Housing Law Bulletin

Volume 32 • September 2002

Published by the National Housing Law Project

Post-Rucker Eviction Decisions *—see page 201*

Housing Justice Network Conference Registration *—see page 203*

Housing Law Bulletin

Volume 32 • September 2002

Published by the National Housing Law Project
614 Grand Avenue, Suite 320, Oakland CA 94610
Telephone (510) 251-9400 • Fax (510) 451-2300
www.nhlp.org • nhlp@nhlp.org

Table of Contents

Page

One-Strike Evictions: Post-*Rucker* Decisions 201
HUD Proposes to Deregulate Small PHAs 206
Chicago Housing Authority's Relocation Counseling Assessment Report 208
The Seniors Housing Commission Reports 211
Midnight Caper Snatches Federal Housing Rehabilitation Funds 213
Tenants File Nationwide Suit to Obtain Enhanced Voucher Payments 214
RHS Prepayment Restriction Threatened in House Legislation 215
California Fair Housing Commission May Award Damages 218
New Jersey Supreme Court Upholds the "Builder's Remedy" and Rules on In Lieu Fees in Three *Mount Laurel* Cases 220
Recent Housing Cases 223
Recent Housing-Related Regulations and Notices .. 225

Announcements

2002 Housing Justice Network Meeting 203
NHLP Web Site: Housing Preservation Information Updated 204
NHLP Job Announcement 217
Publication List/Order Form 229

Cover photo: Lower East Side, New York City public housing.

The *Housing Law Bulletin* is published 10-12 times per year by the National Housing Law Project, a California nonprofit corporation. Opinions expressed in the *Bulletin* are those of the authors and should not be construed as representing the opinions or policy of any funding source.

A one-year subscription to the *Bulletin* is $150.

Inquiries or comments should be directed to Robin Fleckles or Eva Guralnick, Editors, Housing Law Bulletin, at the National Housing Law Project, 614 Grand Avenue, Suite 320, Oakland, CA 94610, Tel: (510) 251-9400 or via e-mail to nhlp@nhlp.org

One-Strike Evictions: Post-Rucker Decisions

Since *HUD v. Rucker*[1] was decided early this spring, public housing tenants and their advocates have lamented the idea that tenants of public housing could be evicted for the criminal activity of others, whether the tenants themselves were involved in or knew of the activity. Newspaper coverage across the country has been virtually unanimous in its condemnation of the decision,[2] and some members of Congress acted quickly to attempt to moot the decision through legislation. Even HUD Secretary Mel Martinez and Assistant Secretary Michael Liu issued letters to public housing authorities instructing them to use their discretion judiciously in light of the decision.[3] In short, fair-minded people with knowledge of the complications of maintaining adequate housing for the poor feared that good tenants, innocent of any wrong-doing, would become the victims of the one-strike policy and lose their public housing with virtually no defense available in a court of law. And, of course, this is essentially what the decision means.[4] The practical applications of *Rucker*, however, are still just beginning to be established. In addition to the flurry of activity alluded to above, a number of courts have addressed one-strike evictions since the *Rucker* decision came down.[5] The results, while

[1] ___U.S. ___, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002).

[2] *See, e.g.*, Evelyn Nieves, *Drug Ruling Worries Some in Public Housing*, N.Y. Times, March 28, 2002; Mary Mitchell, *Poor Pay Heavy Price for Justices' Idealism*, Chicago Sun-Times, March 28, 2002; *Our Opinions: Supreme Court: Public Housing Evictions Trample on Rights of Poor*, The Atlanta Journal Constitution, April 1, 2002, Editorial, at A9; *Drug Law Ruling: Justices Wrongly Choose Eviction Over Innocence*, Detroit Free Press, April 4, 2002, Editorial, at 8A; *Sins of the Few*, The Blade (Toledo, OH), March 31, 2002, Pages of Opinion, at B4, all on file at the National Housing Law Project (NHLP). *But see*, Greg Jonsson, *Area Public Housing Officials Laud Court's Ruling*, St. Louis Post-Dispatch, March 26, 2002, on file at NHLP.

[3] *See* letter from Secretary Mel Martinez to Public Housing Directors, April 16, 2002, available online at www.nhlp.org/html/new/index.htm; letter from Assistant Secretary Michael Liu to Public Housing Directors, June 6, 2002, available online at www.nhlp.org/html/new/index.htm or *See also* Letter from Carole W. Wilson, HUD Associate General Counsel for Litigation to Charles J. Macellaro, Attorney, Re: PHA Evictions For Criminal Activity Proscribed by Lease Provision Mandated by Section 6(l)(6) of the U.S. Housing Act (August 15, 2002) (HUD legal opinion issued to the PHA for Yonkers, NY regarding *Rucker* and HUD regulations. In the opinion, HUD repeats its position that a PHA is not required to apply or consider the discretionary factors, but is free to do so if it wishes to do so. The opinion cites *Oakwood Plaza Apartments v. Smith*, *infra*, and essentially says the position taken by the court there is NOT HUD's position.) The opinion is also available at www.hud.gov/offices/pih.

[4] For a more thorough discussion of the *Rucker* decision itself, *see U.S. Supreme Court Finds No "Innocent Tenants" in Application of One-Strike Law,* 32 HOUS. L. BULL. 95 (April 2002).

[5] *See Housing Authority of Joliet v. Chapman*, 2002 WL 1033123 (Ill. App. 3 Dist., May 17, 2002) (unpublished opinion); *Oakwood Plaza Apartments v. Smith*, 800 A. 2d 265 (N.J. Super. Ct. App. Div., July 2, 2002); *Newport Housing Authority v. Reynolds*, Case No. ND2002-0290 (R.I. Super. Ct. - Newport) (on file at NHLP); *Maryland Park Apartments v. Robinson*, No. CX-02-4044 (Min., 2nd judicial dist., June 17, 2002); John Stevenson, *Judge Blocks Move to Evict Mother, Kids; Public Housing Trying to Keep Drugs out of Communities*, Durham (NC) Herald-Sun, May 5, 2002 (on file at NHLP).

predictably gloomy in one of the cases, actually show that there is a flicker of hope that some defendants may be able to raise a defense in court that goes beyond simply denying that the alleged criminal activity occurred. This article will discuss some of those post-*Rucker* one-strike cases and their ramifications.

The Cases

Rucker affirms the proposition that public housing authorities, under a statutorily required lease clause,[6] may evict an entire public housing household if any member of that household, or any guest, or any other person under a household member's control, engages in drug-related or certain other criminal activity, regardless of whether other members of the household were involved in or knew of the criminal activity, and regardless of where that activity took place.[7] Thus, the policy could, in theory, be applied to evict a tenant whose guest leaves her apartment and, unbeknownst to her, engages in drug-related criminal activity miles away and days later. The only defense such a tenant would seem to have would be that the criminal activity did not actually take place. Evidence that she had no knowledge of her guest's proclivity towards drugs or that she kicked him out of her unit when she learned of such proclivity, for example, would be irrelevant in an eviction proceeding. Advocates fear that the decision will lead to even more evictions of such "innocent" tenants. And that does seem to be the likely result.

Housing Authority of Joliet v. Chapman

This feared result was obtained in *Housing Authority of Joliet v. Chapman*,[8] an unpublished Illinois opinion and perhaps the least-surprising post-*Rucker* ruling regarding one-strike evictions in public housing. The *Chapman* decision is a straightforward application of the one-strike decision, acknowledging the Supreme Court's upholding of HUD's interpretation of its statutory authority. Ms. Chapman's 19-year-old son, a resident of the unit, was arrested for possession of three bags of marijuana and the Housing Authority of Joliet filed an action to terminate Ms. Chapman's tenancy in public housing.[9] The trial court determined that Ms. Chapman had no knowledge of her son's activities and dismissed the housing authority's complaint. The appellate court read *Rucker* and reversed the trial court decision stating that, "because knowledge of the criminal activity was not a prerequisite to eviction, eviction clearly could occur regardless of [Ms. Chapman's] lack of knowledge." Perhaps the point was brought home most clearly by the brief concurring opinion of Justice McDade, who stated:

> I realize that the United States Supreme Court's unanimous opinion in [*Rucker*] compels the decision which we announce today and with which I reluctantly concur. I write separately to express my dismay with the Supreme Court's interpretation of the legislation at issue. It is impossible for me to reconcile fundamental principles of fairness and due process with a finding that wholly innocent persons can be punished for the criminal activity of others of which they had no knowledge and over which they had no control.[10]

Thus, Ms. Chapman, who was found after a trial to have no knowledge or control over the criminal activities of her adult son, lost her home.

Oakwood Plaza Apartments v. Smith

While the *Chapman* decision is basically what advocates expected after *Rucker*, the case of *Oakwood Plaza Apartments v. Smith*[11] raises the specter of even worse results, while at the same time offering a glimmer of hope. The context of *Oakwood Plaza* was not public housing, but a project-based Section 8 development. The landlord filed an eviction action against a tenant, Andrea Smith, after she was arrested for drug-related criminal activity. Ms. Smith vacated the unit prior to the completion of the eviction action, and Tamara Feaster took legal custody of the tenant's children and moved into the unit with the children. Ms. Feaster intervened in the suit as a real party in interest. The lower court, recognizing a judicially created "innocent lessee exception" in New Jersey law, dismissed the case against Ms. Feaster. The appellate court, however, noted that the decision had been entered prior to the *Rucker* decision. Citing the similarity of provisions in Section 8 law with those in Public Housing regarding eviction for drug-related criminal activity, the court concluded that "because of the virtual identity of language in statutory provisions governing drug-related activity as a basis for eviction in public and Section 8 housing, there is no doubt that the reasoning of *Rucker* is applicable to this Section 8 case."[12]

The court noted that HUD had acknowledged and encouraged housing authorities' discretion to decide when eviction was necessary for criminal activity of tenants, household members, etc., through the letters to the public housing authorities.[13] The court ascertained that "*Rucker* does not mandate eviction; it permits it after suitable weighing of positive and negative factors such as those enumerated in federal regulations and HUD's June 6 letter."[14] Thus, the court concluded that the "federal statutory framework therefore does not permit a Section 8 landlord to act in an arbitrary or capricious fashion."[15] Since there was no administrative procedure available to challenge a Section 8 eviction, the court placed the responsibility of deciding whether the landlord had properly exercised his discretion within the trial court's

---

[6]42 U.S.C. § 1437d(l)(6).

[7]*Rucker*, *supra* note 1.

[8]*Chapman, supra* note 5.

[9]*Id.* at *1.

[10]*Id.* at *2 (McDade, J., dissenting).

[11]*Oakwood Plaza*, *supra* note 5.

[12]*Id.* at 473.

[13]*See supra* note 3.

[14]*Oakwood Plaza*, *supra* note 5 at 474.

[15]*Id.*

2002 Housing Justice Network Meeting Set for December 8-9

Pre-HJN Meeting Housing Training Set for December 7

Make all your reservations now!

The 2002 meeting of the Housing Justice Network (HJN) is scheduled to take place on Sunday and Monday, December 8 and 9, in Arlington, Virginia (Washington, DC area). The HJN meeting will be preceded by a one-day training event, set for Saturday, December 7, on recent developments in federal housing law (Public Housing, Voucher, and the project-based Section 8 programs).

The HJN meeting and the pre-meeting training will be held at the Hilton Hotel, located at 2399 Jefferson Davis Highway, (near the D.C. National Airport), Arlington, VA 22202. Special room rates for the training event and the HJN meeting are $99 for single or double occupancy per night. Room reservations must be made directly with the hotel. To receive the special rates, **RESERVATIONS MUST BE MADE ON OR BEFORE NOVERMBER 6, 2002**. The hotel phone number is (703) 418-6800. **When making reservations, make sure to mention that you are making a reservation for the National Housing Law Project/Housing Justice Network Meeting.**

The purpose of the 2002 HJN meeting is to focus the activities of the various HJN working groups on the recent changes to the federal housing programs, particularly those made to the Public Housing, Certificate and Voucher and Section 8 programs, and to discuss how advocates can continue to represent low-income clients' interests in light of those changes and in light of the November elections, which will precede the meeting by a month.

The HJN meeting is not designed as a training conference. We encourage attendance by housing advocates and clients who are willing to actively participate in HJN's ongoing activities. These include exchanging information on effective representation of low-income tenants and community organizations in addressing local housing problems and pursuing permissible legislative and administrative advocacy at the federal, state and local levels.

NHLP will be offering a separate one-day training event on the federal housing programs immediately preceding the HJN meeting. We expect that the training will facilitate the HJN meeting by providing advocates an opportunity to learn about the program changes in detail prior to the meeting and, as a result, to be better prepared to participate in the HJN discussions.

The HJN meeting registration fee is $325 and includes two lunches, break refreshments and conference materials. For legal service organizations who are paying for clients to come to the meeting a discount of $100 is available for the client's registration.

The one-day training registration fee is $150 for persons who do not attend the HJN meeting. The registration fee includes a lunch and training materials. Persons who attend both the pre-HJN training event and the HJN meeting may register for both events for $425. (For clients whose costs are being paid by a legal services program the combined registration fee is $325.) The registration deadline for the meeting and the training is Wednesday, **November 6**, **2002**. **Registrations received by NHLP after November 6 will be charged a $150 late fee for the meeting and a $50 late fee for the training.** Registration checks should be made payable to the National Housing Law Project and sent to our Oakland office at 614 Grand Avenue, Suite 320, Oakland, CA 94610.

A detailed announcement setting out the meeting, training agendas and registration forms are available from our Web site, www.nhlp.org. If you need additional information, call NHLP at (510) 251-9400, Ext. 111 or e-mail us at **nhlp@nhlp.org.**

jurisdiction. Since the lower court had dismissed the action without regard to whether the landlord considered a number of relevant factors and there was no evidence that the housing authority had considered these factors, the court remanded the case for the trial court to consider, for example, whether Ms. Smith had completely removed herself from the unit, whether she would be incarcerated, and whether she would be permitted to visit her children in the unit.[16]

> *The application of the* Rucker *reasoning to Section 8 tenancies greatly broadens the scope of the ruling and clearly puts even more innocent tenants at risk of eviction.*

Oakwood Plaza is both troubling and encouraging. The application of the *Rucker* reasoning to Section 8 tenancies greatly broadens the scope of the ruling and clearly puts even more innocent tenants at risk of eviction. But the language that essentially reinstates the court's role in deciding the fairness of the eviction could significantly expand the options for tenant attorneys faced with one-strike evictions. As the court noted, there is no administrative procedure for challenging Section 8 evictions. Public housing one-strike evictions also bypass the administrative hearing, bringing the case directly to the landlord/tenant court. If other courts follow the New Jersey court's interpretation of *Rucker*, a one-strike trial becomes much more than merely deciding whether the criminal activity took place. Advocates can argue that the housing authority has not properly exercised its discretion because it did not consider all the factors in the case. At the very least, an advocate could argue that the housing authority has acted arbitrarily and capriciously. While this argument may not result in many innocent tenants being able to retain their units, it at least opens a crack for a judge to consider the entire picture.[17]

Durham Housing Authority v. Kersey

In North Carolina, a trial judge found another way to inject some fairness into a one-strike eviction case. In *Durham Housing Authority v. Kersey*, the judge used a stricter definition of "guest" than the housing authority attempted to apply, and refused to evict a public housing tenant. Ms. Kersey braided people's hair to earn extra money. Late one night an unidentified man, whom Ms. Kersey did not know, knocked on her door and asked to have his hair braided. Ms. Kersey declined because it was too late in the evening, asking him to return at some other time. After leaving the unit, the man became involved in a drug transaction with an undercover police officer. Due to this incident, the housing authority proceeded with an eviction action against Ms. Kersey. A magistrate held in favor of the tenant, holding that the man was not a guest. On appeal to the District Court, Judge Marcia Morey also ruled that the man wanting the braids was not a guest or visitor of Ms. Kersey, nor was he under Ms. Kersey's control. "There was nothing to link this unknown man to this apartment," the judge concluded.[18] Thus, the housing authority could not evict Ms. Kersey for the man's criminal actions. In making the ruling, the judge also questioned where the disabled Kersey and her three children would go.

[16] *Id.* at 475-6.

[17] Note that HUD has issued a legal opinion essentially stating that the court's opinion in this case is not HUD's position. *See* note 3 *supra*.

[18] *See* Stevenson, *supra* note 5.

NHLP Web Site: Housing Preservation Information Updated

The "Housing Preservation" page of the NHLP Web site is being updated regularly. Documents are being added to the "Cases" section as they become available. This includes demand letters, complaints, motions for temporary restraining orders and preliminary injunctions, briefs in support of dispositive motions, discovery materials, and court orders.

The housing preservation page contains an outline of topics of interest to advocates working on the loss of HUD multifamily housing. It includes (1) Prepayments of HUD-subsidized mortgages, (2) Opt-Outs - Owner Nonrenewal of Expiring Project-Based Section 8 Contracts, (3) Enhanced Vouchers and (4) State and Local Initiatives. The outline for each of these areas includes a description of the issue and then links to relevant statutes, regulations, HUD handbooks and other administrative materials, other relevant Web sites, cases and *Housing Law Bulletin* articles. These outlines, which are routinely updated and expanded, are structured as a reference for advocates working on preservation issues, with direct links to source materials, often in original format using Adobe Acrobat PDF files.

The preservation section of the Web site also contains "A Guide to Challenging Conversions of Federally Assisted Housing in California." It discusses many issues that are equally applicable to other states and localities.

So visit the preservation page of the National Housing Law Project's website at **www.nhlp.org/html/pres/index.htm**.

The case illustrates yet another area where there may be some play in defending a one-strike eviction case. Since there is no statutory or regulatory definition of "guest" in applying 42 U.S.C. § 1437d(l)(6), attorneys and judges who believe that they should have some role in deciding whether an innocent tenant is evicted for the actions of others can define the word in a way that brings more fairness to the proceedings. This has the potential to eliminate the extreme examples of tenants being evicted for the actions of pizza delivery men or solicitors. It does not, however, eliminate the possibility of tenants being evicted for the unknown actions of their household members.

> *The limited number of post-*Rucker *decisions have shown a mix ranging from rote application of the ruling to creative ways to bring more justice to the proceedings, whether through a stringent definition of the word "guest" or by applying unpreempted state law.*

Additional Recent Cases

Also encouraging are a pair of recent rulings by trial level judges holding that federal law on one-strike eviction does not preempt state protections. In late August, a Rhode Island superior court judge granted a defendant tenant's motion to dismiss an eviction action filed against her because of her boyfriend's drug-related activity.[19] The tenant was not arrested, nor was she home when her boyfriend sold marijuana from her apartment while babysitting for her. The housing authority acknowledged that the tenant was not home and did not know or condone the criminal activity. Nonetheless it attempted to evict her, alleging that she was in violation of a Rhode Island statute that provides, "tenant shall refrain from using any part of the premises for the manufacture, sale or delivery of a controlled substance or from possessing on the premises with the intent to manufacture, sell or deliver" such a substance.[20]

In dismissing the case against the tenant, the judge concluded that the above-cited statute addresses only drug-related activity of the "tenant," rather than that of third parties. The judge specifically acknowledged that federal law would permit eviction of the tenant merely because she allowed her boyfriend into her unit, but ruled that Rhode Island law requires that the tenant do more in order to be subject to eviction. The court specifically held that *Rucker* and 42 U.S.C. § 1437d(l)(6) did not preempt state law.[21]

Similarly, a Ramsey County, Minnesota judge held, in a subsidized project-based context, that a tenant could not be evicted for the actions of her boyfriend, who entered her unit and overdosed on a controlled substance.[22] Finding that the tenant did not know or have reason to know of the drug-related criminal activity and that federal laws did not preempt state law, the judge did not permit eviction of the tenant. Instead, he concluded that a Minnesota statute[23] requiring knowledge or reason to know on the part of the tenant held sway. Both of these cases illustrate the importance and viability of arguing that state law governs the actual eviction proceedings and the significance of working within the state legislature to establish better laws to protect innocent tenants.

Conclusion

To date, the legislative efforts to undo some of the damage of *Rucker* and 42 U.S.C. § 1437d(l)(6) have failed. While an amendment to H.R. 3995, Marge Roukema's (R-NJ) omnibus housing bill that was recently passed by the House Finance Committee, would protect victims of domestic violence in one-strike eviction scenarios,[24] an amendment that would generally protect innocent tenants is not likely to be offered due to a perceived lack of support in Congress. Perhaps if the composition of Congress changes over the next few months, and if a well-organized campaign is mounted, opponents to the one-strike policy as currently interpreted can effect some change in the law. Until that time, however, the fate of many public housing and Section 8 tenants is largely in the hands of the public housing authorities and, unfortunately to a lesser extent, the courts. The limited number of post-*Rucker* decisions have shown a mix ranging from rote application of the ruling to creative ways to bring more justice to the proceedings, whether through a stringent definition of the word "guest" or by applying unpreempted state law.

Secretary Martinez stated in his letter that the one-strike law "should be applied responsibly"[25] and that "applying it rigidly could generate more harm than good."[26] Housing advocates should remind housing authorities and the courts of the Secretary's instructions when suggesting methods for avoiding the harsh injustice that strict application of the doctrine can cause. ■

[19]*See Newport Housing Authority v. Reynolds, supra* note 5.

[20]RIGL § 34-18-24(9).

[21]*See Newport Housing Authority v. Reynolds, supra* note 5.

[22]Maryland Park Apartments v. Robinson, *supra* note 5.

[23]Minn. Stat. 504B.171.

[24]For a detailed discussion of H.R. 3995 and the domestic violence amendment, *see State Courts Revisit Public Housing Trespass Policies*, 32 HOUS. L. BULL. 169 (August 2002).

[25]Martinez letter, *supra* note 3.

[26]*Id.*

HUD Proposes to Deregulate Small PHAs

HUD recently published proposed regulations whose primary objectives are to streamline the annual plan requirements for small Public Housing Authorities (PHAs) and to deregulate small PHAs under the Public Housing Assessment System (PHAS) and Section 8 Management Assessment Program (SEMAP).[1] In addition, the regulations propose to streamline HUD's review of all PHA annual plans (*i.e.*, both large and small PHAs and PHAs that operate a Section 8 voucher program only). The Housing Justice Network (HJN) and the National Housing Law Project (NHLP) have submitted comments to the proposed regulations jointly.[2] The Center on Budget Policies and Priorities (CBPP) submitted separate comments.[3]

Shortened Comment Period

Unfortunately, HUD allowed for only a 30-day comment period on the proposed regulations. The reason provided for deviating from its standard 60-day comment period was that it wanted a final rule before the beginning of Fiscal Year (FY) 2003. HUD also justified the shortened period based on the fact that the proposed rule was a deregulation effort. Neither reason is compelling.

First, the PHA plan process is an ongoing process. PHAs have fiscal years that begin on January 1, April 1, July 1 or October 1. HUD guidance provides that the PHA planning process ought to begin approximately eight months prior to the beginning of a PHA's fiscal year. As a consequence, some PHAs are in the midst of the annual planning process at all times. Moreover, the FY 2003 reference is at best ambiguous. To what date does it refer—October 1, the beginning of the federal government's fiscal year, January 1 or some other date on which a PHA's fiscal year begins? To have meaning for PHAs with a fiscal year that begins on October 1, 2002, the regulation should have been adopted as a final rule by mid-April 2002, the time at which such PHAs should have made a draft plan available to their Resident Advisory Boards (RAB). At the very minimum, the regulation should have been final by mid-May 2002, which is when PHAs with an October 1 fiscal year starting date should have notified the public of the PHA Plan process required public hearing and made available for public review their proposed PHA plan.[4] If the regulations are made effective by October 1, 2002, the first PHAs that will be able to take advantage of them will be those PHAs whose fiscal year begins on April 1, 2003. Those PHAs draft plans should be available for review by their RABs by mid-October 2002. In short, the beginning of the federal fiscal year has no unique significance in the PHA planning process and is not a justifiable reason to expedite the comment period.

The second reason is equally unjustified. Deregulation does not automatically mean that the review and comment process will be less complex or require less time and analysis. HUD ought to return to a policy of allowing sufficient time for meaningful comment and input.

Definition of a Small PHA

The major purpose of the proposed regulation is to deregulate small PHAs. Ironically, the term "small PHA" is not adequately defined in the proposed regulations. To qualify for the PHA streamlined annual plan process, the proposed rule defined a small PHA to be one with less than 250 public housing units. For the frequency of SEMAP review, the proposed rule defined a small PHA as one that expends less than $300,000 in federal awards per year or a PHA with less than 250 assisted units. To confuse the matter even more, the introductory comments to the proposed rule cite a now-expired HUD Notice which defined a small PHA to be one that operates less than 250 public housing units *and* less than 250 voucher units (*i.e.*, a possible total of up to 500 units).[5]

For the streamlined PHA annual process, comments submitted by HJN, NHLP and CBPP urged HUD to define the term "small" more clearly by explaining the term in relation to PHAs with public housing units, voucher units and combined public housing and voucher units. In addition, they urged HUD to define the term to include fewer rather than more overall units. Both sets of comments noted that legislation pending in the House of Representatives defines "small" as a PHA with a total of 100 or fewer units of public housing and vouchers.[6] In addition, HUD was reminded that the current legislation regarding the PHA plan process authorizes HUD to establish a streamlined PHA plan for three groups of PHAs including PHAs "with less than 250 of public housing units." Based on this language, it was argued that a combination of 250 or fewer units of public housing and vouchers would be the appropriate definition of a small PHA. What is clear is that there is no apparent justification for defining a small PHA as one with up to 500 units, 250 of public housing and 250 of vouchers.[7] PHAs that manage up to 500

[1] 67 Fed. Reg. 53,276 (Aug. 14, 2002) (Deregulation of Small Public Housing Agencies).

[2] Letter from Catherine M. Bishop, NHLP, Susanne M. Browne, LAFLA, and Ilene J. Jacobs, CRLA to HUD Rules Docket Clerk (Sept. 6, 2002).

[3] Letter from Barbara Sard, CBPP, to HUD Rules Docket Clerk (Sept. 13, 2002).

[4] See Public Housing Agency Plan Desk Guide, ¶ 2.5, The PHA Plan Development Process and Timeline.

[5] PIH Notice 2000–43, Sept. 18, 2002.

[6] H.R. 3995, the *Housing Affordability for America Act of 2002*, Section 503 (approved July 2002). Available data states that nearly 40 percent of all PHAs nationwide have 100 or fewer of combined public housing and voucher units.

[7] Available data states that 78 percent of all PHAs nationwide have zero to 500 units of combined public housing and voucher units. In addition, PHAs with a voucher program of zero to 299 units comprise 65 percent of all PHAs with voucher program and PHAs with public housing of zero to 299 units comprise 78.5 percent of all PHAs with public housing units. Thus, HUD's proposed definition of a "small PHA" will include over a majority of all PHAs nationwide.

units of assisted housing are in many cases large entities for their respective jurisdictions and their housing activities represent a substantial percentage of the available housing in the jurisdiction. These PHAs should be required to submit full annual plans.

HUD and PHAs' Civil Rights Obligations

The regulations propose to allow small PHAs that are not troubled to submit a streamlined annual plan. Advocates urged HUD to further condition the submission of streamlined plans on a PHA also meeting the threshold civil rights requirements that are the minimum requirements for application for additional funding. If the proposed regulations were changed to reflect this amendment, it would mean that a small PHA would not be eligible for a streamlined annual plan if the PHA has been (1) charged with a violation of the *Fair Housing Act* by the Secretary of HUD; (2) is a defendant in a *Fair Housing Act* lawsuit filed by the Department of Justice; or (3) has received a letter of noncompliance findings under Title VI of the *Civil Rights Act*, section 504 of the *Rehabilitation Act*, or section 109 of the *Housing and Community Development Act*.

The regulations propose to allow small PHAs that are not troubled to submit a streamlined annual plan. Advocates urged HUD to further condition the submission of streamlined plans on a PHA also meeting the threshold civil rights requirements.

Under the proposed streamlined annual PHA plan process, each small PHA is required to submit once every five years statements on housing needs, of the PHA's deconcentration and admissions procedures, of financial resources, of rent policies, of capital improvements needed, of any demolition or disposition, and of the homeownership programs administered by the PHA. In addition, each would be required to submit the civil rights certification. For the intervening four fiscal years, the proposed rule requires that the PHA submit only the statement of capital improvement needs, the civil rights certification and assurances regarding resident participation. Advocates urged HUD to improve the regulation by requiring the PHA's executive directors to sign the civil rights certification under penalty of perjury. Such a certification is not dissimilar to what is now required with respect to the financial statements of CEOs for large publically traded corporations. Moreover, advocates urged that the regulations be amended to require that PHAs report on some basic civil rights issues regarding site-based waiting lists and residency preferences. These are two policies that a PHA has the discretion to adopt and that HUD recognizes as having civil rights implications.[8] The purpose of the reporting would be two-fold. For the PHAs, it would focus attention on their obligation to affirmatively further fair housing and on the steps that should be taken to evaluate the fair housing implications of the policies including the review and collection of relevant data. For HUD, the information would provide a basis to evaluate the PHAs' civil rights certifications.

Promoting Resident Participation and Board Approval

The proposed regulations state that a PHA must provide assurances to HUD that its RAB was consulted, that changes were approved by the PHA's Board, and that revised policies are available for review. HJN and NHLP urged HUD to revise the proposed rule to incorporate the current PHA plan procedures, which explicitly require that all relevant documents be available to residents and that the public (including residents) is provided the opportunity to participate in the PHA plan process. Advocates urged that any assurance or certification of compliance with this section should be made by a PHA executive director or his or her designee under penalty of perjury.

HUD Review of Annual Plans

The proposed regulations limit HUD's review of the PHA plan to the statement of deconcentration and admissions policies, the statement of capital improvement needs, the statement of demolition and disposition, the civil rights certification and any other element of the PHA's annual plan that is challenged. This reduced review tracks the minimum requirements of the statute.[9] The requirement that HUD review any elements of a PHA plan that are challenged could be used by advocates to ensure that the challenges that they raise are thoroughly reviewed and addressed. The streamlined submissions by small PHAs and the reduced review obligations should give HUD staff time to fully review and address challenges.

Exemption of Certain Non-Audit PHAs from SEMAP Assessment

CBPP objected to the proposal to amend existing regulations to exempt from any SEMAP performance assessment those PHAs that expend less than $300,000 annually in federal awards.[10] HUD justified its proposal with self-serving

[8] 24 C.F.R. § 903.7(b)(2) (site based waiting lists) and 960.206(b)(iii) (residency preference) (2002).

[9] 42 U.S.C.A. § 1437c–1(i)(2) (West Supp. 2002).

[10] OMB recently proposed to increase the threshold of federal expenditures for audit requirements under the *Single Audit Act* from $300,000 to $500,000. (See 67 Fed. Reg. 52,545, Aug. 12, 2002). If the HUD proposal to exclude non-audit PHAs is linked to the *Single Audit Act Amendments of 1996*, 31 U.S.C. 7502(a)(3), the current proposal would, if the OMB proposal is finalized, exclude even more PHAs from SEMAP.

circular arguments.[11] CBPP speculated that HUD's real reason for the change may be to paint an artificially rosy picture of agency performance in the voucher program administration (and, impliedly, of HUD's oversight). In HUD's first Report to Congress on the implementation of SEMAP, which was submitted in April of 2002 and was based on a review of SEMAP scores for about three-quarters of the PHAs, HUD reported that 38 percent of the 237 PHAs initially reported as "troubled" under SEMAP are the non-audit agencies that would be exempted under the proposed rule.

The comments propose that in lieu of removing non-audit PHAs from any HUD review, one of two alternatives could be pursued. The first would permit non-audit PHAs to self-certify that they have complied with those elements of SEMAP for which outside review is currently required and for which non-audit PHAs are currently exempt.[12] Alternatively, HUD could alter the threshold for the "troubled" designation for non-audit PHAs to allow such PHAs more room for error.

HJN, NHLP and CBPP all urged HUD to make available SEMAP scores for each PHA. The release of this information will allow for some local monitoring of local performance.

Conclusion

The shortened comment period could be cynically viewed as a bold acknowledgment that HUD intended to dispense with comments altogether and will adopt the regulations as proposed. Hopefully this cynicism will be proven wrong and HUD will address many if not all of the issues raised by the comments submitted by advocates and analysts. ■

[11] 67 Fed. Reg. 53,277 (Aug. 14, 2002).

[12] The fact that the non-audit PHAs are not evaluated currently on more than half of all the SEMAP indicators may be the reason that so many have failed SEMAP. These PHAs have fewer elements for which they may gain positive points, thus increasing the impact of a failure on one of the six remaining elements.

Chicago Housing Authority's Relocation Counseling Assessment Report

Chicago's Transformation Plan

In 1998, nearly 19,000 of the Chicago Housing Authority's (CHA) public housing units failed viability inspection, resulting in CHA's obligation to demolish the units within five years.[1] In response, the city made plans to "'transform' CHA's enormous high-rise developments into smaller mixed-income communities of town homes and low-rise buildings."[2] Fifty-one high-rises and several thousand mid- and low-rise units are to be demolished. In their place, 25,000 units of public housing will be constructed or rehabilitated, resulting in a net loss of 14,000 family public housing units. CHA has faced the task of relocating what was originally estimated to be 6,000 families with Housing Choice Vouchers.[3] The total cost of relocation and "revitalization" is $1.5 billion over 10 years.

CHA began relocation efforts in 1999. Since that time, its methods and approach to relocation of residents have shifted and continue to evolve. CHA's goal was to offer services that would strengthen participants' ability to make good housing choices and transition into the private market successfully without becoming clustered in high-poverty neighborhoods.[4] Counseling services in the first year targeted residents in buildings that were to be demolished who had indicated that they preferred vouchers. CHA has since expanded its offering of services and its audience to include all residents.

In an effort to rapidly assess its relocation program, CHA commissioned this Relocation Counseling Assessment. However, as CHA's programs evolved, the focus of the study shifted to describing the experiences of residents as they went through the relocation process. The results of the study are summarized in this article.[5] The study focuses on a sample of 190 residents who were tracked from 1999 to 2001. The study includes a discussion of what has happened to residents since they moved, as well as residents who have not moved but are slotted to relocate. The study is noteworthy for two reasons. First, it is an assessment of a massive public housing relocation effort that is simply unparalleled in any other locality. Second, much of the relocation is being carried out under the HOPE VI program,[6] which has been criticized for its failure to help families

[1] Section 202 of the *Omnibus Consolidated Reconciliation Act* (OCRA) 1996.

[2] Susan J. Popkin, Mary K. Cunningham, *CHA Relocation Counseling Assessment*, Urban Institute, p.1 (2002) (hereinafter "CHA Assessment").

[3] *Id.* at pp.1 and 5.

[4] *Id.* at 1.

[5] *Id.*

[6] The HOPE VI program was created by Congress in 1992 to respond to the results of the National Commission on Severely Distressed Public Housing report.

relocate from public housing that is slated for demolition.[7] CHA has been the largest recipient of HOPE VI funds to date.[8] Thus, this study provides insight into relocation issues that may be applicable to relocation efforts under other HOPE VI grants as well other public housing demolitions.

CHA's Relocation Efforts

Of the estimated 6,000 families who were to relocate, 1,200 have in fact done so, most in Fiscal Year (FY) 2001.[9] However, of those 1,200, only 490 or so have received vouchers. The rest have moved to other public housing.[10]

Relocation Rights Contract

A significant and new feature of CHA's relocation process since it began in 1999 is a relocation rights contract, created in response to tenant advocates' concerns. Signed in November 2000 by the official residents' council, the contract guarantees a right of return to public housing by all "lease-compliant" tenants living in CHA's public housing as of October 1999.[11] Since the signing of the contract, CHA has created a relocation department, developed relocation planning meetings, and created clinics to improve residents' ability to make informed choices about replacement housing. CHA staff has said that they held 490 such clinics in FY 2001 and collected surveys from 92 percent of residents in buildings that are to be closed in FY 2002.[12]

Programs for Residents

In 1999, CHA contracted with three agencies to provide relocation counseling.[13] CHA modified its program in 2001, contracting with two new agencies to provide services that would specifically prepare residents for the private market, provide housing search assistance and mobility counseling.[14] In addition to providing information on neighborhoods, escorting residents to units, identifying units and assisting with voucher paperwork, counselors provide credit counseling and connections to other service programs.[15]

Two more programs were offered to all residents. The first was a one-day, "Good Neighbor" training session, covering housekeeping and household management, utilities, budgeting, lease compliance, and finding and linking to services in a new community.[16] The second was a Gautreaux[17] -type program that focused on encouraging residents to move to areas with lower poverty rates and a lower number of African-American residents.[18]

CHA offered yet another service called the Service Connector program. Administered by the Chicago Department of Human Services, it consists of case managers, assigned to development clusters, who help residents access public services. Criticism of the program includes the fact that case managers were poorly trained or not trained at all.[19] In 2002, CHA selected four new service providers to provide "transitional counseling." In addition, CHA modified existing relocation counseling offered to all residents regarding accessing lower poverty areas and mandated lower caseloads for counselors assisting residents who requested mobility counseling.[20]

Challenges

The authors of the study cite the following concerns as a result of the three years' worth of data that they have gathered concerning the relocation portion of the transformation process.

Pace of Dislocation

The pace of demolition is outstripping that of new construction and outstripping the development of supportive services for families about to be displaced. Some have also claimed that an unknown number of families left before signing the Relocation Rights Contract and have not received any of the services to which they are entitled.[21]

Insufficient Accessible Affordable Housing

Though it appears that affordable housing in Chicago's metropolitan area exists in sufficient numbers to account for the influx of new voucher-holders (1,200 in FY 2001), it is not clear whether landlords will rent to them or whether residents will have information about how to access the housing in unfamiliar neighborhoods. As a result, CHA residents may cluster in low-income neighborhoods or neighborhoods bordering public housing that may not be able to easily absorb them.[22]

In addition, many residents forced to move are not lease-compliant (per the terms of the relocation rights contract) and will not be allowed to return to CHA's public housing. Once relocated, they will remain in the private market with a voucher. Compared with mainstream Section 8 voucher recipients, this block of participants may have more issues (substance abuse, depression, domestic violence, lack of private market experience, gang affiliation) that will make keeping or accessing housing in the private market difficult.[23]

---

[7]*False HOPE, A Critical Assessment of the HOPE VI Public Housing Redevelopment Program*, 32 HOUS. L. BULL. 119 (May/June 2002).

[8]CHA Assessment, p. 5 (2002).

[9]*Id*. at 6.

[10]*Id*.

[11]*Id*. at 6.

[12]*Id*. at 6-7.

[13]*Id*. at 10.

[14]*Id*.

[15]*Id*. at 10-11.

[16]*Id*. at 12.

[17]*Gautreaux v. Chicago Housing Authority*, 304 F. Supp. 736 (N.D., Ill, 1969) and its brethren are landmark desegregation cases.

[18]CHA Assessment at 11-12.

[19]*Id*. at 12-13.

[20]*Id*. at 11-12.

[21]*Id*. at 7, citing to a Metropolitan Planning Council report (Snyderman and Dailey 2002).

[22]*Id*. at 8.

[23]*Id*. at 9.

Residents Not on Lease

It is estimated that thousands of unknown people live illegally at CHA developments. The study hypothesizes without further explanation that this group of residents will be particularly vulnerable to becoming homeless as a result of transformation.[24] In all likelihood, this is due to the fact that they will not be eligible for either relocation benefits or vouchers. Since these residents are likely to be in the same, or worse, economic position than lawful tenants, the consequences of unassisted relocation are likely to be extremely severe.

Inaccurate Information Regarding Resident Status

Before CHA implemented a comprehensive tracking system, many residents eligible for relocation either relocated or simply left their housing.[25]

Resident Confusion

CHA used local cable and other audiovisual mechanisms in addition to the written word and trainings to inform residents about relocation, but many still are alienated from the "transformation" process and are confused by whatever information they have heard.[26] Lack of resident participation in the transformation process has been criticized and may have contributed to the confusion. Key actors have raised concerns over whether the official residents' council actually represents resident interests. Some have also questioned whether attorneys who were officially negotiating with CHA on behalf of public housing residents accurately reflected most residents' concerns.[27]

Coordinating Multiple Agencies

Residents are in danger of not getting services due them because of participating agencies' lack of coordination and/or inconsistent information. Seventeen agencies are now involved in providing four types of counseling services to CHA tenants in connection with relocation. Coordination meetings have alleviated the problem only somewhat.[28]

Resident Outcomes

The current study is a follow-up to one done by the authors on residents who experienced the first phase of relocation counseling in 1999. Approximately 73 percent (139 households) of those who participated in the original sample took part in this study.[29]

Though there were few differences between residents who moved versus those who did not, those who moved generally had fewer children and were employed. Non-movers manifested a severe lack of financial resources in that they were more likely to have paid rent late in the last six months, could not afford a phone and have had to cut meals because of a lack of money.[30]

Most of those surveyed who moved are now in neighborhoods with far lower poverty rates. However, 55 percent live in communities with 40 percent poverty rates or higher; 18 percent lives in communities with 30-40 percent poverty rates. Another 16 percent live in areas with 20 to 30 percent poverty rates.[31]

Meanwhile, racial segregation is extreme. Most movers live in neighborhoods that are more than 90 percent African-American.[32]

The lack of supportive services and worries over not being able to afford utilities plague some participants. Overall, most participants reported that housing conditions are significantly better, including fewer problems with trash and graffiti.[33] Movers were half as likely to report major drug or gang-related problems in their neighborhoods. With regard to violent crimes, 41 percent of movers reported big problems versus 90 percent of non-movers.[34] A related fact is that movers reported that their communities evinced greater social cohesion and trust, *e.g.*, a greater willingness to help a neighbor or take action if they saw someone causing problems. Many of the participants felt that they and their children are safer.[35]

Finally, there is some indication of improved outlook on life for movers versus non-movers. Half of movers shared the perception that there were always impediments holding them back versus two-thirds of non-movers who shared that sense.[36]

Approximately 40 percent of survey participants were able to move successfully from public housing during the 12 months when the authors tracked them. The rest continue to live in CHA consolidation buildings.[37] The majority reported at least one major problem with the condition of their housing—spanning the range from broken plumbing to rats and raw sewage.[38]

Non-movers' sense of problems with the condition of the property and major crime remained constant. Several reported that the incidence of gang members living in their building made it unsafe for their sons to visit them.[39]

Reasons for Not Moving

At the 12-month follow-up, no single reason for CHA residents' not moving predominated. About 25 percent said they

[24]*Id*.

[25]*Id*.

[26]*Id*. at 8.

[27]*Id*. at 9. Given the expense of the overall transformation plan, it is not clear whether CHA has sufficient funds to fully carry out transformation and provide services to affected residents, much less to effectively serve residents still living in public housing.

[28]*Id*. at 9-10.

[29]*Id*. at 13-14.

[30]*Id*. at 15-16.

[31]*Id*. at 16.

[32]*Id*.

[33]*Id*. at 19-20.

[34]*Id*. at 20.

[35]*Id*.

[36]*Id*. at 21-22.

[37] "Consolidation building" is not defined in the study but probably refers to temporary units in CHA developments to which residents were moved when CHA closed other public housing buildings. *See Id.* at 10.

[38]*Id*. at 22.

[39]*Id*. at 23.

could not find a new apartment. Another 25 percent said they had Section 8 problems, while 13 percent said financial reasons had stopped them from moving. Most (75 percent) reported that they intend to move with a voucher in the next six months.[40] Many participants reported not having received relocation counseling during phase one. At the 12-month mark, almost half said that they had still not been assigned to a counseling agency.[41]

Of those who did receive counseling, some felt the service was inadequate. Several reported having been referred to neighborhoods just as dangerous as the public housing neighborhoods. In scouring the private market for housing, many participants reported experiencing discrimination against them as voucher-holders, and/or as families with children.[42]

Most residents in the sample, movers and non-movers, had lived in public housing for more than a decade. Moving meant leaving behind the familiarity and support of friends and relatives, which is very frightening for many.[43] Rumors about the voucher program have also caused concern.

Participants' physical health problems and hopelessness figure into the equation as well. Approximately 40 percent of participants are depressed (using a rating system developed by the authors of the study), while 10 percent scored as moderately or very depressed.

Lessons Learned Regarding Relocation

The authors of the study recommend on-going, intensive support to help residents who have already relocated remain in their housing.[44] For those who remain in public housing, the problems discussed above (lease-compliance and physical and mental conditions) create additional challenges that CHA should address with intensive, regular follow-up to trainings already done. Without this support, many will have difficulty accessing housing in the private market. Monitoring and coordination of contractors providing these services should improve their quality and, thus, residents' success. Evaluation of those services, including gathering information from residents accessing those services, should also lead to their improved efficacy. Last but not least, CHA needs to do more to track residents who are entitled to return.

In this study, and in the authors' recommendations, lies information valuable to any housing authority or advocate wishing to address challenges and problems associated with resident displacement in the HOPE VI or other demolition and revitalization process. ■

[40]*Id*. at 23-24.

[41]*Id*. at 24.

[42]*Id*. at 25.

[43]*Id*. at 26.

[44]The authors cite to L.A.'s Moving to Opportunity Program, which offered participants a year of services, such as job development and intensive counseling.

The Seniors Housing Commission Reports

As authorized near the end of 1999, Congress appointed the bi-partisan Commission on Affordable Housing and Health Facility Needs for Seniors in the 21st Century to study the nation's senior housing and health facility needs.[1] The Commission was also directed to recommend policy changes to Congress for increasing and improving the affordable housing, health facility and supportive services available to seniors, not just now but into future years, when the senior population will most certainly explode. On June 28, 2002, the Commission submitted its report to Congress, with findings and recommendations broken into separate majority and minority reports.[2]

Each of the two reports, both called "A Quiet Crisis in America," recognizes large areas of agreement, especially concerning the needs and the general level of the recommendations. Yet members of each group clearly differed on their approach, with the minority seeking more immediate action through specific recommendations for which programs should receive increased funding now. The minority report also recommends prioritizing the needs of the lowest-income seniors with the greatest needs, and consequently emphasizes rental housing and housing assistance.

The "quiet crisis" stems from the dramatic swelling of the country's elderly population by the year 2030, when it will almost double its current level to reach 70 million persons, 20 percent of the total U.S. population. Already, unmet housing needs abound—only one eligible senior out of six receives housing assistance. Unaddressed, that figure could become one in 12 by 2030. As is currently true, many seniors will also have needs for long-term care or will require assistance with everyday activities, and the need for home and community-based services will have increased dramatically to keep up with the senior population growth and shifting preferences.

Majority Report

The majority's recommendations are guided by five principles:

Preserve the existing housing stock, both rental and homeownership units
Specific preservation recommendations include:

- passing federal legislation to support preservation and renovation of existing senior developments under various Department of Housing and Urban Development (HUD) multifamily programs such as Section 202, public housing, Section 236 or Section 8 through additional resources or refinancing;
- improving HUD data on properties at risk of conversion or loss through deterioration;

[1]Pub. L. No. 06-74, § 525, 113 Stat.1106 (1999).

[2]The reports, including the recommendations of both groups and supporting documents, can be found at www.seniorscommission.gov.

- providing service-enriched housing and the physical space required wherever possible as part of preservation or renovation plans; and

- developing programs to support seniors' ability to stay in units they own, enabling repairs and physical modifications for seniors' needs (faucet and cabinet adaptations, stair lifts or elevators, bathroom access features, ramps and curbless or roll-in showers).

Expand successful housing production, rental assistance and supportive housing programs, as well as home- and community-based services

The majority report estimates that the projected rise in senior population will require approximately 730,000 additional affordable rental units by 2020 to serve seniors with unmet housing needs (*i.e.*, those living in substandard housing or paying more than 30 percent of income for housing), or on average more than 35,000 units annually. In comparison, current annual production under Section 202 is only 5,800 units. Specific recommendations include increasing production under a variety of housing programs serving both low- and middle-income seniors through rental and homeownership, primarily Section 202. The majority believes that the Section 202 and Section 8 voucher programs should be the primary vehicles to address the needs of extremely low-income seniors. Other recommendations include making changes that would facilitate the use of Low-Income Housing Tax Credits with Section 202 financing and more effectively using rural housing programs while increasing the availability of home and community-based services in rural areas. The majority also recommends ensuring that Medicaid reimbursement levels cover an adequate level of care, and that Fannie Mae and Freddie Mac continue to develop flexible products to permit senior homeownership access to home equity while protecting against predatory lending practices.

- *Link shelter and services to promote aging in place.* Specific recommendations here include expanding and funding service coordination in existing federally assisted developments, revising programs promoting conversion of housing units to assisted living, having the General Account Office (GAO) evaluate how HUD and the Department of Health and Human Services (HHS) could more effectively coordinate functions, support transportation programs, and pursue demonstrations for intergenerational living.

- *Reform existing federal financing programs to maximize flexibility and increase production as well as coverage of health and services.* Specific recommendations here include having the Government Sponsored Enterprises, such as Fannie Mae and Freddie Mac, and the Federal Housing Administration provide for greater flexibility, increased housing production, and coverage of health care and services in senior housing, and that the Federal Housing Administration (FHA) in particular take steps to modernize its housing and health facility insurance programs to meet current and anticipated needs for both service-enriched housing and health facilities. Other recommendations include improving reverse mortgage and other home equity loan products, again while protecting seniors from abusive lending practices, and reforming certain Medicaid or Medicare program and funding components.

- *Create and explore new housing and service programs, models and demonstrations.* Specific recommendations here fall into a grab bag including: clearinghouses of state Medicaid programs providing reimbursement for home and community-based services, databases on senior housing, demonstration program, rural programs, even prescription drug benefits, tax credits for caregivers, and tax incentives for purchasers of long-term care insurance.

Minority Report

Overall, the minority report urges Congress to move boldly by providing sufficient funds to deal with the needs identified in the report, using existing programs research and expertise. Without this substantial commitment, other efforts are likely to be ineffective at confronting a problem of the scale projected for 2020. The minority's first recommendation focuses on rapidly increasing housing production and preservation. Because of the existing gap between demand for and supply of affordable units (only one of six eligible being served), the minority recommends a much more aggressive production goal to fill both part of that gap and some of the needs certain to grow. Even assuming that only one-quarter of the "new" seniors with housing problems will want to live in rent-assisted housing, in conjunction with the existing gap, the need will be 2.4 million units by 2020, which translates to 140,000 units per year. Thus, the minority's target is to increase the supply of assisted and supportive housing for seniors by 60,000 units per year.

The minority also recommends a specific federal appropriation of $200 million for expanded efforts to preserve existing federally assisted housing for seniors, as well as a plan to replace every assisted unit lost.

The minority also recommends increased supportive services and appropriate retrofitting in federally subsidized housing, including public housing, through a variety of existing HUD and HHS programs.

Finally, the minority advocates creation of systems to support aging in place, including revising Medicare to cover long-term care and prescription drugs and having HHS establish Medicaid eligibility based on area median income.

Conclusion

As with most such blue-ribbon reports, the Seniors Commission report is useful primarily because it establishes the case for substantial and immediate action on a number of fronts to begin to address an undeniable problem of enormous dimension. Its specific recommendations will prove helpful to any in Congress looking for ideas of what should be done. The hope is that someone on Capitol Hill will one day soon demonstrate the leadership to take those actions. ■

Midnight Caper Snatches Federal Housing Rehabilitation Funds

Just when you think that the federal government's housing commitment cannot sink much lower, somehow it does. This is a small but sad story of recent events that few are likely to have noticed.

Over the eight years of the past four Congresses, federal funds for pressing housing needs have been termed "unavailable" or occasionally taken away and reallocated ("rescinded") due to some more pressing objective. "Balancing the budget" was the perennial cry to give the funds back until the short-lived days of surpluses, which were replaced by tax cuts. Now it's the double-whammy of finding funds for the military and "domestic security," in a time of growing deficits from those same tax cuts in a slowing economy. All this occurs while the political rhetoric of the importance of meeting domestic needs, ending chronic homelessness and preserving existing affordable housing continues unabated.

In this case, what's really unusual is that we are talking about housing money that was in the bag—money *already appropriated* for a particular use, standing unused because of administrative inaction. Big money, some $300 million, with a clear need recently specified by Congress and supported by key housing senators. These funds were rescinded in the name of finding money to pay for anti-terrorism activities, but ultimately raided for budget politics and then essentially thrown away, with the whole exercise serving absolutely no need whatsoever.

Read on for the details.

In the late 1960s and early 1970s Congress appropriated funds for the Section 236 program, which combined 40-year Federal Housing Administration (FHA) mortgage insurance with federally subsidized interest payments to the lender to finance the creation of affordable rental housing. The subsidy, called the "Interest Reduction Payment" (IRP), lowered the effective interest rate paid by the owner from a market rate to 1 percent. Tenants received the benefits of this subsidy by paying HUD-approved budget-based "basic" rents that reflected the lower effective debt service on the property. Regulatory restrictions further required HUD approval of any rent increases, limited to increases in reasonable and documented operating expenses. A significant feature of the Section 236 program was that the *entire stream* of IRP funds required for the full 40-year mortgage term was appropriated at project inception, thereby creating a revenue source available to the project for the full 40 years.

Many Section 236 owners can now prepay their subsidized mortgage, thereby eliminating the affordability restrictions, resulting in the loss of thousands of units every year. Yet these prepayments and other terminations (*e.g.,* foreclosures) also free the previously appropriated IRP funds because they terminate the IRP contracts before their full 40-year terms expire. Thus, they make funds available that can be used to preserve other properties in the stock. In effect, every time a Section 236 mortgage is prepaid or terminated, the budget authority for the remaining IRP stream is made available to HUD. That recaptured IRP forms a "pool" of money, estimated in the spring of 2002 to total at least $300 million.

Almost five years ago, in Section 531 of the *Multifamily Assisted Housing Reform and Affordability Act of 1997* (MAHRAA),[1] Congress directed that these idle funds be used for rehabilitation of certain specified HUD multifamily properties in exchange for continued use restrictions.

Despite its inclusion in the FY '01 and '02 budgets, and growing rehabilitation needs throughout an aging inventory, HUD has still not implemented this rehabilitation grant and loan program. In late 1999, HUD developed a draft Notice to make this IRP Pool fund available, but it was never issued. The current administration has taken no further action to make these funds available to preserve and improve these properties.

Instead, when Congressional appropriators faced an imperative to deliver an anti-terrorism supplemental appropriations bill within a Presidentially dictated ceiling on new spending, they had to scour the budget to identify previously appropriated funds without much of a constituency which they could rescind to offset other new spending. *Voila*! A HUD program sitting unimplemented with a large appropriation. What better target? After all, the logic went, if funds are not being used, then they must not be needed.

In May, the House version of the Supplemental Appropriation had thus proposed to rescind the funds. However, on its turn, through the hard work of housing advocates and senators alike, the Senate rejected the House approach, reiterating that the funds be used for their intended purpose of rehabilitation. But weeks later, out of sight, literally in the middle of the night, in the mid-July Conference Committee negotiations, the Senate gave in to the House and permitted the rescission, in order to give the President an anti-terrorism bill within the spending limit he sought.[2]

About a week after the bill was signed, the White House indicated that it didn't want all the spending that the bill had authorized. The bill had designated $5.1 billion as "contingent emergency spending," to be released to the affected agencies or rejected in its entirety. The President decided to reject those appropriations. Hence, the rescissions that made such non-spending possible were not really needed after all. In Washington there was much ado about nothing. In the communities of America, $300 million that could have preserved and improved approximately 30,000 units of affordable housing went down the tubes. At least the Senate's HUD FY 2003 Appropriations bill (H.R. 5263) again provides for the rehabilitation program another $100 million of these funds, which continue to flow in as IRP contracts are terminated, so there's some hope of redemption. ■

[1]Pub.L. No. 105-65, §531, 111 Stat. 1409 (1997).

[2]Pub. L. No. 107-206, 116 Stat. 820, 892 (Aug. 2, 2002) (was H.R. 4775).

Tenants File Nationwide Suit to Obtain Enhanced Voucher Payments

Tenants have recently filed a nationwide class action lawsuit to recover past rent subsidies allegedly owed them by the U.S. Department of Housing and Urban Development (HUD) under the "enhanced voucher" program, which provides Section 8 assistance to tenants after owners remove their buildings from federal subsidy programs.[1] The suit was filed by tenants in converted properties located in Portland, Oregon, and San Diego, California, on behalf of all tenants nationwide harmed by HUD's failure to authorize public housing authorities to make additional subsidy payments on behalf of the tenants when the owners increase their rent after the initial conversion of the project. It seeks restitution for rent increases paid by tenants under HUD policies which should have instead been covered by additional federal subsidies, as the tenants contend was required by statute.

Over the past five years, more than 150,000 affordable housing units have been lost when owners removed properties from their prior subsidy program and rent restrictions, usually through prepayment of the HUD-subsidized mortgage or "opt-out" from a project-based Section 8 contract. Upon conversion, Congress has authorized HUD to issue "enhanced vouchers" to local PHAs to provide rental assistance for eligible tenants then residing in the property, which enable them to afford the new rent and to remain in their homes.[2] One of the primary benefits of "enhanced vouchers" over the regular Section 8 housing choice voucher is the subsidy level: public housing authorities (PHAs) must make assistance payments to owners at any amount determined reasonable under market rent comparables, without limitation by the PHA's ordinary voucher payment standard.

In 1998, HUD issued a policy notice governing PHAs' administration of enhanced vouchers limiting the enhanced payment standard to the first rent increase by the owner during the first year after prepayment.[3] Under that policy, any other rent increases levied by the owner were the tenants' responsibility: "the family must decide whether to move to a less expensive unit or pay for the increase in rent out of pocket."[4] These tenant payments were in addition to the regular tenant voucher contribution of 30 percent of the tenants' adjusted income.

In their lawsuit, the tenants claim that HUD's policy is contrary to the language of the enhanced voucher statutes (various HUD appropriations laws) in effect from 1997 to 1999. One court has so held, with respect to tenants in one Minnesota development.[5] When HUD refused to correct its policy, Congress in late 1999 enacted a statutory clarification.[6] The legislative history of that statute is very plain. The House Committee on Appropriations included language in its committee report stating that, in enacting the previous enhanced voucher legislation, the Committee intended the language to "cover initial rent increases as well as subsequent rent increases, where the rent is reasonable according to the public housing authority" and went on to specifically contradict HUD's interpretation of the provision.[7]

After Congress enacted the explicit clarifying language, HUD issued another notice to implement it, instructing PHAs to cover future rent increases.[8] However, HUD's notice continued to ignore Congress' express intent by only providing coverage for prospective rent increases and refusing to cover any earlier rent increases improperly charged to tenants during the period between 1997 and at some point in time between November 1999 and late 2000.

The suit seeks restitution for rent increases paid by tenants under HUD policies which should have instead been covered by additional federal subsidies, as the tenants contend was required by statute.

For more than two years, tenants and tenant advocates unsuccessfully sought clarification from HUD to correct this policy. Hence, the class action suit, brought primarily under the federal *Administrative Procedure Act*, was initiated by tenants at Park Genesee Apartments in San Diego and Washington Plaza Apartments in Portland. Tenants at both properties were subject to rent increases of various amounts that were not compensated by adjustments to the enhanced vouchers. In the case of the class representatives, the improper rent increases ranged between $500 and $700 over the affected period. Although discovery has not yet commenced with HUD, plaintiffs' attorneys estimate that 620 properties containing almost 60,000 units are potentially covered by the policy, and some undetermined portion of these

[1] *Taylor v. Martinez*, CV 02-01120-HU (D. Or. filed Aug. 16, 2002).

[2] 42 U.S.C.A. §1437f(t) (West Supp. 2001). Starting in 1996, Congress first provided enhanced vouchers only to cover tenants in HUD-insured properties when the owners prepaid the insured loans. Congress extended eligibility to Section 8 "opt-outs" and other eligibility events when it enacted unified enhanced voucher authority in October of 1999.

[3] HUD Notice PIH 98-19 (Apr. 3, 1998). HUD reiterated this policy in Notice PIH 99-16 (March 12, 1999).

[4] HUD Notice PIH 98-19 (Apr. 3, 1998).

[5] *215 Alliance v. Cuomo*, 61 F.Supp. 2d 879 (D. Minn.1999); *see Minnesota Section 8 Tenants Win Major Preservation Victory,* 29 HOUS. L. BULL. 161 (Sept. 1999).

[6] Pub. L. 106-74, § 538 (Oct. 20, 1999), *codified at* 42 U.S.C. §1437f(t).

[7] H.R. Rep. 106-286, 106th Cong., 1st Sess., at p. 22 (Aug. 3, 1999).

[8] Notice PIH 2000-09 (March 7, 2000).

might have been subject to improper subsidy determinations. The information regarding which specific projects experienced rent increases not covered by the enhanced vouchers is likely to be known only by local PHAs, as HUD's information on the specific subsequent rent levels of converted properties may be incomplete.

The lawsuit has been filed in the United States District Court for the district of Oregon on behalf of all enhanced voucher tenants nationwide who were subject to uncovered rent increases. Specifically, the complaint defines the class as:

> all persons in the United States who received enhanced Section 8 vouchers as a result of a mortgage prepayment or voluntary termination of insurance and whose vouchers have not covered all rent increases as a result of HUD's unlawful policy of applying the enhanced voucher payment standard feature only to the first rent increase following mortgage prepayment or voluntary termination of insurance.

Plaintiffs welcome identification of additional class members.[9] A list of the potentially affected properties is available at the NHLP Web site;[10] however, it is likely not exhaustive due to the limits of data so far made available by HUD.

The complaint also alleges violation of HUD's duty to affirmatively further fair housing in the implementation of its programs by failing to consider the effect of the 1998 notice on minority and disabled tenants.

Successful resolution of the litigation should provide rent reimbursement for tenants subject to the improper rent increases, and help ensure that HUD's administration of the enhanced voucher program is consistent with Congressional intent. ■

[9]Please contact Craig Castellanet at NHLP (CCastellanet@nhlp.org) with information regarding any potentially affected project or individual. Lead counsel is Micky Ryan of the Oregon Law Center in Portland, assisted by the Housing Preservation Project (Minnesota), the private firms of Miller Nash LLP in Portland and Ross, Dixon and Bell in San Diego, and NHLP.

[10]Available at nhlp.org/html/pres/cases.cfm, under the alphabetic listing for *Taylor v. Martinez*.

RHS Prepayment Restriction Threatened in House Legislation

Owners of Rural Housing Service (RHS) rental housing are once again mounting a serious effort to remove the prepayment restrictions that Congress enacted in 1987 on Rural Rental and Farm Labor housing projects financed prior to December 21, 1979, and, in 1992, on projects financed between December 21, 1979 and December 15, 1989. For the second time in three years the owners have secured House support for an amendment that would remove all prepayment restrictions on these projects if appropriations are available to protect residents of these projects through an extension of the Department of Housing and Urban Development's (HUD) Enhanced Voucher program.

Owners of RHS Rural Rental (Section 515)[1] and Farm Labor Housing (Section 514)[2] have been restricted from prepaying their loans since 1987.[3] Under legislation enacted that year, RHS must offer incentives to owners to encourage them to remain in the programs for an additional 20 years whenever they seek to prepay their loans and convert the housing to other uses. If an owner rejects the incentives, the owner may only prepay the loan if the housing is no longer needed or the prepayment does not affect minority housing opportunities and the owner agrees to protect current residents indefinitely by not raising their rent and not evicting them except for good cause. If the prepayment cannot be made within one of these exceptions, the owner must offer the development for sale at fair market value for a period of six months to a nonprofit or public agency that agrees to operate the housing for its intended purposes for the remaining term of the loan. RHS will provide the financing for the purchase or subordinate its existing financing to private third-party financing. In addition, it will continue to make subsidies available to the development to ensure that it will continue to serve low-income residents.

Owners of Section 515 housing have never liked the restrictions or RHS administration of the incentive program and have challenged their continued application both judicially and legislatively.[4] They oppose the restrictions because they prevent them from converting the projects at will and, in the case of a sale, force them to pay capital gains on property that has been fully depreciated and has often substantially increased in value. They dislike the incentives because they also restrict their right to prepay and because RHS has been extremely slow in extending some of the agreed-to incentives, taking as much as five years to fund approved equity loans.

Most recently, Congressman Ney (R-Ohio) carried the owners' effort to nullify the restrictions. He introduced an amendment to HR 3995, the Roukema (R-NJ) *Housing*

[1]42 U.S.C.A. § 1485 (West 1994).

[2]*Id.* § 1484.

[3]*See Id.* § 1472(c).

[4]*See e.g. Kimberly Assoc. v. United States, 261 F.3rd* 864 (9th Cir. 2001).

Affordability for America Act of 2002, which would eliminate all prepayment restrictions 20 years after an owner received the RHS loan or such later time as the owner and RHS agreed to originally.[5] The amendment conditions the lifting of the prepayment restrictions upon the availability of funding for Enhanced Vouchers under Section 8(t) of the *United States Housing Act of 1937*[6] to protect residents of prepaid projects.

Effectively, the Ney amendment would lift all restrictions on pre-1979 developments and eliminate them on all developments financed post-1979 and before December 1989 at the expiration of their 20-year use restrictions, which would occur, at the latest, in 2009. If enacted, it would free over 300,000 units of RHS housing from current prepayment restrictions and effectively eviscerate the Section 515 rental housing stock, which totals nearly 450,000 units.

When first proposed, the amendment was vague on exactly how and when residents in projects whose loans owners sought to prepay would be protected against displacement. It was unclear whether prepayments were subject to the availability of Enhanced Voucher funding and there was no requirement that owners give notice of their intent to prepay. The latest version of the amendment, which was drafted after the House Committee on Financial Services gave formal approval to it, is much clearer on both issues. It makes all prepayments subject to the availability of funding for Enhanced Vouchers for all the low-income residents of a Section 514 or 515 development whose owner is seeking to prepay its loans and requires that such vouchers be made available to the residents upon prepayment. In addition, the amendment requires that prepaying owners give a 150-day notice of their intention to prepay to all residents, RHS, HUD, and the chief executive officer of the appropriate local or state jurisdiction in which the housing is located.

Given its intent to lift restrictions on RHS prepayments, the final version of the Ney Amendment is a substantial improvement over earlier versions. However, it leaves open several significant issues which affect rural residents generally, residents of Section 515 housing particularly and may, notwithstanding contrary intentions, cause displacement of RHS residents. First, the amendment does not place any obligation on HUD and RHS to coordinate their efforts to ensure that Enhanced Vouchers are issued and available before a prepayment occurs. This is particularly significant because HUD has had difficulties in coordinating among its own offices to ensure the timely issuance of Enhanced Vouchers under the Section 8 program. It is also highly unlikely that Rural Development staff, which administers RHS programs in the field, will know how to inform HUD about an impending prepayment or how to trigger the issuance of Enhanced Vouchers. The problem is likely to be exacerbated by the fact that in many of the rural communities in which RHS projects are located there may not be a local PHA to administer the vouchers. Consequently, HUD will need to identify a state-wide or neighboring entity to administer the program locally. The fact that two separate federal agencies as well as local public housing agencies will be involved in the prompt issuance of Enhanced Vouchers requires extensive and detailed coordination which should be mandated by statute.

Second, the 150-day notice period is inadequate. HUD legislation requires a one-year notice of an owner's intent to opt-out of the Section 8 program in order to give residents and localities adequate notice of the owner's intentions, to provide housing authorities the opportunity to inspect the housing in order to determine its eligibility for Enhanced Vouchers both with respect to Housing Quality Standards and rent reasonableness, and to give residents, with the assistance of local government, the opportunity to relocate to new housing if there is a need or desire to do so. The shorter notice period is inadequate to ensure that all these actions will take place in a timely fashion, particularly in rural areas where the supply of decent and affordable housing is scarce and where it is likely that residents who may be displaced, because the housing is ineligible for Enhanced Vouchers or the owner seeks to convert the property to non-rental housing uses, will have to move to neighboring communities in order to retain decent safe and sanitary housing.

In short, the Ney Amendment does not extend to RHS prepayments the types of protections that are currently extended to residents of HUD developments that are assisted under the Section 8 program. This is particularly troublesome because the majority of residents of RHS developments are elderly or disabled, persons on whom the threat of prepayment and relocation is likely to have a severe if not dire impact. Moreover, the lack of protections are likely to be more severe on rural residents because alternative housing and supportive agencies may not always be available in the same communities as the prepaying developments.

The fate of the Ney Amendment is not clear as of this writing because the House leadership has not set a date for the bill's consideration by the full House. It is possible, because of the November elections and the Democrats' effort to amend the bill on the House floor to force the enactment of a Housing Trust Fund, that the bill will not be considered until after the elections, if at all. However, this does not mean that the Ney Amendment is dead. If HR 3995 is not voted on by the House, it is quite likely that parts of the bill will be incorporated in an omnibus appropriations bill that the House is likely to consider either before the November recess or in a lame duck session that is likely to be held after the elections. It is not known whether or not the Ney Amendment will be part of that legislation.

Advocates hope that even if the House adopts the Ney Amendment that the Senate will not follow suit and that its provisions will not be incorporated in some compromise appropriations bill. Currently, it appears that the Senate will not consider any independent housing legislation this year. Thus, the only way in which the Ney Amendment may be enacted is through an appropriations amendment which the Senate either adopts or concedes to through the conference process. Obviously, opposition in the Senate to the amendment is likely to lessen the likelihood of its adoption. ■

[5] H. Rept. 107_640, Part 2, Pg. 50 (Sept. 17, 2002). A copy of the full report is available at http://financialservices.house.gov/media/pdf/hr107640p2.pdf.

[6] 42 U.S.C.A. §1437 f(t)(West Supp. 2002).

NHLP Job Announcement:

STAFF ATTORNEY/DIRECTOR OF GOVERNMENT RELATIONS

The National Housing Law Project (NHLP) is seeking to hire an experienced attorney to work as Staff Attorney/ Director of Government Relations in NHLP's Washington D.C. office.

The Staff Attorney/Director of Government Relations is responsible for: providing substantive technical support to housing attorneys and other housing advocates on federally assisted public and rental housing issues; undertaking research; drafting and editing manuals, reports, articles and other materials on the operation of federal housing programs and residents' rights under those programs; training advocates and resident organizers; analyzing and responding to federal housing legislation and regulations; and assisting or engaging in litigation. The Staff Attorney/Director of Government Relations is also responsible for monitoring federal legislation and administrative developments, representing clients before Congress, federal and local administrative agencies, and assisting in responding to legislators' and administrators' requests for information on federal housing issues.

QUALIFICATIONS The applicant must have:

- at least five years of experience working on housing and related issues;
- prior experience working with legislative and administrative bodies, preferably in Washington, D.C.;
- working knowledge of federal public and multi-family assisted housing programs and/or issues relating to the preservation of federal affordable housing stock (including public housing and project-based Section 8 housing);
- excellent oral and written communication skills, including experience in training and legal writing;
- excellent analytical skills;
- a strong commitment to advancing the housing rights and interests of very low-income persons and households;
- a law degree and be admitted to practice in at least one state;
- a willingness to travel.

SALARY Salary for the position is based on experience; excellent benefits.

SUBMITTING AN APPLICATION Persons interested in the position should send a cover letter, resume, three professional references and writing sample to Gideon Anders, Executive Director, National Housing Law Project, 614 Grand Avenue, Suite 320, Oakland, CA 94610. Cover letter should indicate the position for which you are applying and include job qualifications, relevant work experience and salary history. No phone calls or faxes, please.

DEADLINE There is no application deadline. However, NHLP seeks to hire a qualified individual as soon as possible.

ABOUT NHLP NHLP is a national housing law and advocacy center and a California IOLTA back-up center that promotes housing justice on behalf of very low-income persons. NHLP has offices in Oakland, CA and Washington, D.C. NHLP is an affirmative action equal opportunity employer that does not discriminate on the basis of race, color, national origin, ethnic background, religion, sex, sexual orientation or disability. We encourage applications from people of color, women and others whose background may contribute to more effective representation of poor people.

California Fair Housing Commission May Award Damages

The California Supreme Court has recently held that the state's Fair Employment and Housing Commission may award damages for emotional distress without violating the judicial powers clause of the state Constitution.[1] California thus joins the ranks of most state courts that have considered the issue.[2] Over a lone dissent, the court reversed a lower state appellate court, concluding that the state legislature's amendments to the state's *Fair Employment and Housing Act* (FEHA),[3] which gives parties in the administrative proceeding the option to adjudicate a controversy in court, successfully distinguish an earlier decision of the court[4] that for the agency to award damages would violate the judicial powers clause.

This decision means that California victims of discrimination have their choice of judicial or administrative forums to seek compensation for violations, including damages for mental distress, the most common form of injury. They can thus choose which forum offers the best prospect for an appropriate remedy within their means. The decision also provides important support for upholding such powers against similar state constitutional challenges elsewhere in those states where courts have not yet expressly decided the question.[5]

Factual Background

A Caucasian rental property owner (Ms. Konig) advertised a duplex unit for rent by posting a notice on her door. Ms. McCoy, an African-American police officer, read the notice as a prospective tenant, and went to Ms. Konig's door. When Ms. Konig came to the door, she asked Ms. McCoy to leave and then slammed the door in her face, having interpreted Ms. McCoy's behavior as an attempt to break into her house. Ms. Konig's insults and rebuff distressed and humiliated Ms. McCoy, causing her to relive an emotionally painful childhood event when she and her family encountered racial discrimination at a restaurant. To determine whether Ms. Konig discriminated against her because of her race, Ms. McCoy asked Terrence Smith, an African-American colleague, to inquire about Ms. Konig's rental. Ms. Konig similarly rebuffed Mr. Smith, and never responded to a piece of paper containing his name, address and telephone number which he left in her mail slot in accordance with the notice on her door.

About one year later, when Ms. Konig again advertised the unit for rent, the local Fair Housing Council tested for discrimination by sending two women, an African-American and a Caucasian, to Ms. Konig's residence to ask about the unit. Whereas Ms. Konig was solicitous of the Caucasian woman, she discouraged the African-American woman from renting the unit and refused to give her an application.

This decision means that California victims of discrimination have their choice of judicial or administrative forums to seek compensation for violations, including damages for mental distress, the most common form of injury.

Procedural History

Ms. McCoy filed a complaint with the Department of Fair Employment and Housing (DFEH). After a hearing, the Fair Employment and Housing Commission (Commission) found that Ms. Konig had discriminated against Ms. McCoy because of her race. The Commission ordered Ms. Konig to cease and desist her discrimination and to pay Ms. McCoy a civil penalty of $10,000 and actual damages of $10,000 for emotional distress and lost housing opportunity.

Ms. Konig filed a petition for a peremptory writ of mandate in Superior Court, arguing that the Commission's factual determination that she had discriminated against Ms. McCoy was erroneous. The court partially granted the petition by striking the $10,000 award for emotional distress and lost housing opportunity on the ground that the Commission was constitutionally prohibited from awarding general compensatory damages for emotional distress. In its 1991 *Walnut Creek Manor* v. *Fair Employment & Housing Comm'n*[6] decision, the California Supreme Court had held that the Commission's award of emotional distress damages to a housing discrimination complainant violated the state constitution's judicial powers clause.

The Commission, which since 1992 had been awarding emotional distress damages, appealed the trial court's deci-

[1] *Konig v. Fair Employment and Housing Commission*, 28 Cal. 4th 743, 123 Cal.Rptr.2d 1, 2002 WL 1733668 (Cal. July 29, 2002).

[2] Kentucky, Tennessee, Montana, Missouri (economic damages), Maryland (monetary damages, but not civil penalties), Wisconsin (economic damages). *See* National Fair Housing Alliance's Brief of Amicus Curiae in Support of Appellant, at pp. 29-30 (filed Oct. 18, 2000).

[3] Cal. Gov.Code, § 12900 et seq.

[4] *Walnut Creek Manor v. Fair Employment & Housing Comm'n*, 54 Cal.3d 245 (1991).

[5] According to a brief filed by Amicus National Fair Housing Alliance, states that permit such administrative damage awards but whose appellate courts have not expressly ruled on the judicial powers question include, *e.g.*, Connecticut, Illinois, Kansas, Massachusetts, Minnesota, New Jersey, New York, Ohio, Oregon, Washington and West Virginia. *See* National Fair Housing Alliance's Brief of Amicus Curiae in Support of Appellant, at pp. 30-31 (filed Oct. 18, 2000).

[6] 54 Cal.3d 245 (1991).

sion, arguing that the 1992 amendments to the state's *Fair Employment and Housing Act* (FEHA), in particular the provision establishing a judicial option for any party in the administrative proceeding, rendered inapplicable *Walnut Creek Manor*'s damages holding. Affirming the trial court's judgment, the intermediate state Court of Appeal concluded that the judicial option provision[7] did not distinguish *Walnut Creek Manor* from the present case. In so[8] doing, the Court of Appeal rejected the Commission's efforts to find support from a 1986 United States Supreme Court case[9] evaluating the similar relationship between an administrative agency and the federal judicial power under Article III. There, the high Court had emphasized the importance of a judicial option provision in overcoming constitutional concerns about agency powers.

The state agency appealed again to the state supreme court, this time successfully.

The Legal Analysis

In its 1991 *Walnut Creek Manor* decision holding that agency damage awards constituted an impermissible exercise of judicial power, the California Supreme Court had based its conclusion on the "substantive limitations on administrative remedial power" set forth in an earlier decision.[10] Under these limitations, the court determined that the Commission's authority to award emotional distress damages under the FEHA violated the judicial powers clause because a damage award was neither necessary nor merely incidental to the law's purpose. Its effect, the court there stated,

> is to shift the remedial focus of the administrative hearing from affirmative actions designed to redress the particular instance of unlawful housing discrimination and prevent its recurrence, to compensating the injured party not just for the tangible detriment to his or her housing situation, but for the intangible and nonquantifiable injury to his or her psyche suffered as a result of the respondent's unlawful acts, in the manner of a traditional private tort action in a court of law."[11]

The court there believed that such authority would jeopardize or dominate the "streamlined and economical [FEHA] administrative procedure."

After *Walnut Creek Manor*, the California Legislature sought to make the FEHA substantially equivalent to the federal *Fair Housing Act*, which permits HUD administrative law judges to award damages for emotional distress in administrative hearings, and to make the DFEH eligible for HUD certification to enforce rights under the federal fair housing scheme. In 1992, the Legislature amended the FEHA by adding Cal. Gov't Code § 12989, which provides the alternative of a civil judicial action to the Commission's administrative proceeding.[12] In addition, the Legislature increased the amount of civil penalties available and placed the Commission's authority to award actual damages in a separate subdivision.

For the court, the 1992 and 1993 amendments eliminated the constitutional separation of powers concerns expressed in Walnut Creek Manor *about the Commission's authority to award emotional distress damages.*

In *Konig,* the California Supreme Court fortunately reached a different result. The majority opinion signed by five of the seven justices held that *Walnut Creek Manor* was not controlling. Of determinative significance was the fact that the availability of the judicial option for parties to the case, authorized by the 1992 and 1993 amendments (in particular section 12989) was not before the court, and those amendments proved decisive for the constitutional analysis.

For the court, the 1992 and 1993 amendments eliminated the constitutional separation of powers concerns expressed in *Walnut Creek Manor* about the Commission's authority to award emotional distress damages. As primary support for its decision, the court favorably cited an earlier United States Supreme Court decision, *Commodity Futures Trading Comm'n v. Schor.*[13] That case had held that the Commodity Futures Trading Commission's authority to adjudicate common law counterclaims to complaints before it did not violate the federal Constitution's judicial powers clause because the Commodity Futures Trading Commission's "jurisdiction over a narrow class of common law claims as an incident to [its] primary, and unchallenged, adjudicative function does not create a substantial threat to the separation of powers."[14] There, the Supreme Court was swayed also by the option of the respondent to file a federal court complaint or to institute a reparations proceeding before the Commission. "Similarly here," the California Supreme Court reasoned in *Konig*, "the Commission, in housing discrimination cases, deals with a narrow and particularized area of law, *i.e.*, the

[7] Cal. Gov't Code § 12989 (a).

[8] Cal. Gov't Code § 12987.

[9] *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833 (1986) (*CFTC*).

[10] *McHugh v. Santa Monica Rent Control Bd*., 49 Cal. 3d 348 (1989).

[11] 54 Cal. 3d at 264.

[12] Its subdivision (a) states that "[i]f an accusation is issued under Section 12981, a complainant, a respondent, or an aggrieved person on whose behalf a complaint is filed may elect, in lieu of an administrative proceeding under Section 12981, to have the claims asserted in the charge adjudicated in a civil action under this part." A party must make an election within about 20 days after service of the accusation or complaint.

[13] 478 U.S. 833 (1986).

[14] 28 Cal. 4th 752.

elimination of discriminatory practices in housing accommodations that are 'against public policy.'" (§ 12920.) Like the Commodity Futures Trading Commission, the Commission's orders are enforceable only by judgment and order of the superior court (§§ 12987.1, subd. (d), 12973, subd. (b)), and are subject to judicial review by way of administrative mandate procedures (§ 12987.1, subd. (a))."[15] Given section 12989 (a), which requires all parties to consent to the Commission's jurisdiction, the court stated that to hold that the Commission's authority to award emotional distress damages violated the judicial powers clause "would create an unjustified distinction between the authority of arbitrators and that of administrative adjudicators."[16]

The court's concern in *Walnut Creek Manor* that awards would threaten "to dominate the administrative hearing" found little resonance in *Konig* because "the Commission, which has candidly admitted having awarded emotional distress damages since 1992, has undoubtedly gained considerable experience in that regard. This experience, along with the Commission's expertise in housing discrimination cases, may go far towards ensuring that its proceedings remain 'streamlined and economical.'"[17]

A concurring opinion by Justice Kennard noted approvingly the majority's decision not to follow *Walnut Creek Manor*, to which she had earlier dissented on the basis that the California judicial powers clause "allows adjudications by administrative bodies only when reasonably necessary to further the purposes of the law being enforced."[18] The facts of *Walnut Creek Manor*, Justice Kennard stated, illustrated "that the Commission's authority to compensate for emotional distress is crucial to the effective enforcement of [the] FEHA, in part because in most cases of housing discrimination the victim's out-of-pocket damages are [minimal], thus leaving emotional distress as the only compensable injury."[19]

In her lone dissent, Justice Brown argued that the Legislature's intent in enacting the amendments was not to overcome *Walnut Creek Manor* but to make the FEHA substantially equivalent to federal law to ensure certification by HUD. The dissent emphasized its view that the amendments suggested legislative acquiescence in the judicial powers controversy, and was not intended to affect the constitutional analysis. Also, the dissent contended that the primary purpose of the FEHA was to prevent discrimination and provide streamlined housing remedies for victims, and that therefore compensatory damages were unnecessary and not merely incidental to this purpose. Thus, an administrative award of damages lies outside of any administrative power under *McHugh v. Santa Monica Rent Control Bd*.,[20] and usurps a fundamental judicial prerogative. ■

[15]*Id.* at 753.

[16]*Id.* at 754.

[17]*Id.* at 756.

[18]*Id.* at 758.

[19]*Id.*

[20]49 Cal. 3d 348 (1989).

New Jersey Supreme Court Upholds the "Builder's Remedy" and Rules on In Lieu Fees in Three *Mount Laurel* Cases

The New Jersey Supreme Court has again upheld its landmark *Mount Laurel* decision, which established municipalities' obligation to allow realistic opportunities for affordable housing development within their zoning and planning regulations based on the state constitutional requirements of substantive due process and equal protection.[1] In three recent cases,[2] the court affirmed and refined the *Mount Laurel* doctrine by further defining when a developer may obtain a "builder's remedy" to gain court approval of a proposed development, and by ruling on the propriety and implications of charging a development fee as a substitute for affordable housing construction.

The 1975 *Mount Laurel* decision found that the exclusionary land-use regulations of the Township of Mount Laurel were written and enforced in such a way as to make construction of an adequate supply of low- and moderate-income housing physically and economically impossible. The court held that once a municipality chooses to enter the field of land-use regulation, it assumes an affirmative duty to provide housing necessary to meet its fair share of the regional low- and moderate-income housing needs through an "inclusionary" land-use plan.[3] Two years later, the New Jersey Supreme Court created the "builder's remedy," which permits builders to seek court approval for construction of a housing development, either concurrently with the submission, or after rejection of, a construction application to the municipality.[4] This remedy allows a builder to proceed with construction of a project upon judicial approval, which is typically granted if the builder guarantees that at least 20 percent of the units to be constructed will be affordable to low- or moderate-income families and the township has not otherwise provided sufficient opportunities for affordable housing construction.

In 1985, the New Jersey legislature codified the builder's remedy in a statute entitled the *Fair Housing Act* (FHA). It

[1]*Southern Burlington County N.A.A.C.P. v. Mt. Laurel Township*, 336 A.2d 713 (1975) (Mt. Laurel I); *see* N.J. Const. Art I, ¶1, Art IV, §6, ¶ 2; *see also Southern Burlington County N.A.A.C.P. v. Mt. Laurel Township*, 456 A.2d 390 (Mount Laurel II), *Toll Bros. Inc. v. Township of West Windsor,* 803 A.2d 53, 76 (N.J. 2002). For a full discussion of the status of the *Mount Laurel* doctrine, a review of other states' treatment of the doctrine, and state statutory inclusionary housing schemes, *see* Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 Seton Hall L. Rev. 1(2001).

[2]*Toll Brothers, Inc. v. Township of West Windsor*, 803 A.2d 53 (N.J. 2002), *Fair Share Housing Center, Inc. v. Township of Cherry Hill*, 802 A.2d 512 (N.J. 2002), *Bi-County Development of Clinton, Inc. v. Borough of High Bridge*, __ A.2d __, 2002 WL 1787924 (N.J. 2002).

[3]*Mt. Laurel I* at 743-44.

[4]*Oakwood at Madison v. Township of Madison*, 371 A.2d 1192 (1977) (Madison).

created the Council on Affordable Housing (COAH), which, through the voluntary participation of municipalities, oversees the development of low- and moderate-income housing and determines regional housing needs.[5]

The Builder's Remedy in *Toll Brothers*

In *Toll Brothers, Inc. v. Township of West Windsor*, the first case decided by the New Jersey Supreme Court in August, the court reviewed a successful lower court challenge to West Windsor's planning practices by a developer seeking a builder's remedy to construct 1,165 units of housing.[6] The court's review focused on three issues: whether the trial court erred in its conclusion that the township's planning practices, which had not been approved by COAH within the five-year presumptive period, prevented a realistic opportunity for development of affordable housing; whether the trial court erred in considering market demand for particular housing types in reaching its conclusion; and, whether the trial court erred in concluding that Toll Brothers was entitled to a builder's remedy.

The court acknowledged the controversial nature of the builder's remedy, but rejected invitations by several amici to curtail or eliminate it.

The New Jersey Supreme Court began its opinion by reviewing the genesis of builder's remedy, recognizing the controversy surrounding its use, and repeating that it is an "incentive for the institution of socially beneficial but costly litigation" designed to provide "needed affordable housing for at least some portion of the moderate income elements of the population."[7] The court explained that under the provisions of the FHA, a municipality voluntarily may seek COAH review of its zoning and affordable housing regulations, and if approved, establish a 10-year presumption of validity for its land-use decisions, which may then only be overcome by clear and convincing evidence. The court, which had previously upheld the constitutionality of the voluntary COAH review,[8] wrote that due to the ongoing threat or prosecution of builder's remedy suits, the COAH process becomes a practical necessity for most all municipalities with a significant *Mount Laurel* obligation. For these reasons, the court continued to endorse builder's remedy suits.

Turning to the questions before it, the court first considered whether West Windsor's ordinances, regulations and site factors prevented a realistic opportunity for affordable housing development and whether the consideration of market demand for particular types of housing by the trial court was a reversible error. West Windsor argued that its consistent zoning approval of land available for multifamily housing made sites available to satisfy its *Mount Laurel* obligation, and that the lack of market demand for multifamily housing within the township is not a valid basis to discount the available sites. In response, the court observed that its *Mount Laurel* cases recognize that market forces play a role in the viability of site development, as do the *Fair Housing Act* and COAH procedures.[9] Furthermore, the court noted the builders' "obvious" profit interest and that there is "no greater area of concern for a developer than the marketability of its project."[10] The court therefore upheld the detailed review of market data by the trial court, which found the West Windsor's plan "wholly unrealistic" because it assumed that nine multifamily sites in the township could be developed even though there was insufficient market demand in the township for multifamily housing. The court found that West Windsor should approve affordable housing which is marketable in the township, namely, single-family housing which is not built with zero lot lines.

On a related issue, the court affirmed the trial court's finding that the township's requirement of an oversized and expensive gravity-fed sewer system was a "significant impediment" to the development of affordable housing.

The court next turned to the third issue, whether it was appropriate for the trial court to order a builder's remedy where the proposal contained a 15 percent affordable unit set-aside rather than the 20 percent level generally required by the courts. In upholding the ruling, the court relied on findings made at an intermediate appeal,[11] namely, that: Toll Brothers acted in good faith by communicating to the West Windsor Planning Board about the need to amend its ordinances to implement the development; it need not apply for variances from those rules owing to the size of the property, its importance in the Township's compliance plan, and number of variances needed; and that the proposed development "does not differ from development previously permitted except that a portion of the site will contain 'marketable' detached single-family houses rather than 'unmarketable' zero lot-line houses."[12]

In conclusion, the court acknowledged the controversial nature of the builder's remedy, but rejected invitations by several amici to curtail or eliminate it because it contributed to suburban sprawl or worked as a developer's weapon against municipalities. The court reiterated that it is necessary to compensate builders who successfully demonstrate

[5]*Toll Bros.* at 512; N.J. Stat. Ann. 52:27D-307 (2002).

[6]*Toll Brothers, supra,* 803 A.2d at 62, n. 7.

[7]*Id.* at 77, citing *Madison, supra*, 371 A.2d 1192.

[8]*Hills Development Co. v. Bernards Tp. in Somerset County*, 510 A.2d 621(N.J., 1986).

[9]*Id.* at 83-84.

[10]*Id.* at 85.

[11]*Toll Bros., Inc. v. Township of West Windsor*, 756 A.2d 1074 (N.J. Super. Ct. App. Div., 2000).

[12]*Toll Brothers*, *supra*, 803 A.2d at 88-89.

that a municipality was not meeting its affordable housing obligation. To do otherwise, the court found, would achieve only a "pyrrhic victory" for the challenger.

Development Fees Cases

Four days after issuing the *Toll Brothers* decision, the New Jersey Supreme Court issued two decisions related to fees paid by developers in lieu of affordable housing construction. *Fair Share Housing Center, Inc. v. Township of Cherry Hill*[13] involved a proposed 225-acre development called Garden State Park (GSP) on which the developer proposed to construct 1,700 units of luxury housing, 1.5 million square feet of office and commercial space and a 150-room hotel. The GSP development was proposed without including any on-site affordable housing. Instead, the developer proposed to pay a town-approved development fee to meet its fair share obligations. Fair Share Housing, Inc., which had challenged the township's fair share housing obligations in earlier litigation that was settled, brought the action under the settlement to determine whether the town could exclude the proposed development from its fair share affordable housing obligations simply by imposing a development fee on the owner of the property.

The court held that development fees are a permissible method to meet fair share obligations but they may only be charged in the context of a housing plan approved by COAH.

The New Jersey Supreme Court's opinion reviewed the lengthy procedural history, settlement agreement and court orders for Cherry Hill's *Mount Laurel* obligations. In the relevant part of this protracted story, Cherry Hill adopted a 1994 development fee ordinance which provided that its authority to collect development fees expires "unless the municipality filed a housing element with COAH, petitions for substantive certification and receives [COAH's] approval of its development fee ordinance."[14] While Cherry Hill did not obtain the required approval from COAH, it nevertheless approved the GSP development with the payment of a development fee instead of imposing any on-site affordable housing construction obligation. The trial court upheld the in lieu fee, finding that development fees are the "functional equivalent" of actual construction of affordable housing, and approved the development as proposed.

[13]802 A.2d 512.

[14]*Id.* at 518.

The court reversed the trial court. The court held that development fees are a permissible method to meet fair share obligations but they may only be charged in the context of a housing plan approved by COAH. In so finding, the court undertook a detailed review of its prior ruling in *Holmdel Builders Association v. Township of Holmdel*,[15] on which the trial court relied and which upheld the imposition of development fees charged to commercial and non-inclusionary residential properties. In that case the court found that the fees were the "functional equivalent of mandatory set-asides."[16] However, in reviewing that decision the court found that the approval of development fees in *Holmdel* was "inextricably linked" to the authority of the *Fair Housing Act*, and administrative approval by COAH. The court further distinguished *Holmdel* on the grounds that Cherry Hill proposed to permanently eliminate the use of the site to satisfy its affordable housing obligation, a *quid pro quo* not contemplated by the earlier ruling. The court concluded that the COAH substantive certification process authorized by the legislature "would be undermined irreparably if a municipality could, in effect, exempt choice parcels of land from its affordable housing obligation by the simple expedient of imposing a development fee."[17]

In the third case, *Bi-County Development of Clinton, Inc. v. Borough of High Bridge*,[18] the New Jersey Supreme Court limited the privileges enjoyed by an in lieu fee-paying development. In that case the builder of a residential housing development paid a COAH-approved development fee to the township of Clinton in lieu of constructing affordable housing. The fee was part of a settlement agreement based on Bi-County's builder's remedy suit against Clinton. That agreement also provided that Clinton would take appropriate actions, including exercise of eminent domain, to assist Bi-County's efforts to obtain sewer treatment capacity.[19] The eventual solution for economic provision of sewage for the development was a proposed easement from the neighboring borough of High Bridge. When High Bridge refused the easement, Bi-County and Clinton sought judicial relief.

The trial court granted summary judgment in favor of Bi-County because its project was an "inclusionary" development by virtue of its having paid the in lieu fee.[20] As an

[15]583 A.2d 277 (N.J. 1990).

[16]*Fair Share Housing Center*, 802 A.2d at 523.

[17]*Id.* at 526-27.

[18]__ A.2d. __ , 2002 WL 1787924 (N.J. 2002).

[19]*Id.* at 3.

[20]As in *Fair Share Housing Center*, the trial court in this case also relied on *Holmdel* to conclude that projects which pay a developer fee are entitled to the same protections as projects which construct affordable housing. The New Jersey Supreme Court in this case follows the analysis in *Fair Share Housing Center*, to the effect that *Holmdel* only conferred statutory authority for COAH to define what constitutes an inclusionary housing development. In this case, COAH did determine that the Bi-County development was an inclusionary development pursuant to the FHA. While the court's reasoning tends to contradict COAH's conclusion, it does not resolve the issue on appeal since COAH conceded that its ability to restrict cost generating local ordinances has "no force and effect with regard to High Bridge, [so] those restrictions do not assist us in resolving the issue

inclusionary development, the trial court found that it is entitled to require neighboring municipalities to contribute to access to its utilities pursuant to *Samaritan Center v. Borough of Englishtown*.[21]

The New Jersey Supreme Court found that *Samaritan* appropriately required Englishtown to grant access to the sewer and water systems to facilitate the actual provision of affordable housing. However, it declined to extend such a mandate to Bi-County's development merely because it paid a development fee.

> [T]he payment of a development fee, either by commercial developers, non-inclusionary residential developers, or by the owners of inclusionary residential sites in the form of in lieu payments, does not have a sufficient nexus to the actual production of low income housing to justify infringing on another municipality's right to restrict access to its sewer system."[22]

Consequently, the court allowed the development to proceed without an affordable housing component, but did not allow the developer or the lower court to ascribe any special status to a development that merely pays an affordable housing fee and does not actually include affordable housing.

Conclusion

These New Jersey Supreme Court's decisions reflect the court's continued commitment and focus on actual construction of affordable housing as a component of the development approval process by state municipalities. While the court did not use these cases to further refine the nature of its "builder's remedy," it also did not use them to withdraw from the field of ensuring affordable housing production, something which "this Court has always wanted and sought."[23] By limiting the use of in lieu fees and upholding the fundamental *Mount Laurel* principles, the court continued its extraordinary and somewhat lonely 27-year history of continuing to exert judicial pressure to produce affordable housing in New Jersey.[24] ■

at the root of this appeal." *Id.* at 15. In this manner, the court deferred to COAH's judgment and declined an opportunity to directly rule on the "inclusionary status" of a fee-paying development.

[21]683 A.2d 611 (N.J. Super. Ct. Law Div. 1996).

[22]*Bi-County, supra*, at 16.

[23]*Toll Brothers, supra*, at 80, quoting *Hills Development Co. v. Bernards Township*, 510 A.2d 621 (1986).

[24]*See e.g.* Span, *supra* note 1.

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 <u>not</u> available from NHLP.

***Gallatin Housing Authority v. Montesillo*,** 2002 WL 1800968 (Tenn. Ct. App., August 7, 2002). The Tennessee court of appeals reversed a trial court ruling that gave the Gallatin Housing Authority (GHA) possession of two of its units because the authority had entered into new leases with the tenants. GHA filed for possession of the units based on the tenants' alleged lease violation of stealing cable services. One tenant had legally obtained cable service and permitted a neighbor to hook up to her service. When GHA gave the tenants notice that it was terminating their tenancies, the tenants filed a request for grievance. GHA told the tenants that they were not entitled to counsel at the informal hearing and if the tenants insisted on counsel the hearing would be deemed waived. GHA then proceeded to file for eviction, and the trial court granted it possession of the units based on the alleged "criminal activity" of stealing cable. The court also ruled that, because it was criminal activity, there was no requirement of the grievance procedures. The tenants appealed the decision and obtained a stay of eviction pending the appeal. Before the appeal could be heard, GHA entered into new leases with both tenants, with the new leases making no reference to the outstanding writs against the tenants or any prior court proceeding, and made no effort to reserve GHA's right to evict pending the outcome of the appeal.

The court of appeals held that the new leases were dispositive, making the issue on appeal moot because the tenants had new tenancies from which they could not be evicted under a lease violation from the prior tenancies. The court concluded that GHA had waived its right to enforce the breach by entering into the new agreements. Since the leases were new, they were not to be considered as extensions of the prior lease. The court rejected GHA's argument that it was compelled to enter into new public housing leases by HUD because the court found nothing to prevent GHA from including references to the pending litigation in the new leases, which they failed to do. Thus, the court dismissed the cases as moot and assessed costs for the appeal to GHA.

***Christopher Village and Wilshire Investments Corp. v. United States*,** 2002 WL 1839260 (Fed. Cl., August 5, 2002). The United States Court of Federal Claims denied plaintiff/building owners' motion for summary judgment on liability and

[1]www.westlaw.com

[2]www.lexis.com

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

granted the United States' cross-motion for summary judgment because the issue had been fully litigated in the Fifth Circuit. The plaintiffs were owners of a Section 221 property who sought damages in connection with the government's foreclosing upon their property. HUD took action against the owners because the building had become severely run down. The owners asked HUD for a rent increase in order to have more money to refurbish the buildings. HUD denied this request and demanded that the owners place $2 million in escrow to pay for the necessary repairs. When the owners failed to pay the $2 million, HUD notified them that they were in violation of the regulatory agreement and took possession of the property. In response, plaintiffs filed suit against HUD in United States District Court. The district court denied the owners relief and granted the United States' motion for summary judgment, holding that the owners had an absolute obligation to maintain the property, regardless of any requested rent increases. Subsequently, HUD sold the building to the City of Bryan, Texas for $10.

The Fifth Circuit concluded that several of the plaintiffs' claims were moot because of the sale of the building. The Fifth Circuit, however, also concluded that it was appropriate to grant declaratory relief in order for the plaintiffs to be able to collect damages from HUD. The court also concluded that, although HUD could grant or deny a rent increase request at its discretion, it could not refuse to consider a rent increase. The Fifth Circuit concluded that the owners had not been negligent in their operations of the building and that HUD had acted arbitrarily when in refused to consider the request for a rent increase. Subsequent to the decision, however, it was discovered that Christopher Village's general partner had submitted false statements to HUD in connection with the requests for rent increases.

In the case at bar, the Court of Claims first considered whether the government's defense to the owners' breach of contract claim was barred by *res judicata* and concluded it was not. The owners contended that the Fifth Circuit's conclusion that HUD had violated its regulations and contracts was binding upon the Court of Claims in the breach of contract case. The United States argued that, since the Court of Claims has exclusive jurisdiction over the breach of contract claim, the government could not have litigated its breach of contract defenses in the Fifth Circuit. The Court of Claims noted that the Fifth Circuit specifically stated that the breach of contract claims would be litigated in the Court of Claims. Principles of collateral estoppel and issue preclusion did govern, however, but not to bar the government's defenses. Thus, the government could no longer challenge the Fifth Circuit's conclusion that HUD had violated its regulations. It could, however, raise the defense of a prior material breach of contract by the owners in submitting the false information, an issue that had not been and could not have been litigated in the Fifth Circuit.

Having ruled that the government was entitled to raise its defenses, the court then addressed their merits and concluded that, because the owners had provided false information to the government in their application for a rent increase, the owners had materially breached the contract. This result obtained regardless of the fact that the government did not know about the false statements until after its own breach. Finally, the owners argued that the "global settlement" they had entered into regarding the criminal charges surrounding the submission of the false information precluded the government from using the owners' material breach as a defense. The court rejected this argument as well, finding that the global settlement did not prevent the government from raising defenses to liability; it only prevented the government from taking affirmative action. Thus the court concluded that HUD's arbitrary and capricious termination of the contracts was excused by the owners' prior breach of contract and denied the owners' motion for summary judgment and granted the government's.

Manor v. Gales, 2002 WL 1969296 (Minn. App., August 27, 2002). The Minnesota court of appeals overturned a trial court's dismissal of an eviction action against a Section 8 tenant based on repeated late payment of rent. Over a period of 10 years, the owners served the tenant with 68 late payment notices and filed eight eviction cases against the tenant. Each time, the tenant eventually paid the rent, late fees, and court costs, while the owners paid their own attorney's fees. On appeal, the owners argued that their costs beyond what they were legally entitled to recover constituted an adverse financial effect and were grounds for eviction. The tenants argued that since the owners always recovered that to which they were legally entitled, there could be no adverse financial effect. 24 C.F.R. § 247.3(c) provides for eviction for material noncompliance with the lease, which includes repeated minor violations of the rental agreement that interfere with project management or have an adverse financial effect on the project. The court of appeals concluded that the regulation mandated no minimum amount to qualify as an "adverse financial effect" and that the administrative costs—including the attorney's fees—of the owner having to file in excess of 70 documents qualified as such an effect. Thus the court reversed and remanded the case.

Forest City Management, Inc. v. Tackett, 2002 WL 1835644 (Ohio App. 11 Dist., August 9, 2002). An Ohio appeals court affirmed the decision of the trial court that granted possession of a Section 8 unit to the owners because of noise and abusive behavior by the tenants. The owners had served a notice that stated specific dates upon which the tenant allegedly disturbed the rights and comforts of other residents and staff. 24 C.F.R. § 880.607 provides for eviction for material noncompliance with the lease, which includes repeated minor violations of the rental agreement that interfere with project management or have an adverse financial effect on the project. The tenant contended that the written notice was insufficient because it was not specific enough. The court disagreed with this argument, holding that a notice that gave specific dates and generally described the behavior in question was adequate, especially in light of the fact that the tenant's counsel had full access to the tenant's file, which contained detailed incident reports. Finding the notice valid, the court upheld the eviction.

911 Glen Oak Apartments v. Wallace, 2002 WL 1824914 (Tx. App. Corpus Christi, July 11, 2002) (**unpublished opinion**). A Texas appellate court affirmed a trial court's judgment in favor of a Section 8 tenant whose lease the owners were trying to terminate because the tenants allegedly had been too noisy and threatening. The tenants allegedly had loud parties and at one point threatened another tenant with a golf club. The evidence at trial was conflicting as to whether the incidents actually occurred. The owners argued that the "good cause" standard to not renew a lease was easier to meet than that of "material non-compliance" with a lease. The court acknowledged that good cause may be a less stringent standard than material non-compliance, but concluded that the owners had not established good cause in the case at bar. Since the owners could not refuse to renew the Section 8 lease without good case pursuant to federal law, and the trial court had not made a ruling contrary to the weight of the evidence such that it would be clearly wrong or manifestly unjust, the appellate court upheld the ruling that the tenant was not a holdover tenant at sufferance.

United States v. Retirement Services Group, 2002 WL 1870446 (5th Cir., August 15, 2002). The U.S. Court of Appeals for the Fifth Circuit vacated and remanded in part a judgment in favor of the United States in its suit against a partnership that owned HUD-insured real estate. The court also reversed a judgment against two individual owners. Under HUD regulations, a mortgagor, in this case the partnership, generally was permitted to expend project funds only for payment of mortgage obligations and payment of reasonable expenses necessary for the proper operation and maintenance of the project. The project owner could not distribute "surplus" cash unless all mortgage payments were made and the owner was in compliance with all other conditions. An audit concluded that one defendant in the partnership had "skimmed" over $800,000 of project funds for unauthorized disbursements to herself and others. The draft of this audit arguably was completed six years to the day prior to the date that the government filed suit seeking double damages pursuant to 12 U.S.C. § 1715z-4a. The district court denied the defendants' motion for summary judgment, holding that the six-year statute of limitations for the suit had not run, and entered judgment for the government in double the amount skimmed against all defendants, who it found to be jointly and severally liable for the entire amount.

On appeal, the owners argued that someone in the government must have known about the misuse of funds prior to the completion of the draft audit, triggering the running of the statute of limitations earlier and causing it to expire prior to the time the government filed the suit. HUD urged the court to adopt an interpretation that would not start the statute of limitations before the day that HUD confirmed the illegal conduct by means of an audit. The Court of Appeals held that, because there was a question as to the actual date of the draft audit and as to which HUD officials knew what prior to the draft audit, there existed genuine issues of material fact that precluded summary judgment. In so holding, the court declined to establish the draft audit date as the earliest possible date for the statute of limitations to start running. It instead concluded that it was possible that some government official of adequate stature knew enough of the facts of the matter prior to the draft audit to trigger the running of the statute.

It also held that there was no evidence that one of the individual defendants received any of the illicit funds, thus she could not be held liable. It entered judgment in favor of that defendant. As to one other individual defendant who did receive some of the funds, the court held that there were genuine issues of material fact whether any of the money she received was used improperly and reversed and remanded the judgment against her. The court also limited her potential liability to double the amount of money she actually received. ■

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 August 31, 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. 51,030 (Aug. 6, 2002)
Public Housing Agency Plans: Deconcentration– Amendments to "Established Income Range" Definition

Summary: This final rule amends the deconcentration component of HUD's Public Housing Agency (PHA) Plans regulations and revises the definition of Established Income Range (EIR) to include within the EIR those developments in which the average income level is at or below 30 percent of the area median income, and therefore ensure that such developments cannot be categorized as having average income "above" the EIR. An income level that is at or below 30 percent of the area median income is defined as "extremely

[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.

low income" in HUD's regulations. HUD believes that developments with an average family income at or below 30 percent of the area median income should not be categorized as higher-income developments for purposes of income mixing because efforts to place lower-income families into these developments would not result in income deconcentration as contemplated by the statute. This rule follows publication of an August 15, 2001, proposed rule, takes into consideration public comment received on the proposed rule, and slightly revises the proposed rule for clarity.

Effective Date: September 5, 2002.

HUD Federal Register Proposed Rules

67 Fed. Reg. 52,526 (Aug. 12, 2002)
Retention of Section 236 Excess Income

Summary: This proposed rule would establish the terms and procedures for owners of projects receiving section 236 rental assistance to participate in retaining some or all of their excess rental charges (Excess Income) for project use; to retain Excess Income charges for non-project use after a determination by HUD that the project is well-maintained housing in good condition and that the owner has not engaged in material adverse financial or managerial actions or omissions; and to request a return of Excess Income remitted to HUD.

Comments Due Date: October 11, 2002.

67 Fed. Reg. 53,276 (Aug. 14, 2002)
Deregulation for Small Public Housing Agencies

Summary: This proposed rule would simplify and streamline HUD's regulatory requirements for small public housing agencies (PHAs) that administer the public housing and voucher assistance programs under the *United States Housing Act of 1937*. Specifically, the proposed rule would further streamline the PHA Annual Plan requirements for certain small PHAs. HUD also proposes to deregulate the assessment and scoring of small PHAs under the Public Housing Assessment System (PHAS) and the Section 8 Management Assessment Program (SEMAP), consistent with its basic regulatory responsibilities. HUD believes that these changes will alleviate administrative burden, and better enable small PHAs to focus on their core mission of providing decent, safe and affordable housing for the neediest American families. In addition to the changes that solely concern small PHAs, this proposed rule would also streamline HUD's review of the Annual Plans submitted by all PHAs (large and small).

Comments Due Date: September 13, 2002.

HUD Federal Register Notices

67 Fed. Reg. 50,766 (Aug. 5, 2002)
Notice of Funding Availability (NOFA) for the Operation Lead Elimination Action Program Fiscal Year 2002

Summary: The purpose of the Operation Lead Elimination Action Program (LEAP) NOFA is to leverage private sector resources to eliminate lead poisoning as a major public health threat to young children.

Available Funds: $6.5 million.

Eligible Applicants: Not-for-profit and for-profit organizations and entities.

Application Due Date: October 31, 2002.

67 Fed. Reg. 52,736 (Aug. 13, 2002)
Announcement of Funding Awards for Fiscal Year 2002; Urban Scholars Fellowship Program

Summary: In accordance with the *HUD Reform Act of 1970*, Title V, this document notifies the public of funding awards for the Fiscal Year 2002 Urban Scholars Fellowship Program. The purpose of this document is to announce the names and addresses of the award winners and the amount of the awards to be used to attract scholars with recent PhDs and academic appointments at institutions of higher education to undertake research now, and throughout their careers, on research topics of interest to HUD, including Section 8 voucher use and a HOPE VI study.

67 Fed. Reg. 53,958 (Aug. 20, 2002)
***Real Estate Settlement Procedures Act* (RESPA); Simplifying and Improving the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers; Notice of Availability of Economic Analysis and Correction of OMB E-mail Address**

Summary: Through this notice, HUD is advising the public that the Initial Economic Analysis that was prepared in connection with HUD's RESPA proposed rule, published on July 29, 2002, is available for review on HUD's Web site at www.hud.gov. In addition, this notice advises the public of a correction made to the e-mail address of the HUD Desk Officer at the Office of Management and Budget (OMB).

67 Fed. Reg. 54,716 (Aug. 23, 2002)
Notice of Regulatory Waiver Requests Granted for the First Quarter of Calendar Year 2002

Summary: The purpose of this notice is to comply with the requirements of section 106 of the *HUD Reform Act*. This notice contains a list of regulatory waivers granted by HUD during the quarter beginning on January 1, 2002, and ending on March 31, 2002.

67 Fed. Reg. 55,418 (Aug. 29, 2002)
Delegation of Authority to the Special Applications Center (SAC) Director

Summary: In this notice, the Assistant Secretary for Public and Indian Housing redelegates to the Director of the Special Applications Center authority to review and approve or disapprove: (1) demolition or disposition applications pursuant to section 18 of the *United States Housing Act of 1937* and 24 CFR part 970; and (2) agreements for the taking of public housing property in eminent domain proceedings, and conducting all activities related to such review, approval and disapproval with exceptions.

Effective Date: August 12, 2002.

67 Fed. Reg. 55,860 (Aug. 30, 2002)
Reduction in Certain FHA Multifamily Mortgage Insurance Premiums

Summary: This Notice lowers the mortgage insurance premiums (MIPs) for certain Federal Housing Administration (FHA) multifamily mortgage insurance programs whose commitments will be issued in Fiscal Year 2003, and republishes others at the rate that was in effect in Fiscal Year 2002.

Comments Due Date: September 30, 2002.

67 Fed. Reg. 55,860 (Aug. 30, 2002)
Public Housing Assessment System (PHAS); Extension of Interim Scoring Methodologies for PHAS Physical Condition and Financial Condition Indicators

Summary: This notice advises public housing agencies (PHAs) and the public that HUD will extend the use of interim scoring methodologies for the Public Housing Assessment System (PHAS) Physical Condition and Financial Condition Indicators. These methodologies were adopted by notice published in the Federal Register on March 15, 2002, and described in notices published in the Federal Register on November 26, 2001. This extension applies to PHAs with fiscal years ending December 31, 2002; March 31, 2003, and June 30, 2003.

67 Fed. Reg. 55,861 (Aug. 30, 2002)
Notice of Availability of Revised Public Housing Occupancy Guidebook and Request for Comments

Summary: This notice advises the public that HUD is revising the Public Housing Occupancy Guidebook (Occupancy Guidebook). HUD will make available a copy of the draft, revised Occupancy Guidebook on its Web site and invites interested parties to comment on HUD's revised Occupancy Guidebook.

Comment Due Date: September 16, 2002.

67 Fed. Reg. 55,861 (Aug. 30, 2002)
The Performance Review Board

Summary: HUD announces the appointments of Vickers B. Meadows as Vice Chairperson, and Frank L. Davis and Dexter J. Sidney as members of the Departmental Performance Review Board.

HUD PIH Notices

Notice PIH 2002-20 (HA) (Aug. 15, 2002)
Housing Choice Voucher Program—Area Exception Payment Standard Review and Reporting Instructions

Summary: This Notice explains how area exception payment standard amounts are determined and reviewed, and provides an overview of changes specified in the housing choice voucher program. Also included are reporting instructions for approved area exceptions.

Expires: Indefinite.

HUD Housing Notices

H 2002-16 (HUD) (Aug. 23, 2002)
Revised Prepayment of Direct Loans on Section 202 and 202/8 Projects with Inclusion of FHA Mortgage Insurance Guidelines

Summary: This Notice supersedes Notice H 00_26, provides guidance for Multifamily Hub/Program Center (Hub/PC) staff and owners of Section 202 Direct Loan projects on prepayment and refinancing of Section 202 Direct Loans projects and Section 202 Direct Loans with project-based Section 8 Rental Assistance (Section 202/8 projects). It sets forth the requirements for a narrowly defined Limited Partnership ownership entity that may acquire and operate the project after prepayment. It authorizes Hub Directors to approve prepayment proposals. It also includes underwriting guidelines where an owner or prospective owner is proposing to use FHA mortgage insurance to refinance the Section 202 Direct Loan.

Expires: August 31, 2003

Notice: H 2002-17 (Aug. 2, 2002)
Renewal of Expiring Project Rental Assistance Contracts (PRACS) for Projects Under the Section 202 Program of Supportive Housing for the Elderly and the Section 811 Program of Supportive Housing for Persons with Disabilities

Summary: This Notice provides instructions for renewing expiring Project Rental Assistance Contracts for Section 202 and Section 811 projects.

Expires: August 31, 2003.

RHS Administrative Notices

RD AN No. 3780 (1930-C) (Aug. 20, 2002)
Civil Rights Laws' Accessibility Requirements that Apply to the Multi-Family Housing (MFH) Program

Summary: Reviews of the MFH program indicate a need to clarify Agency and borrower responsibilities regarding the requirements of section 504 of the *Rehabilitation Act of 1973*, the *Fair Housing Act*, as amended, and the *Americans with Disabilities Act*. This Administrative Notice (AN) clarifies that MFH borrowers are responsible for complying with each of these civil rights laws. The Agency will facilitate compliance by allowing project resources to be used for that purpose and assuring that no further loans are provided to borrowers who fail to comply. This AN provides direction to Agency staff on monitoring, facilitating and responding to borrower compliance issues. Brief summaries of the accessibility requirements of the civil rights laws are provided on Attachment A. Attachment A-1 summarizes how the architectural accessibility requirements of the civil rights laws affect the eligibility for Agency loans.

RHS Unnumbered Letters

Multi-Family Housing Enforcement Team Mission, Goals and Requests for Assistance (July 29, 2002)

Summary: Rural Housing Service (RHS) has established a Multi-Family Housing (MFH) Enforcement Team to improve its efforts to detect and eradicate fraud, waste and abuse in the MFH program. The Team was developed from concepts utilized during the successful joint Office of the Inspector General (OIG)/RHS initiative. Current Team members have been selected from field staff nominees. The following Mission Statement and Statement of Services were adopted for the Enforcement Team: The Mission of the RHS Multi-Family Housing Enforcement Team is to protect the interests of residents, ensure quality housing, restore public trust in Government investments, and eliminate program fraud, waste, and abuse.

Expiration Date: Aug. 31, 2003. ■

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	________	$ ____________
RHCDS (FmHA) Housing Programs: Tenants' and Purchasers' Rights (2d ed. 1995)	$55.00	________	$ ____________
Combined HUD Housing Programs (2d ed.), 1998 Supplement and RHCDS (FmHA) Housing Programs (add $9.00 postage/handling)	$250.00	________	$ ____________
Housing Law Bulletin (annual subscription, 10-12 issues)	$150.00*	________	$ ____________
Welfare and Housing—How Can the Housing Assistance Programs Help Welfare Recipients? (2000)	$5.00*	________	$ ____________
Congress' New Public Housing and Voucher Programs (1998)	$10.00**	________	$ ____________
Housing for All: Keeping the Promise (1995)	$5.00*	________	$ ____________
The Family Self-Sufficiency Program: An Advocate's Guide (1994)	$10.00*	________	$ ____________
Let's Choose a New Owner! What Residents Need to Know When an Owner Wants to Sell an Expiring-Use Project Under Title VI (1993) (master for duplicating)	$10.00*	________	$ ____________
A Passage from Poverty: Self-Sufficiency Policies and the Housing Programs (1991)	$10.00*	________	$ ____________

*Includes postage and handling ** $5.00 each additional copy
All materials are mailed book rate. Allow four weeks for delivery.
For more information on first-class mailing and large quantity discounts, call (510) 251-9400 x108.

Subtotal: ________ $ ____________

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

Postage and Handling: **Number of books ______ x $3.00 per book:** $ ____________

TOTAL AMOUNT ENCLOSED: $ __________

PLEASE TYPE OR PRINT

Name____

Organization____________________________________

Address____

____

______________________________ Zip________________

ALL ORDERS MUST BE PREPAID

Please do not send cash. Make check or money order payable to the NATIONAL HOUSING LAW PROJECT, attach to a copy of this form and send to:

NATIONAL HOUSING LAW PROJECT • Attn: Publications Clerk
614 Grand Avenue, Suite 320 • Oakland, CA 94610

❏ I want to charge my credit card. ❏ Visa ❏ Mastercard

Card #________________________________ Exp. date ______________

Name on card: ____

Credit card billing address ____________________________________

____

Signature (required for credit card) ______________________________

National Housing Law Project
614 Grand Avenue, Suite 320
Oakland, California, 94610

First Class Mail