocates can attempt to correct an EID implementation problem, they must first identify it. There are a few methods that can be used to do this. First, advocates should call their PHA to determine if it believes that it has implemented the EID and if so when. In 1998, when NHLP surveyed PHAs about their knowledge and implementation of the EID, a surprisingly large number of PHAs admitted outright that they had either not heard of the EID or had not implemented it.[4] In Connecticut, conversations with PHA directors and the HUD Field office revealed that they were not even aware of the EID and legal services attorneys quickly realized that there would be thousands of people overpaying their rent. As a result, they changed their intake procedures to better screen for possible EID clients. The Legal Aid Society of the District of Columbia learned of the EID through the 1999 LALSHAC (now Housing Justice Network (HJN)) conference and questioned the D.C. Housing Authority's landlord/tenant attorney on her knowledge of the program. When that attorney failed to demonstrate awareness of the EID issue, they began to screen their own applicants for possible EID problems.

Second, advocates should review their PHA plans. PHAs are required to address the question of whether they will exercise the local option to provide additional deductions from income to support tenants' efforts to work in their PHA plans. In the context of making that decision, it is relevant to consider the implementation of the mandatory EID and to question the PHA on the effectiveness of that program. Moreover, the mandatory EID should be set forth in the PHA's Admission and Occupancy Plan, which is a supporting document to the PHA Plan and is available for review. Advocates should check the Admission and Occupancy Plan for a discussion of the mandatory EID.

Third, legal services providers can question their clients to determine if the EID is being implemented locally. This can be done in a number of ways, including talking to public housing residents or altering intake forms to capture information regarding the possible applicability of the EID in eviction actions due to non-payment of rent. It also can be done by simply alerting intake workers to the issues involved so they are better equipped to identify possible problems when dealing with public housing and some Section 8-assisted residents. Legal services providers from Charlottesville, Virginia, were unable to attend the 1999 LALSHAC conference, so they sent resident leaders. Those leaders heard about the old EID at the conference, questioned whether their rent had been calculated correctly and brought the issue back to legal services. In Cincinnati, legal service attorneys were first alerted to the problem after becoming aware of the existence of the new EID regulations. They then started to notice possible EID problems among applicants for their services by looking at their source of income and length-in-job more closely. Thus, once legal services providers suspect an EID problem in their jurisdiction, adjustments to their intake procedures may serve to focus those concerns.

Informing the Public/Finding Potential Clients

Once the beginnings of a problem are recognized, legal service providers and advocates need to determine the extent of the problem and identify as many tenants as possible to whom the PHA did not appropriately apply the EID. As

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[1] *See PHAs Are Slow to Heed Earned Income Disregard Program*, 33 HOUS. L. BULL. 37 (Feb. 2002).

[2] Much of the information contained in this article was derived from conversations with the following people who have worked with the EID issue in their jurisdiction: Nick DiNardo of Legal Aid of Greater Cincinnati; Eric Angel and Julie Becker of the Legal Aid Society of Washington, D.C.; Claire Curry of Charlottesville, Virginia Legal Aid; Richard Tennenbaum of Connecticut Legal Services; J. Mark Finnegan, associated with the Equal Justice Foundation in Ohio; and George Gould of Community Legal Services, Inc. in Philadelphia. NHLP wishes to extend our thanks to all of them for taking the time to discuss this issue.

[3] This article addresses issues surrounding the mandatory earned income disregard provisions. *See* 42 U.S.C. § 1437a(d)(West Supp. 2001) and 24 C.F.R. § 960.255 (2001). Advocates should be aware that PHAs may also implement additional earned income disregards that can have different qualifying criteria. Because PHAs are not required to offer these additional disregards, they are considered "discretionary" EIDs. *See* 42 U.S.C. § 1437a(b)(5)(B)(West Supp 2001); *see also* 24 C.F.R. § 5.611 (2001). Many of the techniques discussed herein will apply with equal force to EIDs that PHAs have adopted locally.

[4] *PHAs, Rents and the Working Poor*, 28 HOUS. L. BULL. 89, 90 (June 1998).

noted earlier, legal service providers can identify an EID client through their intake process. Only a few basic red flag questions need be answered to find potential EID problems. First, the potential clients are virtually all going to be public housing residents and the cases will be primarily eviction cases for non-payment of rent, although a client at risk of eviction for other reasons may still have an EID issue. There also may be similarly situated disabled-voucher recipients who may take advantage of the EID. The intake worker must then assess if the tenant or member of her family is or was employed, either in a traditional job or through a job training program. If so, the interviewer should ascertain how long the person has had the new income (or any increase in income) and what the person's status was before the new job, job training program, or increase in earned income. If the new or increased income has come within the last few years and the earner had been on welfare or was unemployed for a year or more, the EID specter is raised. The interviewer should then try to determine whether the tenant reported that increase in income and whether the tenant's rent was adjusted due to that increase in income. Of course, any determination of whether the tenant did or did not receive the benefit of the EID will require careful review of the tenant's rent recertification forms.

After they suspected a problem, advocates in Virginia, D.C., Cincinnati, and Connecticut all started asking EID-relevant questions of their clients and all identified some tenants who were eligible for a disregard but had not received one. Legal Aid in D.C. created an EID questionnaire to augment their intake process and sent a memo to all their attorneys. They also shared their knowledge with other legal services providers in the city.

Searching for potential clients can and should be extended beyond the intake process. In Charlottesville, the housing authority cooperated with legal services in trying to reach clients. Because of the authority's relatively small size (376 units, with about 100 units renting to disabled or elderly people whose income was likely to be fixed), attorneys strove for personal contact with as many tenants as possible. One attorney set up a table for half a day in various community centers in PHA developments and informed tenants of the EID and their rights.

Several jurisdictions, including Charlottesville, created and distributed fliers and posters about the EID with phone numbers of whom to call with questions, thereby giving clients knowledge about the program and the means to act on that knowledge. In Charlottesville, the phone number on the fliers led directly to the attorney dealing with the EID issue, so any possible attrition due to the normal legal services intake process was minimized. Advocates in D.C., Cincinnati, Charlotte, and Connecticut also conducted outreach to tenants by attending resident meetings and enlisting the help of citywide and development-wide resident groups to spread the word.

It is worth noting that the EID issue actually served as an organizing tool in some jurisdictions. The possibility of tenants receiving refunds or credits on their rent was a strong motivating factor for those tenants to get involved in their statewide or development-wide tenant organization. An example of the substantial benefit that enforcement of EID may produce is highlighted by the Charlottesville experience where 33 families received more than $57,000 in credits and refunds.[5]

The EID issue has served as an organizing tool in some jurisdictions. The possibility of tenants receiving refunds or credits on their rent was a strong motivating factor for getting involved in tenant organizations.

With welfare reform, it is also possible that local welfare agencies may assist housing advocates in identifying welfare recipients who are residents of public housing and may be eligible for the EID.[6] These agencies have an independent interest in the EID because it assists families who may be in the process of moving from welfare to work. Likewise, contacting the local welfare department and informing it of the benefits of the EID is another good way to get information about the program to tenants.

Another strategy employed at least in D.C., Charlottesville, and Connecticut was to contact job training organizations working with the housing authority. Since tenants who attended those trainings are likely to be eligible for the EID, this method of outreach proved quite fruitful in finding people who were being overcharged due to the improper implementation of the program. Lastly and unfortunately, homeless providers may also be a source of clients because some potential EID recipients who did not get the EID may have been evicted. Homeless providers may also be an avenue to educating tenants who may be eligible for the EID.

Confronting and Working with the PHA

Once an EID implementation problem is discovered, advocates should approach the PHA directly to ascertain if it is aware of the problem and what steps it is taking, or willing to take, to address the issue. Some attorneys have started with demand letters to their PHA, identifying the problem and noting that they have a potentially major class action law suit at hand. In Connecticut, legal aid attorneys sent a letter to the directors of every PHA in the state. These letters almost invariably lead to meetings with PHA officials. Issues to address at these meetings include the following: how the PHA will screen for the EID during the recertification

[5]*See Enforcement of Income Disregard Provisions Yields $58,000 in Benefits for Charlottesville Public Housing Residents*, 29 HOUS. L. BULL. 72 (Apr. 1999).

[6]Fourteen percent of public housing residents receive some form of welfare, while 28 percent receive some from of wages. *See* http://pic.hud.gov/pic/RCRPublic/rcrmain.asp.

process; will the PHA suspend non-payment evictions until the EID is properly implemented; how the PHA will deal with refunds for those who have overpaid their rent; and how they will redress tenants who may have been improperly evicted for non-payment of rent that they would not have owed if the EID had been properly implemented.[7]

To address many of these concerns, some attorneys offered to provide EID training to the PHAs' staffs. This offer was generally declined, but HUD and legal services providers in Connecticut did conduct joint training of PHA officials in that state, although not of the staff that may have needed it the most—the rent recertification specialists.

Most jurisdictions report that the PHAs have been cooperative at the meeting stage. In Connecticut, advocates were fortunate to have HUD's backing, and it was HUD that helped to convene the meetings that eventually led to a negotiated plan without litigation. Meetings proved productive in D.C. and Charlottesville, where the PHAs realized they needed to take action to better implement the EID and eventually developed acceptable plans to do so without litigation. In Cincinnati, the PHA also addressed the issue without the threat of litigation.

Some PHAs, of course, were not cooperative. In Philadelphia, for example, the PHA resisted vigorously deep into the litigation process, but now may be closer to settling since a judge certified the class of tenants.[8] In Columbus, Ohio, litigation was also necessary before there was a settlement.[9]

The PHA Plan process is also an excellent avenue for tenants to raise the issue of the EID, both the mandatory EID and the local option to implement a discretionary one. Residents and Resident Advisory Board (RAB) members should raise the issue in hearings about the PHA Plan and in any plan discussions with the PHA. If the EID is not addressed, they should demand that it be included in the plan. In the more likely event that the EID is addressed but inadequately implemented, residents should ask the PHA to provide them with their strategy for assuring that those who qualify for the EID receive it, including better screening processes and training for PHA staff. Tenants and RABs should request that the PHA provide the number of individuals who are claiming the EID and explain its mechanism for tracking the number of EID recipients. Form 50058, the Family Report,[10] used by PHAs to report to HUD tenant characteristics and rent calculations, includes a line for the amount of "income exclusions," which includes EIDs. However, the form does not specifically ask whether a given tenant receives an EID,[11] or include questions that might prompt a rent recertification specialist to ascertain whether a tenant might qualify for the EID. A recertification form that would help to identify potential EID recipients would have to be developed locally and some advocates have created such questionnaires.

In sum, this negotiation process has proven crucial in getting PHAs to properly implement the EIDs. With good tenant organizing, and perhaps HUD support, advocates can persuade or force PHAs to fix any problems they might have in assuring that tenants who qualify for EIDs get them, and skilled negotiation and persistent inquiry can obviate the need for litigation.

Follow-Up

Following up on EID implementation once the PHA has agreed to address the problem is more difficult and time-consuming and therefore more "ad hoc." Some PHAs have allowed attorneys to conduct a random sampling of rent calculations to see if tenants who qualify for the EID are receiving it. Attorneys in D.C. have scheduled follow-up meetings with the PHA on the issue, but their intake system still reveals clients who are not benefitting from the EID. At the very least, advocates should continue to closely monitor the situation through their own intake process and through meetings with the PHA and active engagement in the PHA Plan process. They should continue to educate tenant groups about the program and work closely with those groups to learn if they believe the EID is being implemented and to assure that the PHA Plan adequately addresses the issue. Advocates should also make sure that any training that the PHA promised to conduct actually takes place and that new PHA employees are informed about EID issues. They should confirm that PHAs are using locally developed questionnaires to prompt recertification specialists to the applicability of the EID.

If a PHA does not seem to have done as it has promised, advocates should consider approaching the PHA board directly. Litigation also continues to be a viable, and so far successful option.

Conclusion

The EIDs—both the old and the new—create important benefits for tenants and fit perfectly within the framework of congressionally and presidentially supported welfare-to-work programs. If tenants are expected to get jobs and increase their income, the EID should alleviate any fears they may have that their rents will rise substantially as soon as they report the income. Implemented correctly, EIDs could relieve PHAs of part of the administrative burden of resetting tenant rents whenever they improve their earned income level. In the long run, an effectively implemented EID may increase a PHA's rent collection, because it supports public housing residents' work efforts. If a PHA experiences an increase in the amount of rent collected, HUD regulations permit it to retain 50 percent of any increase and not be subject to a reduction in operating subsidy.[12] In short, EIDs have the potential to benefit everyone involved. Advocates should therefore make sure that their PHA is properly implementing those benefits and take strong measures when it is not. ■

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[7] *See PHAs Are Slow to Heed Earned Income Disregard Program*, 33 HOUS. L. BULL. 37 (Feb. 2002), *supra* note 1, for a discussion of possible outcomes of these discussions.

[8] *See id.* at 42.

[9] *See id.* at 41.

[10] Available online through www.hudclips.org/sub_nonhud/html/forms.htm.

[11] *See* Form 50058, line 7e, *supra* note 8.

[12] 24 C.F.R. §§ 990.109(b)(iii) and 990.116(a)(2001).

Supreme Court Hears Argument in *Rucker* "One-Strike" Eviction Case

On February 19, the United States Supreme Court heard oral argument in the case challenging the Department of Housing and Urban Development's (HUD) "one-strike" eviction policy that permits the eviction of innocent tenants who did not know or had no reason to know of the offending conduct by household members or guests. *United States Department of Housing and Urban Development v. Rucker*, ___ S.Ct. ___, 2001 WL 576,227, 70 USLW 3,036 (U.S. Sept. 25, 2001)(No. 00-1770). Most observers emerged pessimistic about the tenants' chances of winning an affirmance of the lower court judgments that had enjoined HUD's policy as applied to offenses occurring outside a tenant's unit.

Case Background

The tenants' federal court challenge to HUD's policy was based both on grounds of statutory interpretation and on constitutional principles, primarily due process. The Federal District Court issued a preliminary injunction against the Oakland Housing Authority (OHA), preventing the eviction of four public housing residents for violating HUD's "one-strike" policy embodied in their lease. After an initial panel of the United States Court of Appeals for the Ninth Circuit initially reversed the injunction, the full Ninth Circuit granted an unusual *en banc* rehearing, and later issued a decision upholding the District Court's decision.[1] That decision had construed the applicable statute, which was first passed by Congress in 1988 and requires public housing leases to contain specified language making certain criminal or drug-related conduct a cause for the termination of tenancy, as requiring consideration of the tenants' innocent tenant defense. The *en banc* Ninth Circuit had relied on the statute's legislative history, other relevant contemporaneous statutes and the unfair and possibly unconstitutional results produced by HUD's broad interpretation—that the statute's mandate concerning "cause" was sufficient to require tenants to become guarantors of the conduct of household members and guests—as precluding any "innocent tenant" defense or judicial review of all of the circumstances. Both HUD and the local housing authority then petitioned for review of that decision, and the Supreme Court granted that request last September.

The Argument

At oral argument before the Supreme Court, most of the Justices appeared skeptical or even hostile to the tenants' position. Although Justice Scalia began with a question concerning the common practice of interpreting a scienter requirement into criminal statutes, Justice Kennedy then asked why the tenants had standing to challenge the government's policy if they had signed a lease agreeing to refrain from such conduct. Other Justices later appeared to place great emphasis on the tenants' agreement to this mandatory lease provision. Justice O'Connor asked why the government would want to pursue a policy with such possibly draconian results, even if it were lawful, and Justice Thomas asked the OHA about the dimensions of the drug and crime problem addressed by the policy. Justice Ginsberg was especially interested in exploring any legal distinction between offending conduct within the unit and that occurring outside the unit, since the lower court had only enjoined application of HUD's policy to conduct outside the unit and the tenants' advocacy for an innocence defense made no such explicit distinction. Justice Ginsberg appeared troubled by the absence of any limitation on the tenants' argument, which in her view stretched even beyond the reach of the lower court's injunction, despite the fact none of the remaining plaintiffs affected by the "innocence defense" being reviewed by the Court faced eviction for activity inside their unit. Other related questions explored the limits of the government's authority under the statute and most of the Court seemed satisfied that only constitutional limits could further constrain the reach of HUD's rule interpreting the statute. Focusing primarily on substantive due process, the question and answers revealed that no Justice supported such limits, as each seemed convinced of a legally sufficient relationship between the "one-strike" policy that requires tenants to guarantee the conduct of others and the general goal of reducing drug and criminal activity.

Chief Justice Rehnquist clearly expressed a view that the federal civil forfeiture statute's specific inclusion of an innocent owner defense suggests that Congress intended no such defense by its silence in the public housing eviction context. Still other inquiries indicated the Court's solicitude for clearly distinguishing between the function of civil forfeiture laws and their constitutional limitations—taking private property that never belonged to the government—and eviction procedures designed to restore property to the lessor for breaches of the lease. None of the Justices seemed seriously troubled by the fact that HUD's policy grants housing authorities a discretion to evict that is essentially unreviewable by any

[1] *Rucker v. Davis*, 237 F. 3rd 1113 (9th Cir. 2001). *See En Banc 9th Circuit Rules that "One-Strike" Law Does Not Permit Eviction of "Innocent Tenants,"* 31 HOUS. L. BULL. 29 (Feb. 2001).

Supreme Court Issues *Rucker* Decision

On March 26, the United States Supreme Court issued its unanimous opinion in *Rucker v. Oakland Housing Authority*, ____ U.S. ____, 2002 WL 451,887 (2002). The ruling, which upheld the Oakland Housing Authority's and HUD's "one-strike" policy, will be reviewed in detail in the April issue of the *Bulletin*.

court, except to challenge whether the elements of the breach have been proven or to explore possible constitutional problems as applied. Similarly, most of the Justices seemed content to defer to HUD's discretion to fill in any gaps in the statutory language through rules, and were troubled by the fact that the tenants had sought an injunction in federal court against enforcement of the statutorily mandated lease provision that contained no innocent tenant defense, rather than awaiting an eviction court's decision on the case. Justice Breyer had previously recused himself from participating in the case, probably due to the fact that the trial judge who had enjoined the policy was his brother.

Copies of the briefs filed in the case are available from www.FindLaw.com. The full transcript of the oral argument is available from the Supreme Court's Web site.[2] ■

The Need to Assess the Tax Benefits of the Section 8 Homeownership Program

Now that low and very low-income persons can participate in the American dream of homeownership through the Section 8 Homeownership Program, there are some questions as to whether persons participating in the program can also benefit from the interest and property tax deductions that middle and upper-income households routinely use to reduce their income tax obligations. The Department of Housing and Urban Development (HUD) recently raised the issue of full deductibility of interest and property taxes by households participating in the Section 8 Homeownership Program with the Internal Revenue Service (IRS). The IRS responded by issuing a non-binding informational letter on August 28, 2001.[1]

IRS Opinion

According to the IRS, the Housing Assistance Payment (HAP) received by the Section 8 homeowner, or by a lender on behalf of the homeowner, is a general welfare payment that is not included in the income of the participant and is therefore exempt from income tax. Generally, Section 163(h)(2)(D) of the Internal Revenue Code (IRC) allows for the deduction for all interest paid or accrued within the taxable year on the principal residence of the taxpayer. Similarly, Section 164(a)(1) authorizes taxpayers to deduct state and local real estate property taxes for the taxable year within which those taxes were paid or accrued. However, Section 265(a)(1) of the IRC prohibits the deduction of any amount which is allocable to one or more classes of income wholly exempt from taxes.[2] Pursuant to this section, the IRS letter concludes that a Section 8 homeowner may not claim a deduction for any mortgage interest or property taxes paid by the HAP.

The IRS determination is based on a broad reading of Section 265(a)(1) of the IRC, which is intended to prevent a "double tax benefit."[3] It is supported by *Induni v. Commissioner*,[4] a case in which the taxpayer received a tax-exempt housing stipend incidental to his employment with the federal government. In that case, the Second Circuit noted that "the principal application of Section 265(a)(1) is to bar the deduction of expenses incurred in the course of earning tax-exempt income."[5] Nonetheless, the court found that, with the specific exception of housing allowances provided to ministers and military personnel, Congress intended the prohibition of Section 265(a)(1) to apply to all other housing subsidies. Accordingly, the court held that the taxpayer was prohibited from claiming a deduction for the mortgage interest and property taxes paid by the housing subsidy.[6]

Application of IRS Ruling to Section 8 Homeownership Program

Neither the IRS informational letter nor *Induni* mean that persons participating in the Section 8 Homeownership Program may not deduct any interest or property taxes paid from their income. IRS regulations provide that expenses and amounts directly allocable to either exempt or non-exempt income will be allocated to that particular form of income.[7] The regulations further state that if "an expense or amount otherwise allowable is indirectly allocable to both a class of non-exempt income and a class of exempt income, a reasonable portion thereof determined in the light of all the facts and circumstances in each case shall be allocated to each."[8] Accordingly, the Section 8 participant should not be precluded from claiming mortgage interest and property tax deductions for any portion of the mortgage interest and property taxes that are directly paid by the participant's earned income and not by the HAP.

Public housing authorities (PHAs) and advocates are in a position to maximize a Section 8 homeowner's ability to deduct interest and property tax payments from income by carefully identifying the purposes for which the HAP payments are being made. If, for example, the HAP payments

[2]www.supremecourtus.gov/oral_arguments/argument_transcripts.html.

[1]A copy of this letter is available on the HUD Web site at www.hud.gov/offices/pih/programs/hcv/homeownership. Because the IRS letter is "informational," it is not binding on the IRS. Taxpayers who want a definitive ruling from the IRS on the issue are encouraged to request a private letter ruling from the IRS's national office.

[2]26 U.S.C. § 265(a)(1)(West 2002).

[3]*United States v. Skelly Oil Co.*, 394 U.S. 678 (1969).

[4]990 F. 2d 53 (1993).

[5]*Id.* at 55.

[6]*Id.* at 57.

[7]26 C.F.R. § 1.265-1(c)(Westlaw, current through Mar. 5, 2002, 67 F.R. 9928).

[8]*Id.*

are intended to cover the cost of insurance, utilities, maintenance, and reserves, and the homeowner pays for principal, interest and property taxes, there is no reason why the homeowner should not be able to fully deduct the interest and property tax payments from income. On the other hand, if the HAP payment is used to amortize the loan and pay for property taxes, the homeowner is not entitled to deduct either from income. Under other circumstances, the homeowner may be able to deduct some, but not all, of the interest paid on the loan and may be able to deduct all of the property taxes. For example, some lenders have chosen to structure the Section 8 homeownership purchase using two mortgages. Under this approach, the first mortgage is a conventional 30-year mortgage that is fully amortized by the participant household's income. The second mortgage is a 15-year mortgage amortized exclusively by the HAP contract. Under these circumstances, the homeowner would be able to fully deduct the interest that is paid on the 30-year mortgage, but would not be able to deduct any of the interest attributable to the 15-year mortgage because it is paid by the HAP. Whether or not the homeowner would be eligible to deduct property taxes from income would depend on whether the homeowner pays for the property taxes or they are covered by the HAP.

While income tax considerations may play a role in structuring a particular purchase, PHAs and advocates should not allow these considerations to dictate how the home purchase is set up. There are two reasons for this. First, the household may not benefit significantly, if at all, from the interest and property tax deductions. Second, a deal that is based on tax considerations may not be in the best interest of the homebuyer.

Generally, low and very low-income homebuyers have not benefitted significantly from the interest and property tax deductions, which together will cost the federal government close to $90 billion in Fiscal Year (FY) 2002. This is nearly three times the entire HUD budget of $30.4 billion. Moreover, about 80 percent of the benefits afforded by these deductions go to households with incomes over $75,000. Less than 3 percent of the benefits go to lower and moderate-income taxpayers.[9] This disparity is attributable to four factors. First, fewer low-income households own their own homes than middle and upper-income households. Second, higher-income households benefit disproportionately from the interest and property tax deductions because they are able to incur higher costs and are able to deduct a higher percentage of those costs than low-income persons. Third, because the value of itemizations is so much lower for low-income households, taking the standard deduction may be more advantageous to them than itemizing expenses.[10] Fourth, lower-income households may not take itemized deductions on their tax returns because they are not familiar with all the tax benefits afforded to homeowners and are unable to afford the cost of securing advice and assistance from tax professionals in calculating their deductions and completing and filing their tax returns.

While income tax considerations may play a role in structuring a particular purchase, PHAs and advocates should not allow these considerations to dictate how the home purchase is set up.

The Section 8 Homeownership Program is an effort to address the first of these issues by increasing the number of low-income households that can become homeowners and only a change in the tax code will alter the effects of the second. PHAs, advocates and others, such as counseling agencies, can assist low-income households determine whether they can benefit from itemization, educate them on how to do so and assist them in locating *pro bono* assistance for completing and filing their income tax returns.

The current standard deduction for a married couple is $7,600. Thus, a household cannot benefit from itemized deductions unless the total of the itemized deductions for the household exceeds that amount. In many instances, a Section 8 homeowner who does not have deductions other than the interest and property tax deductions may in fact not pay more than $7,600 for interest and property taxes and therefore may not derive any benefits from itemization. For example, a Section 8 homeowner whose non-Section-8-supported mortgage is $100,000 will only pay slightly more than $6,900 in interest during the first year of the mortgage if the mortgage is amortized over 30 years at 7 percent. Therefore, if the homeowner's property taxes do not exceed $700 per year, there is no reason for the homeowner to itemize these costs on the household's income tax return unless the homeowner has other deductions that would take the homebuyer over the $7,600 standard deduction.

Moreover, even if the total deductions exceeded $7,600, because low-income households are in a low tax bracket, the advantage gained from itemizing deductions may be considered small by some taxpayers. For example, a household in the 15 percent income tax bracket will only save $75 in income taxes if their total itemized deductions are $8,350. There is no reason, however, why a low-income homeowner should not take that deduction if the homeowner can file for it without having to pay for a tax advisor or filing service.

[9]Kenneth Harney (syndicated columnist), *Homeowners Reaping a Tax-Break Bonanza* (May 6, 2001). Although households with annual incomes over $100,000 represent only 32 percent of taxpayers claiming mortgage interest deductions, the same households receive approximately 59 percent of the total tax savings of $65.7 billion. Taxpayers earning between $75,000 and $100,000 per year collected 20.5 percent of the total tax savings and represented 22.4 percent of income tax filers claiming a mortgage interest deduction. *Id.*

[10]*See* Steven C. Bourassa and William G. Grigsby, *Income Tax Concessions for Owner-Occupied Housing,* 11 Housing Policy Debate 521, 531-32 (2000). The authors further note, however, that for these small proportion of lower-income homeowners who do itemize, these households "receive substantial tax benefits from the mortgage interest deduction." *Id.*

Some Section 8 homeowners may indeed benefit significantly from itemization. Some states, notably, California, have relatively high property taxes. A Section 8 homeowner who purchases a $200,000 home in California can expect to pay at least $2,500 in property taxes during the first year of homeownership. Obviously, it would not take a very large mortgage to quickly bring that homeowner over the $7,600 standard deduction threshold and make itemization advantageous. Generally, PHAs and advocates should not make assumptions about the efficacy of itemization, particularly since they may not be fully familiar with all the household expenses that may make it advantageous. Instead, they should ensure that program participants get adequate information and advice at various times in the process.

Homeownership and Tax Counseling

Currently, there are opportunities for low-income households to receive tax benefit counseling and education but these occasions are often underutilized. Lower-income first-time homebuyers that receive "affordable lending loans" originated by prime lenders, downpayment grants or silent seconds designed to leverage mortgage financing and/or Section 8 homeownership assistance are often required to complete pre-purchase homeownership counseling before obtaining approval to buy their homes.[11] Required pre-purchase counseling, however, generally is designed to mitigate credit problems and describe the process of finding, buying and financing a home. Sometimes the counseling will discuss money management and home repair and maintenance issues. The type and effectiveness of pre-purchase counseling and education also vary with effectiveness and type between individual counseling, classroom settings and telephone or home study.[12]

The first year of homeownership is probably the best time to counsel homeowners on available homeownership tax benefits—especially because the homeowner may be more likely to benefit from itemization after paying mortgage points and fees. Section 8 homeowners, however, may also need advice prior to purchasing a home because the structure of the transaction may significantly affect the amount of income tax paid by the homeowner. As noted earlier, designating the HAP payment to nondeductible expenses can help families take the greatest advantage of the tax laws by leaving the interest and property tax expenses as deductible items. However, this may not always be possible and therefore not advantageous to the homebuyer. For example, in the two mortgage context, the buyer benefits substantially in terms of the mortgage that the household can afford by applying the full HAP payment toward the second mortgage. In such a case, efforts to allocate the interest expenses from all the loans to the homebuyer may be counterproductive since the homebuyer will only be eligible for a substantially smaller loan. Thus, it is critical that PHAs work closely with pre-purchase counseling agencies in ensuring that they understand the nuances of the Section 8 Homeownership Program and that they review the tax consequences of the program with the participants prior to their entering into a purchase agreement.

Section 8 homeownership participants should also receive tax advice as part of any post-purchase counseling program. Unfortunately, these programs are not as common as pre-purchase counseling and are more likely to concentrate on developing financial budgets, avoiding mortgage default and dealing with repair and maintenance problems. If a post-purchase counseling program is not available, Section 8 homeowners should be directed to other resources, as well as free or low-cost tax service providers, to determine fully how to take advantage of the tax benefits provided through homeownership.[13]

Conclusion

The Section 8 Homeownership Program provides low-income residents a unique opportunity to become homeowners and to take advantage of all the benefits attendant to homeownership. Income tax deductions for interest and property tax payments may or may not be one of those benefits depending on the household income and how the Section 8 Homeownership Program is structured. PHAs, counseling agencies and housing advocates should therefore work closely with homebuyers to determine whether the Section 8 Homeownership Program can provide their participants with these additional benefits and structure the purchase accordingly. ■

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[11] Abdighani Hand and Peter M. Zorn, *A Little Knowledge Is a Good Thing: Empirical Evidence of the Effectiveness of Pre-Purchase Homeownership Counseling*, (May 22, 2001); *see also* 24 C.F.R. § 982.626 (2001)(To receive Section 8 homeownership voucher assistance, the family must complete pre-assistance homeownership counseling).

[12] *Id.*

[13] *See e.g.* National Foundation for Credit Counseling, *Keys to Home Ownership* (2001) *at* 86-87 for a discussion of possible tax benefits for homeowners.

There may be times when we are powerless to prevent injustice, but there must never be a time when we fail to protest.

—Elie Wiesel

First Circuit: No Fair Housing Violations in Town's Sudden Rescission of Zoning Approval for Low-Income Housing Development

In a January 2002 opinion, *Macone v. Town of Wakefield*,[1] the First Circuit Court of Appeals affirmed the district court's decision to grant the defendant-appellee town's motion for summary judgment in a challenge to the rescission of a zoning approval for a low-income housing development. The First Circuit rejected the plaintiff-appellant developer's disparate treatment and disparate impact claims under the *Fair Housing Act*.[2]

The Wakefield Zoning Decision

The *Macone* plaintiffs sought to construct a 133- to 160-unit condominium development, Hillside Estates, in Wakefield, Massachusetts, about 15 miles north of Boston.[3] Thirty-four of these units were to be designated as "affordable" and five were to be "set aside" for "minority" purchasers.[4] The plaintiffs planned to proceed with development under Massachusetts Department of Housing and Community Development (DHCD) Local Initiative Program (LIP) regulations. Under LIP regulations, the plaintiffs would have been able "to bypass many local zoning and regulatory hurdles," provided they obtained the written endorsement of the Wakefield Board of Selectmen.[5]

In May 1998, the Board of Selectmen voted to approve the Hillside Estates development. In November and December of that year, DHCD contacted the Board to express reservations about the size of the development and to inform the Board that it "would not suffer adverse consequences from the simple failure to approve all LIP proposals."[6] In March 1999, without notice to the plaintiffs, the Board voted to rescind its earlier approval of Hillside Estates.[7]

According to the plaintiffs, the town only approved the development in the first place in order "to take advantage of local preference provisions of LIP," which would have allowed it to "require that up to 70 percent of the low and moderate-income units be granted preferentially to [Wakefield] residents or their relatives."[8] Plaintiffs contended that "the Board feared that the project would be built even without Wakefield's participation, in which case Wakefield would have no local preference."[9]

The plaintiffs also emphasized a comment made by one of the Board members regarding Hillside Estates at the initial approval hearing: "I don't think that gives the flavor to what we want in Wakefield and unfortunately—and I understand how the neighbors down there probably feel, I'm not sure that's what they're going to want to see at the end either."[10]

Wakefield is a "predominately white community."[11]

The First Circuit's Fair Housing Reasoning

The opinion addressed the plaintiffs' disparate treatment[12] and disparate impact[13] race claims under the *Fair Housing Act*. The court rejected all of these claims.[14] The plaintiffs alleged that the town's rescission of its LIP approval was motivated by the race of the potential residents of Hillside Estates and was therefore unlawful. In support of this claim of purposeful racial discrimination, the plaintiffs pointed, *inter alia*, to the "flavor" comment, the "unprecedented" approval rescission and the effect the rescission would have on affordable and minority housing opportunities in Wakefield.[15]

The First Circuit panel, without discussion of what the "flavor" comment referred to, decided that "this one comment" did not support a disparate treatment claim.[16] The court pointed to the fact that this comment was made prior to the rescission and that the plaintiffs produced "no other evidence" of discriminatory purpose.[17] It rejected the plaintiffs' argument that the procedural irregularities surrounding the Board's approval rescission were evidence of discriminatory purpose,

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[1] 277 F.3d 1 (1st Cir. 2002)(Torruella, J.).

[2] Title VIII of the *Civil Rights Act of 1968*, 42 U.S.C.A. § 3601, *et seq.* (West Supp. 2001). Plaintiffs raised Fourteenth Amendment Due Process and Equal Protection claims that were also rejected.

[3] *See Macone v. Town of Wakefield ("Macone")*, 277 F.3d at 1.

[4] *Id*. at 2, 3. The opinion provides no details about the level of affordability or how the "set aside" was to have been administered.

[5] *Id*. at 1.

[6] *Id*. at 2.

[7] *See id*.

[8] *Id*. at 3, n. 4.

[9] *Id*. at 2.

[10] *Id*.

[11] *Id*. at 6. According to 2000 Census figures, Wakefield is 96.9 percent white. *See* http://factfinder.census.gov/servlet/BasicFactsServlet ("American FactFinder: Race and Hispanic or Latino (QT) for a City or Town").

[12] *I.e.*, purposeful discrimination. *See generally*, *Fair Housing Litigation to Prevent the Loss of Federally Assisted Housing: The Duties of Public Housing Authorities and Project Owners, Part One: Federal Fair Housing Law* (*Fair Housing Litigation: Part One*), 31 HOUS. L. BULL. 73, 76, n. 45 (Apr. 2001).

[13] *I.e.*, a facially neutral policy or practice that causes disproportionate or special harm to members of classes protected under civil rights laws. *See generally Fair Housing Litigation: Part One*, 31 HOUS. L. BULL. 78-9 (Apr. 2001).

[14] The court also rejected the plaintiffs' Due Process and Equal Protection claims based on the economic harm caused by the rescission. *See Macone* 277 F.3d at 7-8.

[15] *Id*. at 3.

[16] *Id*.

[17] *Id*.

stating that "such abnormalities are only relevant within a larger scope."[18]

The effect the rescission would have on minority housing opportunities was addressed by the court in its treatment of the plaintiffs' disparate impact claim. The court decided that this claim failed because "there is no information that any minorities would actually move into the Hillview Estates project."[19]

Macone Contrasted with *Arlington Heights* and Other Fair Housing Case Law

The *Macone* court relied extensively on the U. S. Supreme Court's opinion in *Village of Arlington Heights v. Metropolitan Housing Development*[20] in deciding both the disparate impact and disparate treatment fair housing claims. The court's reliance on *Arlington Heights* on the disparate impact issue[21] was entirely misplaced. The Supreme Court did not address any disparate impact claims in *Arlington Heights.* The *Arlington Heights* decision addressed constitutional claims exclusively and did not reach any statutory claims because of the "unorthodox" posture of the case on appeal.[22]

The court in *Macone* similarly misapplied *Arlington Heights* in its decision on the plaintiffs' disparate treatment claims. In *Arlington Heights*, the Supreme Court stated that deciding a purposeful discrimination claim "*demands* a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[23] Discriminatory purpose may be—in fact, often must be—established by inference.[24] *Arlington Heights* set forth an illustrative list of factors to be considered to determine whether discriminatory purpose is present.[25] These included the racial impact of the challenged action, procedural and substantive departures posed by the action, and administrative or legislative history.[26]

The *Macone* plaintiffs presented evidence, under precisely the factors set forth in *Arlington Heights*, of a sudden and unprecedented decision to block the development of housing for low-income families of color which, according to deliberative history, was motivated by concerns about the effect the development would have on the "flavor" of an almost exclusively non-minority community. The court in *Macone* considered each factor separately and decided that the plaintiffs' disparate treatment claim failed because no one piece of evidence presented could definitively establish discriminatory purpose. This type of narrow, wooden analysis is directly contrary to the "sensitive inquiry" required under *Arlington Heights.*

The First Circuit's treatment of the "flavor" statement is particularly troublesome. *Arlington Heights* emphasizes that "legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."[27] Despite direction from the Supreme Court to the contrary, the *Macone* panel rejects the relevance of the "flavor" statement out of hand.[28] The court's reason for discounting this statement—that it was not made at the time the approval was rescinded—has no basis in *Arlington Heights*. It is inconsistent with other reasoning in *Macone*. The Board gave no reasons for the approval rescission at the time it was made. The court nonetheless determined that the Board had "legitimate" reasons for its decision by examining prior statements made by Board members at the time the initial approval was granted.[29]

Conclusion

Macone is at least the second unfavorable civil rights decision relating to low-income housing from the First Circuit in recent years. It follows *Langlois v. Abington Housing Authority*,[30] which rejected a challenge to the use of residency preferences in voucher program admissions by suburban public housing authorities as having a disparate impact on the basis of race and perpetuating segregation. ■

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[18] *Id.* The panel went as far as to suggest that approval would have been more indicative of discriminatory purpose:

> Future projects may or may not include the local preference provision which was included in the Hillview Estates proposal. Therefore, the Board, if anything, faces a more uncertain future regarding the movement of minorities into Wakefield. If keeping minorities out of Wakefield were actually a concern for the Board, blocking the Hillview Estates project would hardly further that goal.

Id. at 4.

[19] *Id.* at 6.

[20] *Village of Arlington Heights v. Metropolitan Housing Development* (*Arlington Heights*), 429 U.S. 252 (1977)(Powell, J.).

[21] *See Macone*, 277 F.3d at 6.

[22] *See Arlington Heights,* 429 U.S. at 271.

[23] *Id.* at 266 (emphasis added)(discussing a Fourteenth Amendment claim).

[24] *See Washington v. Davis*, 426 U.S 229, 242 (1976)("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts…").

[25] *See Arlington Heights*, 429 U.S. at 268.

[26] *Id.* at 266-8.

[27] *Id.* at 268. The court even contemplates calling decision-makers to the stand at trial to "testify concerning the purpose of the official action." *Id.*

[28] *See Macone*, 277 F.3d at 5 (relying on *Nat'l Amusements, Inc. v. Town of Dedham,* 43 F.3d 731, 735 (1st Cir.1995): "We are not required to enter into the realm of fantasy and conjecture when reviewing a grant of summary judgment").

[29] *Id.* at 6-7. Even more dismaying, according to the panel's decision, these reasons included a desire to see that only certain kinds of people reside in Wakefield, namely persons whom the Board believed "could become 'lifelong' residents." *Id.* at 7.

[30] 207 F.3d 43 (1st Cir. 2000). *See also*, *Second Circuit Bars Working Family Admission Preference in NYC Public Housing on Fair Housing Grounds*, 33 HOUS. L. BULL. 54-5 (contrasting *Langlois* with *Davis v. New York City Housing Authority*, 278 F.3d 64 (2nd Cir. 2002)).

New Jersey Supreme Court Rules that Extra Charges Are Not Rent

The New Jersey Supreme Court recently ruled that the *Brooke Amendment* prohibits a public housing authority (PHA) from evicting a tenant for failure to pay attorneys' fees, late charges and court costs where the lease expressly defines such fees as rent. The facts of *Housing Authority & Redevelopment Agency of the City of Atlantic City v. Taylor*[1] raises important issues of the federal preemption of state law in public housing cases. The tenant, Vanessa Taylor, had been a public housing tenant for 15 years, and lived in the Stanley Homes public housing development with her six children and her granddaughter. Pursuant to the *Brooke Amendment*,[2] her rent was limited to 30 percent of her adjusted gross income, or $324 per month.[3] The lease also provided that if she failed to pay her rent in a timely manner she would be charged $20 per month in late fees, and that she would have to pay attorneys' fees plus costs if the housing authority instituted eviction proceedings in which she did not prevail. All of these additional fees were specifically defined as "additional rent" by the lease.[4] When Ms. Taylor fell three months behind in her rent, the PHA brought an eviction action, also seeking $144.50 in attorneys' fees and $20 in late fees.[5] On the date of the hearing, Ms. Taylor proffered the full three months of back rent, but challenged the legality of the PHA requiring her to pay the attorneys' fees and late charges in order to avoid eviction.[6] The trial court held that the housing authority was permitted to demand the additional charges pursuant to the lease, and ruled that the *Brooke Amendment* did not preempt existing state contract law.[7] It thus entered a judgment of possession against her, ruling that she was required to pay the additional $164.50 the next day or have the eviction proceedings progress against her.[8] The New Jersey appellate court affirmed.[9]

The Court Ruling

The New Jersey Supreme Court, however, held that federal law preempted state contract law and reversed.[10] The court first noted that New Jersey law had long provided that residential landlords could consider attorneys fees, late fees and other additional costs related to an eviction as additional rent.[11] It also acknowledged that New Jersey law provides that good cause to evict exists when the tenant fails to pay rent or outstanding late fees or attorneys' fees if those fees are considered to be additional rent or "accrued costs of the proceedings."[12] The *Brooke Amendment*, however, provides that public housing tenants cannot be charged more than 30 percent of their adjusted income for rent.[13] In this situation, these two concepts were in direct conflict with each other, leading the court to consider whether the federal law preempted state contract law in this area.

The court concluded that the state law permitting attorney's fees and other charges to be considered "rent" was preempted by the Brooke Amendment because including such fees as rent would drive the rent level above 30 percent.

Since the *Brooke Amendment* contains no express preemption clause, the court considered the two avenues for implied preemption of state law. The first is where the scheme of federal law is so pervasive that it is clear that Congress intended that there be no room for the states to supplement the law. The second is where complying with both state and federal law is impossible.[14] The court first observed that federal law governs public housing issues.[15] It then laid out the comprehensive federal scheme of how rent is to be calculated and charged in public housing, noting the existence of minimum rents, flat rents, ceiling rents and exemptions from the minimum rent. This scheme, the court said, was all part of Congress' intent to permit very low-income tenants to rent housing at no more than 30 percent of their income.[16] The court also observed that the Department of Housing and Urban Development (HUD) regulations—and the court decisions interpreting them—draw a sharp distinction between "rent" and "other charges."[17] Without clearly stating which of the two implied preemption doctrines it found to apply, the court concluded that the state law permitting attorney's fees and other charges to be considered "rent" was preempted by the *Brooke Amendment* because including such fees as rent would drive the rent level above 30 percent.[18] Thus, the court

[1] ___ A2d ____, 2002 WL 264,181 (N.J., February 26, 2002).

[2] 42 U.S.C.A. § 1437(a)(1)(A).

[3] *Taylor*, 2002 WL 264,181, at *1.

[4] *Id.*

[5] *Id.* at *2.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at *3.

[13] 42 U.S.C.A. § 1437(a)(1)(A).

[14] *Taylor*, 2002 WL 264,181, at *3.

[15] *Id.* at *4.

[16] *Id.*

[17] *Id.* at *5-6.

[18] *Id.* at *7.

concluded, the PHA was not permitted to require payment of those additional fees in order for the tenant to stave off eviction. The court, however, did not prohibit the collection of such additional fees, finding that the PHA could pursue a civil action against the tenant to collect the additional fees.[19]

Analysis

The decision in *Taylor* is unique in so far as it is predicated upon a *Brooke Amendment* analysis and a preemption analysis. Its result is, however, consistent with HUD's definition of rent, which does not include extra charges and from its long-held policy of requiring that PHAs collect extra charges separately from rent.[20] This does not mean that PHAs, or other subsidized landlords, cannot evict residents for nonpayment of extra charges or from doing so in the same proceeding in states that permit them to do so. For example, a PHA may seek to evict a tenant for breach of the lease for repeated nonpayment of excess charges. However, when state law or a PHA's procedure allow a tenant to cure a nonpayment of rent, it does prevent a PHA from refusing to accept the rent payment because the tenant also has not tendered additional charges that may be due and to then proceed to evict for nonpayment of both the rent and the extra charges. It also means that PHAs and landlords cannot rely on expedited nonpayment of rent proceedings to evict for failure to pay extra charges and that they would have to rely on the more traditional 30-day notice to evict for a lease violation based on nonpayment of extra charges. In addition, the right to seek a grievance should attach to the nonpayment of extra charges even when the resident has not escrowed the amount demanded by the landlord, whereas a grievance would not be available if the tenant has not escrowed the past due rent.

It is also important to note that while *Taylor* was decided in the public housing context, its rationale is equally applicable to the Section 8 voucher program and other programs that set rent as a percentage of household income and define rent narrowly to exclude additional charges. Moreover, as noted earlier, to the extent that HUD or other assisted housing programs define rent separately from other charges, residents should be able to achieve the same result by arguing that other charges are not part of rent and must be collected separately.[21] In short, the decision exemplifies that advocates in public or subsidized housing eviction cases for non-payment of rent should carefully scrutinize exactly what money the tenant is claimed to owe and whether that money is defined as "rent." ■

[19]*Id.* at *8.

[20]*See,* National Housing Law Project, *HUD Housing Programs: Tenants' Rights*, 14/16 (1994) (Section 14.2.4.4 Definition of Rent).

[21]The Rural Housing Service regulations, for example, specifically state that landlords must pursue the collection of other charges through separate legal action. 7 C.F.R. Part 1930, Subpart C, Ex. B, ¶ VII C 8 (2001).

Recent Housing Cases

The following are brief summaries of recently reported federal housing cases that should be of interest to housing advocates. Copies of the opinions can be obtained from a number of sources including the cited reporter, Westlaw,[1] Lexis,[2] or, in some instances, the court's Web site.[3] Copies of the cases are not available from NHLP.

Community Stabilization Project v. Martinez, 2002 WL 272,313 (8th Cir., Feb. 27, 2002). The Court of Appeals for the Eighth Circuit declined to vacate a lower court decision concluding that a nonprofit organization did not have standing to sue the Department of Housing and Urban Development (HUD), the City of St. Paul and the owner of a low-income housing building to prevent the building from being demolished. The Community Stabilization Project (CSP), a nonprofit organization dedicated to preserving low-income housing, sued the city, the owner and HUD when the city proposed purchasing and demolishing the building without ensuring that it would continue to operate as low-income housing for the full term of the mortgage, allegedly in violation of 12 U.S.C. § 1701z-11(k). After the district court's ruling, CSP appealed but failed to seek an expedited appeal and did not seek an injunction for months, waiting until nine days before the closing of the sale. The district court denied the injunction; the building was sold and shortly thereafter demolished. CSP then moved to dismiss its appeal and vacate the district court's ruling as moot. The Eighth Circuit dismissed the appeal, but declined to vacate the judgement because the matter became moot due, in great part, to CSP's delay in trying to enjoin the demolition of the building. Thus, the *res judicata* effect of the ruling on standing remains in effect.

Davidson 1992 Associates v. Corbett, 2002 WL 338,108 (N.Y. Sup. App. Term, Feb. 26, 2002). A New York State appellate court affirmed a ruling denying a home health care worker the right to succeed to possession of a project-based Section 8 unit when the tenant died. The health care worker had been listed as such on all leases for the unit, and her allegation that she had developed a personal relationship with the decedent did not overcome the fact that she and the tenant had never requested or obtained approval to consider her as an additional family member.

Morial v. HUD, 2002 WL 246,334 (E.D. La., Feb. 20, 2002). A federal district court denied the City of New Orleans's motion for Breach of Contract, Declaratory Judgment, Writ of Mandamus, and Application for Injunction asking that the court restrain HUD from putting the Housing Authority of New Orleans (HANO) into receivership. HUD had assumed

[1]www.westlaw.com.

[2]www.lexis.com.

[3]For a list of courts that are accessible through the World Wide Web, *see* www.uscourts.gov/links.html (federal courts) and www.ncsc.dni.us/COURT/SITES/courts.htm#state (for state courts). *See also* www.courts.net.

control of HANO because it breached its Annual Contributions Contract (ACC). A Cooperative Endeavor Agreement (CEA) governed the relationship between HANO and HUD. It was undisputed that HANO was still in substantial default of the ACC at the time of the opinion. The District Court first made a number of standing rulings. It held that the individual tenant plaintiffs do not have standing to sue under 42 U.S.C. § 1437 because the statue creates no implied right of action. However, the court also held that they had standing as third-party beneficiaries of the CEAs at issue because they were issued for the benefit of the public housing tenants. The court additionally held that the plaintiff, the Mayor of New Orleans and the City itself, could not assert standing as *parens patriae* for the citizens of New Orleans because the suit was against the United States, which is the ultimate *parens patriae* for its citizens with respect to federal legislation. But, since the Mayor and City were parties to the CEAs, the court found that they did have standing to sue on the contract.

The court next addressed the issue of jurisdiction and sovereign immunity, concluding that the *Tucker Act* (28 U.S.C. §§ 1346 and 1491) precludes the waiver of sovereign immunity. Because the United States has only waived sovereign immunity in contract cases where the plaintiff asks for monetary damages, and the case at bar asked for injunctive relief, the court ruled that it did not have jurisdiction to hear the matter and denied the plaintiffs' motions.

Billieson v. City of New Orleans, 2002 WL 221,609 (E.D. La., Feb. 8, 2002). The District Court granted the plaintiff class' motion for remand to state court for lack of subject matter jurisdiction in their lead-based paint exposure suit against the City of New Orleans and its housing authority. The plaintiff class had sued the housing authority and city in state court for damages resulting from their exposure to lead-based paint while living in public housing units. Defendants removed the case to federal district court, invoking the *All Writs Act*, 28 U.S.C. § 1651. The court concluded that the *All Writs Act* cannot be invoked to remove a case to federal court without some independent basis for federal jurisdiction or some extraordinary circumstances which would justify the federal court exercise of its jurisdiction. Finding neither the independent basis nor the extraordinary circumstances, the court concluded that federal subject matter jurisdiction was lacking and granted the motion to remand the case to the state court.

***Fulk v. Lee*,** 2002 WL 316,325 (Conn. Super., Feb. 7, 2002). A Connecticut state court awarded plaintiff applicant damages, holding that a building owner discriminated against her because she was a recipient of housing assistance and other public assistance. The plaintiff applied for a rental unit and told the landlord that her Section 8 Housing Choice Voucher would pay the full rent for the apartment. The plaintiff also received welfare benefits. She had a modest but good credit history and a good reference from her last landlord. The owner of the apartment she applied for denied her application because of "no employment." He reasoned that the plaintiff would not be able to pay for the apartment if the Section 8 benefits terminated and that the welfare income would not be enough to pay any additional fees. Connecticut law forbids discrimination in housing on the basis of lawful source of income. Holding that rejecting the plaintiff for lack of employment indirectly achieved the same result as rejecting her for the source of her income, the court found the owner to have violated Connecticut law. The court awarded the plaintiff $1,500 for emotional distress and ordered the defendant to provide the plaintiff with notice of any apartments that became available at the development in question for the next six months.

***Chancellor Manor v. Qandid*,** 2002 WL 172,034 (Minn. App., Feb. 5, 2002). The Minnesota Court of Appeals upheld the eviction of a tenant from a subsidized apartment due to non-disclosure of changes in employment and income. At the time of recertification, the tenant reported income of $420 per month. The landlord later determined that her actual income was approximately $480 per month. The next month, the tenant obtained a new job paying over $1,000 per month. She did not report this change in writing, but alleged that she told the property manager about it, and was told that there was no need to file any paperwork. In the interim, a trial court found that the tenant's son had intentionally failed to report income and ordered him, but not the tenant, out of the unit. At the tenant's next recertification, she reported income of "about $500 per month" without naming her employer. At this point, the owners discovered that the tenant's income had increased several months earlier and served her with notice of violation of the disclosure rules and intent to terminate the lease. The trial court failed to make an explicit finding of fraud, but did hold that the tenant intentionally withheld the information about her increased income. This ruling was based in part on the fact that the tenant learned of many of the disclosure rules during her son's trial. The appellate court upheld the lower court decision, noting that the lower court found that the tenant knew of the rules and intentionally violated them, thus fitting squarely within HUD's definition of "fraudulent," which is the type of behavior required under HUD regulations for termination of the lease. The appellate court also rejected the tenant's argument that a language barrier (she was Somalian) contributed to her alleged lack of understanding of the reporting requirements.

***Oti Kaga, Inc. v. South Dakota Housing Development Authority*,** 2002 WL 272,334 (D. S.D., Feb. 8, 2002). A federal district judge granted defendant state housing authority's motion for summary judgment on all counts in a Native American corporation's suit alleging discrimination in distribution of low-income housing tax credits and HOME funds. The plaintiff sued only as itself, with no individual plaintiffs named and no explanation of how it represented Cheyenne River Sioux Tribal government, or if it did at all. It had applied for low-income housing tax credits and, after an initial denial, was granted credits for one development. Its application for HOME funds was denied. The court noted some ambiguities regarding the *Native American Housing Assistance and Self-Determination Act* (NAHASDA), but also

concluded that many of the issues raised by the suit were political ones. The plaintiff sued for, among other things, emotional distress, hurt feelings, and discrimination, asking the court to rescind the award of all low-income housing tax credits from 1996 and redistribute them. Incredulous that a corporation would sue for emotional distress and that it proceeded in the suit with absolutely no evidence of discriminatory conduct, the court granted the defendants motion for summary judgment on all counts, and hinted strongly that plaintiff would be subject to Rule 11 sanctions. Along the way, the court held that plaintiff did have standing to pursue any claim relating to the tax credit issue. Although the court concluded that the plaintiffs did have standing for their HOME claims, it found all of its discrimination claims to be completely unsupported by evidence and failed to comprehend how a corporation could allege that it was a member of a protected class. The court was also put off by the plaintiff's allegations of "intentional negligence" and its complete disregard of court orders. In short, the case is a fine example of how not to litigate a case. ■

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD), and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued through February 28, 2002. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

Copies of the cited documents may be secured from various sources, including (1) the Government Printing Office's Web site on the World Wide Web,[1] (2) bound volumes of the *Federal Register*, (3) HUD Clips,[2] (4) HUD,[3] and (5) USDA's/Rural Development Web page.[4] Citations are included with each document to help you secure copies.

HUD Federal Register Rules

67 Fed. Reg. 6,819 (February 13, 2002)
Determining Adjusted Income in HUD Programs Serving Persons With Disabilities: Requiring Mandatory Deductions for Certain Expenses; and Disallowance for Earned Income—Technical Amendments

***Summary*:** This document makes two technical corrections to the final rule published on January 19, 2001, that amended HUD's regulations in part 5, subpart F, to disregard certain increases in earned income to persons with disabilities in specified HUD programs.

***Effective Date*:** March 15, 2002.

[1]*At* www.access.gpo.gov/su_docs.

[2]*At* www.hudclips.org/cgi/index.cgi.

[3]To order notices and handbooks from HUD, call (800) 767-7468 or fax (202) 708-2313.

[4]*At* www.rdinit.usda.gov/regs.

HUD Federal Register Notices

67 Fed. Reg. 5,418 (February 5, 2002)
Notice of FHA Accelerated Claim Disposition Demonstration

***Summary*:** This notice announces HUD's proposal to establish the Accelerated Claim Disposition (ACD) Demonstration. Under the ACD Demonstration, HUD would pay accelerated claims on certain defaulted FHA-insured mortgages. HUD intends to select approximately five to nine mortgagees to participate in the ACD Demonstration. The demonstration will have a limited initial duration and will include mortgage loans secured by properties located within the jurisdiction of HUD's Philadelphia, Pennsylvania and Atlanta, Georgia Homeownership Centers (HOCs). At the conclusion of the demonstration, HUD will assess its success and determine whether to implement the ACD process, on a permanent basis, throughout the country.

***Comments Due Date*:** April 8, 2002.

67 Fed. Reg. 6,266 (February 11, 2002)
Notice of Certain Operating Cost Adjustment Factors for Fiscal Year 2002

***Summary*:** This notice establishes factors used in calculating rent adjustments under section 524 of the *Multifamily Assisted Housing Reform and Affordability Act of 1997* (MAHRA) as amended by the *Preserving Affordable Housing for Senior Citizens and Families into the 21st Century Act of 1999* and the *Low-Income Housing Preservation and Resident Homeownership Act of 1990* (LIHPRHA).

***Effective Date*:** February 11, 2002.

67 Fed. Reg. 7,921 (February 20, 2002)
Funding for Fiscal Year 2001: Capacity Building for Community Development and Affordable Housing

***Summary*:** The FY 2001 *HUD Appropriations Act* provided $32,450,000 in FY 2001 funds for activities authorized in section 4 of the *HUD Demonstration Act of 1993.* Twenty-five million dollars of these funds are appropriated to the Enterprise Foundation (Enterprise) and the Local Initiatives Support Corporation (LISC) for activities authorized by section 4, as in effect immediately before June 12, 1997. The funds are to be used for capacity building for community development and affordable housing—provided that at least $5 million of the funding is used in rural areas, including tribal areas.

67 Fed. Reg. 8,427 (February 22, 2002)
Notice of Funding Availability (NOFA); Fair Share Allocation of Incremental Voucher Funding, Fiscal Year 2002

***Summary*:** The purpose of this NOFA is to invite public housing agencies (PHAs) to apply for vouchers on a fair share allocation basis under the Housing Choice Voucher Program. The vouchers are for issuance to families on a PHA's housing choice voucher waiting list to enable these families to access decent, safe and affordable housing of their choice on the private rental market.

***Application Due Date*:** March 25, 2002.

67 Fed. Reg. 9,137 (February 27, 2002)
Notice of Certification and Funding of State and Local Fair Housing Enforcement Agencies Under the Fair Housing Assistance Program (FHAP)

***Summary*:** Under HUD's regulations addressing the certification of state and local fair housing enforcement agencies under the Fair Housing Assistance Program, the Department is required periodically to inform the public of certified and interim certified agencies and identify those agencies where a denial of interim certification or withdrawal of certification has been issued or proposed and solicit comments from the public, prior to HUD granting certification to state or local fair housing enforcement agencies. This notice fulfills these requirements.

***Comments Due Date*:** March 29, 2002.

HUD Notices

Notice PIH 2002-2 (HA) (February 6, 2002)
Form Cancellations

***Summary*:** The purpose of this notice is to provide confirmation of the cancellation/discontinuance of the following Forms: HUD 52295, Report of Tenants Accounts Receivable (TAR); HUD 52595, Balance Sheet for Section 8 and Public Housing; HUD 52596, Statement of Income & Expense & Changes in Accumulated Surplus or Deficit from Operations; HUD 52598, Analysis of Nonroutine Expenditures; HUD 52599, Statement of Operating Receipts & Expenditures (SORE); HUD 52603, Statement of Initial Operating Income & Expense (IOP); HUD 52656, Limited Revolving Fund; and HUD 53049, Mutual Help Balance Sheet.

***Effective Dates*:** Cancellation of the Form HUD 52599 is effective January 1, 2002. PHAs with a fiscal year ending December 31, 2001, will file the HUD 52599 with the local HUD office. Submission of the HUD 52599 will not be required for PHAs with fiscal years ending on or after March 31, 2002. Submission of the other listed forms was not required in 2001 and the forms were discontinued at the 2001 expiration date.

Notice PIH 2002-3 (HA) (February 6, 2002)
Reinstatement—Notice PIH 2000-41 (HA), Use of Housing Choice Vouchers in Assisted Living Facilities

***Summary*:** This notice reinstates Notice PIH 2000-41 (HA), same subject, which expired September 30, 2001, for another year until January 31, 2003.

***Expires*:** January 31, 2003.

HUD Mortgagee Letters

Mortgagee Letter 2002-04 (February 13, 2002)
Issuance of FHA Multifamily Mortgage Insurance Commitments, Availability of Credit Subsidy and Mortgage Increases in FY 2002

***Summary*:** This letter described the policies that FHA has established for the operation of FHA multifamily mortgage insurance programs in FY 2002.

RHS Federal Register Notices

67 Fed. Reg. 8,684 (February 25, 2002)
Notice of Availability of Funds; Multi-Family Housing, Single Family Housing

***Summary*:** RHS announces the availability of housing funds for FY 2002. This action is taken to comply with 42 U.S.C. 1490p, which requires that RHS publish in the Federal Register notice of the availability of any housing assistance.

***Effective Date*:** February 25, 2002.

67 Fed. Reg. 8,671 (February 25, 2002)
Notice of Funds Availability (NOFA) for section 514 Farm Labor Housing Loans and section 516 Farm Labor Housing Grants for Off-Farm Housing for Fiscal Year 2002

***Summary*:** This NOFA announces the timeframe to submit applications for section 514 Farm Labor Housing loan funds and section 516 Farm Labor Housing grant funds for new construction and acquisition and rehabilitation of off-farm units for farmworker households. Applications may also include requests for section 521 rental assistance (RA) and operating assistance for migrant units. This document describes the method used to distribute funds, the application process, and submission requirements.

***Application Deadline*:** 5:00 p.m., local time for each Rural Development State office, May 28, 2002.

67 Fed. Reg. 8,674 (February 25, 2002)
Notice of Funding Availability (NOFA) for the Section 515 Rural Rental Housing Program for Fiscal Year 2002

***Summary*:** This NOFA announces the timeframe to submit applications for section 515 Rural Rental Housing (RRH) loan funds and section 521 Rental Assistance (RA) for new construction, including applications for the nonprofit set-aside for eligible nonprofit entities, the set-aside for the most Underserved Counties and Colonias (*Cranston-Gonzalez National Affordable Housing Act*), and the set-aside for Empowerment Zones and Enterprise Communities (EZ/ECs) and Rural Economic Area Partnership (REAP) communities. This document describes the methodology that will be used to distribute funds, the application process, submission requirements and areas of special emphasis or consideration.

***Application Deadline*:** 5:00 p.m., local time for each Rural Development State office, April 26, 2002.

67 Fed. Reg. 8,678 (February 25, 2002)
Notice of Funds Availability (NOFA) for section 533 Housing Preservation Grants

***Summary*:** RHS announces that it is soliciting competitive applications under its Housing Preservation Grant (HPG) program. The HPG program is a grant program which provides qualified public agencies, private nonprofit organizations, and other eligible entities grant funds to assist very low and low-income homeowners repair and rehabilitate their homes in rural areas, and to assist rental property owners and cooperative housing complexes to repair and rehabilitate their units if they agree to make such

units available to low and very low-income persons. This action is taken to comply with Agency regulations found in 7 C.F.R. part 1944, subpart N, which require the Agency to announce the opening and closing dates for receipt of preapplications for HPG funds from eligible applicants.

***Application Deadline*:** 5:00 p.m., local time for each Rural Development State office, May 28, 2002.

67 Fed. Reg. 8,679 (February 25, 2002)
Notice of Availability of Funding and Requests for Proposals for Guaranteed Loans Under the Section 538 Guaranteed Rural Rental Housing Program

***Summary*:** This NOFA announces the timeframe, submission requirements and deadlines to submit proposals in the form of "NOFA responses" for the section 538 Guaranteed Rural Rental Housing Program (GRRHP)for the FY 2002 allocation of $99.77 million. This notice describes the commitment of program dollars, eligibility requirements, lender responsibilities and the overall NOFA and application processes.

***Dates*:** The FY 2002 program dollars will be allocated through a continuous selection process. The RHS will review all NOFA responses through May 16, 2002. Reviews will take place on an ongoing basis. NOFA responses received after May 16, 2002 will be held for review subject to the availability of funds.

RHS Administrative Notices

RD AN No. 3,699 (1940-L) (January 28, 2002)
Allocation of Rental Assistance (RA) for Renewal and Replacement Needs for Multi-Family Housing (MFH) Projects for Fiscal Year (FY) 2002

***Summary*:** This Administrative Notice (AN) allocates RA for renewal/replacement for all types of existing multi-family housing projects.

***Expiration Date*:** September 30, 2002.

RD AN No. 3,703 (1924-A) (February 5, 2002)
MFH Lead-Based Paint Risk Assessment Schedule

***Summary*:** This AN provides guidance to Rural Development staff on the implementation of Subpart D—"Project-Based Assistance Provided by a Federal Agency Other Than HUD" of HUD's Final Rule on Lead-Based Paint Hazards in Federally Owned Housing and Housing Receiving Federal Assistance. This will also clarify the Agency's schedule for conducting lead-based paint risk assessments on a multi-family residential complex constructed before 1978. The complex must receive more than $5,000 annually in project-based assistance, which includes rental assistance.

***Expiration Date*:** February 28, 2003.

RD AN No. 3,704 (1924-A) (February 5, 2002)
Housing Preservation Grant Program Lead-Based Paint Requirements

***Summary*:** This AN provides guidance to Rural Development staff on implementation of Subpart J-"Rehabilitation" of HUD's Final Rule on Lead-Based Paint Hazards in Federally Owned Housing and Housing Receiving Federal Assistance (hereinafter, the "LBP regulation") as it relates to the Housing Preservation Grant (HPG) Program. Subpart J sets out the requirements for the Agency's programs, which provide assistance for housing rehabilitation. This AN clarifies the Agency's and the grantee's responsibilities under Subpart J.

***Expiration Date*:** February 28, 2003.

RD AN No. 3,705 (1965-B) (February 8, 2002)
Multi-Family Housing Workout Plan

Summary: This AN identifies the priorities of various workout plan approaches. The intended outcome is to be consistent in the use of workout plans.

***Expiration Date*:** January 31, 2003.

RD AN No. 3,710 (1930-C) (February 12, 2002)
Maintaining Acceptable MFH Project Management with Effective Servicing Actions

***Summary*:** This AN is issued to provide examples of requirements for determining acceptable management and implement streamlined servicing guidelines in individual Multi-Family Housing projects.

***Expiration Date*:** January 31, 2003.

RD AN No. 3,713 (1944-E) (February 21, 2002)
Processing Section 515 New Construction Loan Requests Fiscal Year 2002

***Summary*:** This AN provides guidance on processing section 515 loan requests in accordance with RD Instruction 1944-E and the FY 2002 Notice of Funding Availability (NOFA) that was published in the Federal Register on February 25, 2002.

***Expiration Date*:** September 30, 2002.

RHS Unnumbered Letters

Rural Economic Development Loan and Grant Program Projects Funded for Second Quarter Fiscal Year 2002 (February 26, 2002)

***Summary*:** The Rural Business-Cooperative Service (RBS) has announced loan and grant selections for the second quarter of FY 2002 under the Rural Economic Development Loan and Grant (REDLG) Program.

***Expiration Date*:** September 30, 2002.

Registration Form
$25/UNIT/YEAR RESIDENT PARTICIPATION FUNDING TELECONFERENCE

May 30, 2002

7:00-8:30 PM Eastern • 6:00-7:30 PM Central
5:00-6:30 PM Mountain • 4:00-5:30 PM Pacific

Please return this form by May 1, 2002, if you are requesting a scholarship.
For general registration, this form and a payment must be returned by May 21, 2002

PLEASE PRINT

Name: _____ email _____

Title: _____

Organization: _____

Address: _____

City/State _____ Zip _____

Telephone (_____)_____ Fax (_____)_____

I will be paying by:

❑ **Check**
Please make payable to National Housing Law Project and mail by May 21, 2002 to:
National Housing Law Project, Attention: Amy I. Siemens
614 Grand Avenue, Suite 320, Oakland, CA 94610

❑ **Credit card**
Please fill complete this form and fax to National Housing Law Project at (510) 451-2300
Please charge my credit card in the amount of $_____

❑ Visa ❑ Master Card Card no. _____

Name on credit card: _____ Exp. date _____

Billing address: _____

Signature (required on credit card orders): _____

please complete page 2 on reverse

1. Please indicate how you want to be informed of the call-in number and code: ❑ By e-mail ❑ By mail
   You will receive this information one day prior to the teleconference call.

2. Please estimate the number of public housing residents and the total number of people who will be with you and listening in on the call: Number of public housing residents _____ Total number of people _____

3. Please check one:
   ❑ I am willing to download the materials for the teleconference from NHLP's Web site (no cost): **OR**
   ❑ I would like to have the materials sent to me by e-mail (PDF or WordPerfect 6/7/8/9 format) (no cost) **OR**
   ❑ I would like to have the materials sent to me by ordinary mail ($5/public housing resident, $10/other).

4. **Registration for Public Housing Residents**

Registration	($15.00)	$_____
Materials, if mailed	($ 5.00)	$_____
Audio tape of teleconference	($ 6.00)	$_____
LATE FEE (if paid after May 21, 2002)	($10.00)	$_____
TOTAL		**$**_____

   The call-in number will ***NOT*** be a toll-free number. The call will last 90 minutes. Your phone company will charge you for the cost of the long distance call. If you do not have a reasonable long distance service, you should consider purchasing a phone card with more than 90 minutes, to cover the time of the call plus any service charges. Some of the warehouse clubs have cards which charge as little as 3.5¢ a minute. The scholarship, if awarded, will ***NOT*** cover the cost of the long distance telephone call or for the audio tape of the teleconference. To apply for a scholarship, see Section 6.

5. **Registration for All Other Participants (PHAs, nonprofit organizations and other public and private entities)**

Registration	($25.00)	$_____
Materials, if mailed	($10.00)	$_____
Audio tape of teleconference	($10.00)	$_____
LATE FEE (if paid after May 21, 2002)	($10.00)	$_____
TOTAL		**$**_____

   The call-in number will ***NOT*** be a toll-free number. The call will last 90 minutes.

6. **Scholarship Information for Public Housing Residents Only**
   There is a limited number of scholarships available. Please note that no scholarship is available for the costs of the long distance call or for a copy of the audio tape of the teleconference. You must make arrangements to pay for these.

   I am a public housing resident and have tried to get assistance to pay for the cost of the teleconference. I am applying for a scholarship to cover the cost of the teleconference.

   A. **<u>Please check only one</u>:**
      ❑ I am applying for a scholarship to cover the cost of registration ($15.00)
      ❑ I am applying for a scholarship to cover the cost of mailing the materials ($5.00)
      ❑ I am applying for a scholarship to cover the cost of both registration and mailing of the materials ($20.00)

   B. **<u>Please check *all* that are applicable</u>**:
      ❑ I asked my local resident organization if it could assist with the cost and determined that it could ***not*** assist with the costs.
      Please provide the name of the local resident organization_____
      ❑ I asked my local PHA if it could assist with the cost and determined that it could ***not*** assist with these costs.
      Please provide the name of the PHA _____
      ❑ I am trying to get access to a speaker phone so that other residents may participate in the call.

_____ _____
Signature of public housing resident seeking scholarship Date

Publication Order Form

National Housing Law Project
614 Grand Avenue, Suite 320 • Oakland, California, 94610
(510) 251-9400; fax: (510) 451-2300

	PRICE	QTY.	TOTAL
HUD Housing Programs: Tenants' Rights (2d ed. 1994)	$165.00	_____	$ _____
HUD Housing Programs: Tenants' Rights (1998 Supplement)	$120.00	_____	$ _____
Combined HUD Housing Programs: Tenants' Rights and 1998 Supplement (add $6.00 postage/handling)	$220.00	_____	$ _____
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Combined HUD Housing Programs (2d ed.), 1998 Supplement and RHCDS (FmHA) Housing Programs (add $9.00 postage/handling)	$250.00	_____	$ _____
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All materials are mailed book rate. Allow four weeks for delivery.
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Subtotal: _____ **$** _____

Tax (California residents only): **(Subtotal, excluding Bulletin x 8.25%):** **$** _____

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Organization_____

Address_____

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_____ Zip_____

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