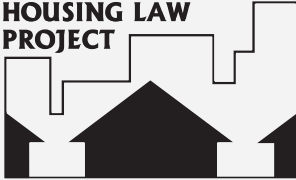


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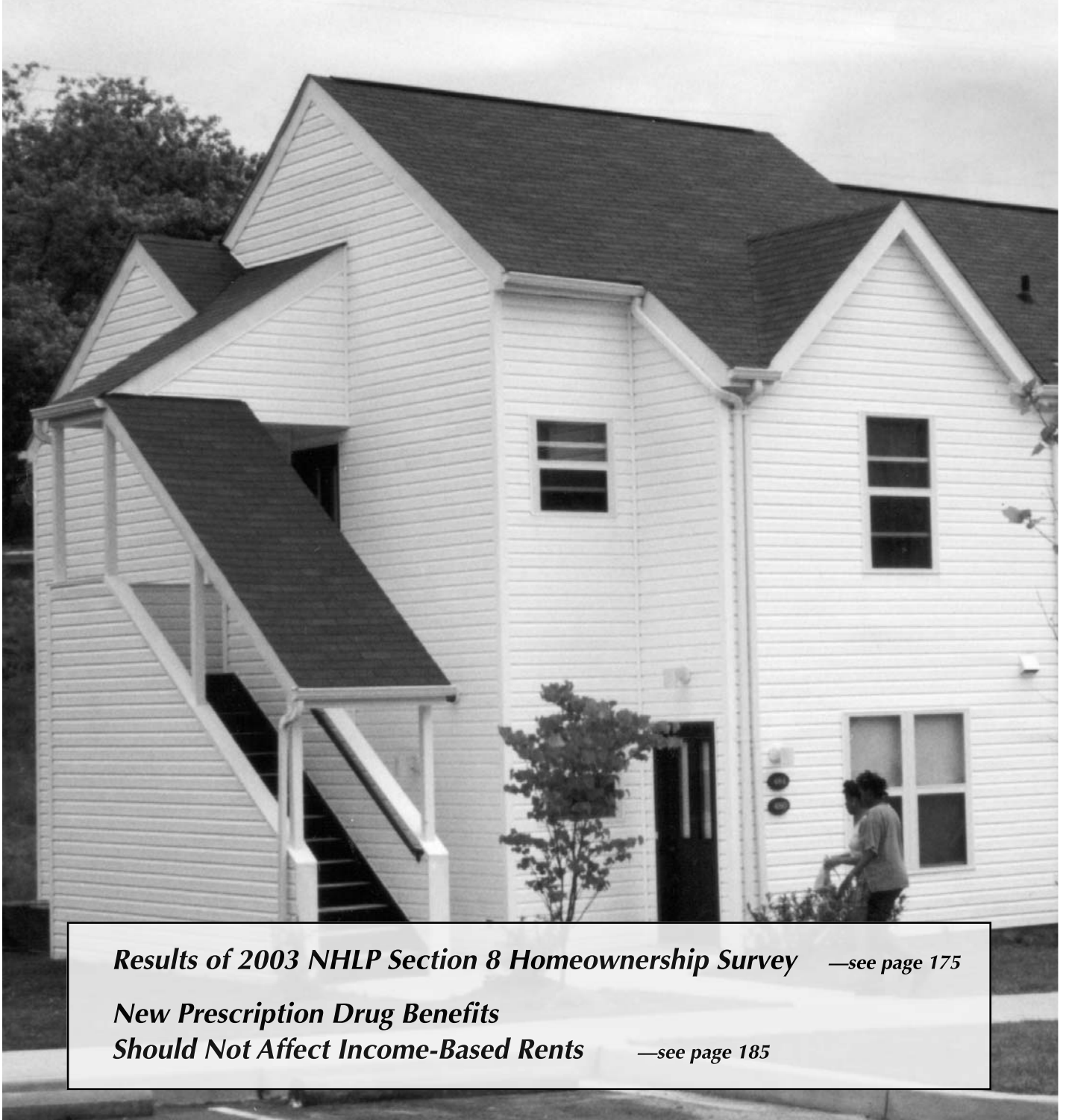


advancing housing justice

# Housing Law Bulletin

Volume 34 • September 2004

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***Results of 2003 NHLP Section 8 Homeownership Survey*** —see page 175


***New Prescription Drug Benefits  
Should Not Affect Income-Based Rents*** —see page 185


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EDITION


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# Housing Law Bulletin

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**Cover:** Prince Fredrick Village, a 25-unit Section 515 family development in Laplata, MD. Owned by Rural Housing Services, Inc. and Tri-County Development Corp. Photo courtesy of Housing Assistance Council.

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## Results of 2003 NHLP Section 8 Homeownership Survey

Over the course of the summer of 2003, the National Housing Law Project (NHLP) gathered information regarding the Section 8 Homeownership program by surveying public housing authorities (PHAs) across the country.<sup>1</sup> The results show, surprisingly, that PHA interest in adopting a Section 8 Homeownership (S8HO) program has continued, despite the budgetary trials and tribulations PHAs have faced nationally from federal funding cuts. The survey also reveals details about the financial resources of participating voucher holders, how PHAs are funding their work on the program, and a possible correlation between PHAs' operation of a Family Self Sufficiency (FSS) program and the operation of an S8HO program.

### Survey Goals and Methodology

Where NHLP's 2002 survey focused exclusively on interest in and perceived challenges to PHAs' start-up of S8HO programs, the 2003 survey included questions pertaining to program operation, including PHAs' and voucher holders' access to financial resources.<sup>2</sup> Survey questions also addressed such issues as homeownership counseling, participant access to loans and loan performance, as well as PHAs' ability to implement a program in a challenging funding environment. Although not the main thrust of the survey, general questions concerning numbers of programs adopted and implemented were included as well, in order to get an updated perspective on program participation.

NHLP received responses from 447 PHAs, which represents 19% of the PHAs to which surveys were sent. The 2003 survey was sent to PHAs regardless of their size, meaning number of vouchers administered.

There are a total of 2.1 million vouchers in the U.S. The total number administered by the respondents to the survey is approximately 510,167,<sup>3</sup> representing 24% of all vouchers in the U.S.

<sup>1</sup>NHLP utilized a list of 2341 PHAs that administer a voucher program. Estimates and calculations of NHLP in its analysis of survey results are based on the universe of the number of PHAs to whom we mailed. Based on HUD estimates of approximately 2600 PHAs administering a voucher program, we assume that our mailing list was missing approximately 260 PHAs.

<sup>2</sup>NHLP, *NHLP Survey Reveals PHAs' Interest in S8HO*, 32 HOUS. L. BULL. 127 (2002) (2002 survey results and analysis).

<sup>3</sup>Number provided is an estimated 1% undercount as several PHAs did not list how many vouchers they administered and such information was not available through HUD.

## Program Implementation— PHA Capacity and Impediments

Results from NHLP's 2003 survey indicate that seventy-four of the total 447 responding PHAs had a total of 661 families or individuals who had successfully completed purchase of a home under an S8HO program. Forty-six out of those seventy-four PHAs, plus another fourteen with no purchases closed, had 202 households in escrow (purchase pending). In other words, a total of sixty PHAs had 202 individuals or families waiting for their home purchase to close. Thus, the total of completed and pending purchases reported in response to the NHLP 2003 survey is 863.<sup>4</sup>

### Does Size Make a Difference in Program Implementation?

Questions have been raised as to whether there are particular PHA attributes that contribute to a successful S8HO program. One concern has been agency size—specifically, whether only large (by number of vouchers administered) PHAs have the capacity to manage a homeownership program. The NHLP survey examined PHA participation in the homeownership program by PHA program size and broke “participation” into four categories:

- 1) Successful Adoption of the Program
- 2) In Process of Drafting Policies for the Program
- 3) Adopted a Program but Were not Successful Implementing
- 4) Have Decided not to Provide the Program

In 2003, NHLP estimated that approximately 700 PHAs had adopted an S8HO program as of January 2003.<sup>5</sup> Adoption, for this purpose, means that the PHA has developed its own program rules within the parameters permitted by statute and regulation. Among respondents that have implemented programs, the number of closings varies significantly by PHA, apparently related to factors such as voucher holder preparation, access to appropriate financing, characteristics of the local housing market, and PHA program management.

According to the 2003 survey, 187 respondents (26.4%) indicated that they had successfully adopted an S8HO program. Of the 118, 3.3% are Extra Large, 33% are Large, 31.3% are Medium High, 17.8% are Medium Low, 10.2% are Small and one PHA (less than 1%) is Very

Small.<sup>6</sup> Though Very Small PHAs appear in this category, the number is insignificant. The bulk of PHAs that have successfully adopted are among the Large and Medium High PHAs.<sup>7</sup>

In the next category, 93 PHAs indicated that they were in the process of drafting S8HO policies. Of those PHAs, 4.3% are Very Small, 24.7% are Small, 18.3% are Medium Low, 26.9% are Medium High, and 20.4% are Large. There were no Extra Large respondents in this category. The majority, 75.3%, indicated that they intended to adopt the program in 2003 or 2004. Almost 24% did not provide a date by when they would adopt the program. Responses in this category were thus evenly distributed across all categories except Very Small and Extra Large.

Only twenty-five PHAs (5.6%) indicated that they had adopted a program but had not successfully implemented it as of the time of the survey. Out of the twenty-five, three are Small PHAs, four are Medium Low, eight are Medium High, and seven are Large. No Very Small or Extra Large programs responded in this category. We do not interpret that response as indicative of whether a PHA of a particular size has problems in implementation. Recent adoption of the program could account for a portion of the PHAs in this category.

Out of 447 responses, 141 PHAs (31.5%) indicated they would not be adopting an S8HO program. Out of those 141, 9.9% are Very Small PHAs, 46% are Small, 19.8% are Medium Low, 11.3% are Medium High, and another 8% are Large or Extra Large. The concentration of negative responses is among Small PHAs.

There are PHAs that indicated they had successfully adopted the program but no participants had purchased a home at the time the survey was conducted. Seventy-four PHAs (16.8% of the 447 respondents) had at least one family who completed the purchase of a home under the S8HO program. Of those seventy-four, 4% are Extra Large PHAs, 29.3% are Large, 14.7% are Medium High, 9.3% are Medium Low, and 5.3% are Small.<sup>8</sup> From these figures, it appears that success is concentrated in Large and Medium High programs. No Very Small programs responded in this category.

Program size has clearly had an impact on which PHAs have adopted or implemented an S8HO program.

<sup>6</sup>The size determination used by NHLP for purposes of this survey is based on the number of vouchers administered by the PHA, to wit: Very Small (one to forty-nine vouchers), Small (fifty to 249 vouchers), Medium Low (250 to 499 vouchers), Medium High (500 to 1249 vouchers), Large (1250 to 9999 vouchers), Extra Large (10,000+ vouchers). This breakdown mirrors that used by HUD in its PHA housing profiles, which categorizes PHAs by the number of public housing units administered. See HUD, *PIH Information Center, HA Profiles*, available at <https://pic.hud.gov/pic/haprofiles/haprofilelist.asp>.

<sup>7</sup>Approximately 21.2% of all PHAs that had successfully adopted the program did so in 2003, just a few weeks or a few months before receiving the survey. Slightly over 38% had adopted the program in 2002.

<sup>8</sup>The large number of PHAs that did not respond at all to this question may limit the utility of the responses we did receive.

<sup>4</sup>Respondents who indicated home purchases or escrows under any other homeownership program were not, of course, counted in these totals.

<sup>5</sup>Estimate based on results from 2002 NHLP survey of PHAs administering at least 300 vouchers.

The majority of PHAs that have had a Successful Adoption of the Program, or were In Process of Drafting Policies for the Program, or had Adopted a Program but Were not Successful Implementing, are Large and Medium High. An insignificant number of Very Small PHAs have drafted policies or successfully implemented the program. In addition, the majority of programs that reported they would not adopt an S8HO program—46%—are Small PHAs.

This breakdown is not necessarily indicative of whether Small or Very Small PHAs will adopt a homeownership program in greater numbers in the future. More likely is that it indicates that they will be among the last to pursue the program unless the impediments that they face are removed.

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*HUD has not provided any additional funding to support PHAs' development, implementation or administration of the S8HO program.*

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#### **Funding for S8HO Program Administration**

Funding is a key concern for PHAs considering start-up of an S8HO program.<sup>9</sup> Developing a homeownership program entails such tasks as drafting local policies, incorporating them into the Section 8 administrative plan, developing program partnerships, and conducting outreach to voucher holders. Program Implementation requires at least a half-time staff person. The Department of Housing and Urban Development (HUD) has not provided any additional funding to support PHAs' development, implementation or administration of the S8HO program. The only related funding offered to PHAs thus far has been on a one-time basis for purposes of hiring additional FSS staff, who may or may not be involved in an S8HO program.<sup>10</sup>

A new voucher program authorized under the final rule in 2002 is the Downpayment Assistance Grants (DAG), which would allow PHAs to offer one-time downpayment assistance instead of mortgage assistance.<sup>11</sup> With the DAG,

the PHA would receive administrative fees (unlike under the homeownership program), and administration of the DAG would probably be less cumbersome. However, PHAs may not actually make grants under the program until HUD publishes a notice in the *Federal Register*. The delay in implementation is caused by the fact that HUD still does not have funds for the DAG program. Only one PHA indicated in its survey response that it intended to offer the DAG. The as-yet unauthorized administrative fee, as well as the program's limited utility for participants, have likely discouraged PHA interest.

Of the seventy-four respondents that had completed at least one Section 8 home purchase, thirty PHAs (40.5%) indicated that they had applied for outside funding, beyond existing administrative funds in order to pay for administration of the homeownership program.<sup>12</sup> Another forty-four PHAs had successfully adopted a program, but not all had home purchases completed yet. Out of those forty-four, thirty-nine PHAs (88.6%) had sought outside funding.

Out of the twenty-five PHAs that had adopted but not yet successfully implemented the program, twenty (80%) indicated that they had also applied for outside funding to pay for administration or other costs associated with program implementation.

Thus, out of 143 PHAs that had adopted a homeownership program (whether operating successfully or unsuccessfully) 62.2% (eighty-nine) were turning to sources of funding above and beyond their allotment of administrative funds from HUD.

The types and sources of funding that PHAs have received include:

- funding from HUD for FSS staff
- Iowa Homeownership Education Project, a private, nonprofit entity, for purchase of computer equipment
- state downpayment assistance loan funds
- a National Housing Services grant
- funding from Fannie Mae
- county government to fund a homeownership coordinator
- state Department of Housing and Community Affairs downpayment and closing cost assistance funds
- Community Development Block Grant funds
- state housing finance agency funds

These responses not only indicate PHA resourcefulness but provide concrete examples of types and sources of funding that other PHAs could consider pursuing. The

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<sup>9</sup>NHLP, *NHLP Survey Reveals PHAs' Interest in S8HO*, 32 HOUS. L. BULL. 130 (2002).

<sup>10</sup>See Super Notice of Funding Availability (SuperNOFA) for HUD's Discretionary Grants Programs for Fiscal Year 2002, 67 Fed. Reg. 13,826 (Mar. 26, 2002).

<sup>11</sup>The DAG is a one-time grant of twelve months' worth of Section 8 assistance in lieu of mortgage assistance. PHAs may not offer the DAG until Congressional authorization. See 67 Fed. Reg. 64,484 (Oct. 18, 2002). Pub. L. No. 106-569, tit. III, §§ 301 *et seq.*, 114 Stat. 2944 (2000). The American Homeownership and Economic Opportunity Act of 2000 amended §8(y) of the United State Housing Act of 1937, 42 U.S.C.A. 1437f(y)(7)(West Supp. 2000). The proposed rule was published on June 13, 2001, for public comment, 66 Fed. Reg. 32,198 (June 13, 2001).

<sup>12</sup>Not all applications were successful.

majority of funding sought was to provide PHAs with staffing or other resources to support program implementation. However, some funding (e.g., downpayment and closing cost assistance) was apparently used to augment participant resources, indicating that some PHAs felt this was a need. The data suggests that PHAs and other entities wishing to bring an S8HO program to their community should expect that the PHA will need funding over and above its existing administrative grant from HUD.<sup>13</sup>

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*The data suggests that PHAs and other entities wishing to bring an S8HO program to their community should expect that the PHA will need funding over and above its existing administrative grant from HUD.*

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#### **PHA Program Interest**

PHAs, at least as of summer of 2003, still evinced interest in adoption of an S8HO program, despite a challenging funding environment at the federal level. Out of the 447 respondents, 11.4% were in the process of adopting a program within the next two to twelve months. Eight of these PHAs are Small and two are Very Small. Another 3.5% were in the process of researching whether the program was feasible in their area.

Impediments to program implementation cited by PHAs are:

- lack of lender interest
- insufficient staffing
- expensive single-family homes
- inadequate purchase subsidies
- problems with participant credit

There was no apparent correlation between types of impediments listed and PHA size.

#### **Legal Assistance**

Thirty-five PHAs reported that they have law offices working with them on the homeownership program, including private law firms, legal service programs, the city attorney's office, and/or the PHA's in-house counsel.

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<sup>13</sup>Survey responses reflect PHA efforts made before the most severe of Congressional funding attacks. If those attacks continue, the number of PHAs requiring outside funding to adopt and implement a homeownership program will increase.

#### **Homeownership Counseling**

PHAs generally rely on nonprofit partners to satisfy the S8HO program requirement that participants receive pre-purchase counseling. There appear to be significant variations between PHAs with regard to the length and content of pre-purchase counseling programs they require. The majority of respondents (85.5%) used outside partners to provide homeownership counseling to program participants.

Post-purchase counseling is not required under the S8HO program, but it can be a valuable component to a homeownership program. Whether PHAs require or encourage post-purchase counseling continues to be an area of interest, as counseling is seen as vital to helping participants become successful homeowners. NHLP survey results indicate that the majority of the responding PHAs (66.4%) have made post-purchase counseling mandatory. Still, for the remaining 34.6% to use incentives instead is a considerable number, and it will be worthwhile examining in years to come which method is most effective. Post-purchase counseling classes or trainings range from time commitments as minimal as one month to as long as five years. Almost 6% require one month's worth of counseling.<sup>14</sup> Another 6% require six months of counseling. Five percent require twelve months of counseling. The rest of the responses were scattered in terms of number of months or number of courses required of participants. Among PHAs that encouraged but did not require post-purchase counseling, there was also a marked lack of uniformity in terms of what was offered to participants.

The lack of uniformity reflects the newness of the concept of post-purchase homeownership counseling. This is an area where further study will be beneficial in years to come.

#### **Participating Families—Financial Resources**

##### **Personal Savings**

Potential homeowners, low- and moderate-income alike, must arrange for sufficient funds to cover downpayment and closing costs on the purchase of a home. The S8HO program is available only to low-income, first-time homebuyers, which means that participants are among those least likely to have a significant amount of funds saved. Most states and a number of cities and counties offer downpayment or closing cost assistance.<sup>15</sup> However, that assistance may not be sufficient to account for the

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<sup>14</sup>No additional information provided regarding the number of hours of counseling in that month.

<sup>15</sup>NHLP has published a list of funding streams available to fund downpayment assistance nationally, as well as matched savings program resources. See *First-Time Home Buyer Downpayment Resources—Nationally*, at <http://www.nhlp.org/html/sec8/sec8home/homeownership.htm>. In addition, for the San Francisco Bay Area, NHLP has compiled a list of local downpayment and closing cost assistance programs, available upon request from staff attorney Maeve Elise Brown at (510) 251-9400, ext. 110.

cost of housing. In higher-cost parts of the country, that is certainly the case. The ability of voucher holders to save money is critical to developing a pool of people who are able to take advantage of the S8HO program.

For that reason, NHLP asked PHAs how much in savings participants had on average at the time of purchase of a home through the program, including through an FSS or Individual Development Account (IDA) program. IDAs are matched savings program that may be run by any interested agency or an employer, under which the account-holder agrees to meet minimum savings goals in exchange for which savings are matched at varying levels (typically two to one).<sup>16</sup>

Sixty-one (82%) of the seventy-four programs with purchases indicated that participants had personal savings from at least one source at the time of purchase. Forty-nine PHAs indicated that their participants had FSS savings.<sup>17</sup> The vast majority of respondents—398—did not list FSS as a source of participants' savings. That result could reflect a lack of voucher holder interest in participating in the FSS program but is just as likely to be reflective of a failure by PHAs to institute an FSS program.<sup>18</sup> The aggregate amount of dollars saved through an FSS program, reported by the forty-nine PHAs, is \$234,830. Exactly half of the PHAs with at least one home purchase utilized FSS funds. The average FSS savings level for voucher holders at those thirty-seven PHAs was \$4596.73 (\$170,079 total savings divided by the thirty-seven PHAs).

Only seventeen PHAs reported that participants used IDAs.<sup>19</sup> This lower number could reflect the fact that IDAs are not widely available. The average savings amount for IDA holders was \$3748.06 (\$63,717 divided by seventeen). Eleven of the seventeen had an IDA as well as an FSS savings account.

Voucher holders also brought in savings from other, unspecified sources. Twenty-seven PHAs reported a total of \$75,873, for an average of \$2810.11 per household in other savings that participants had available at the time of purchase. Those funds were used in combination with FSS savings at 16.2% of the PHAs that had reported at least one home purchase.

One possible conclusion to draw from these results is that successful participants are savers. Average sav-

ings amounts, from any source, are significant, given the income level of the savers. Between personal savings and any local or state downpayment or closing cost assistance programs that are available, the savings amount was sufficient for participants to become homeowners. Also noteworthy is that 66% of the seventy-four PHAs with completed purchases used an FSS program for savings. A possible correlation between the FSS program and the S8HO program is discussed below.

### Lenders, Loans and Loan Performance

A concern in program development has been whether or not participants have been able to access affordable, conventional mortgage loans. A lack of willing lenders continues to be the number one cited reason for PHAs not successfully implementing the program, followed by insufficient staffing.<sup>20</sup> Lenders who have agreed to participate span the range from smaller, local banks and credit unions to State Housing Finance agencies and national banks.

Lenders, PHAs and community groups alike have had questions about the riskiness of borrowers or the program itself. One might expect to see a concern about risk reflected in the interest rates of loans from participating lenders. NHLP's survey solicited information regarding the interest rate on mortgage loans that participants obtained. The question was general, requesting "typical" first mortgage interest rates, rather than requesting a breakdown of the actual interest rate each participant obtained. Therefore, the responses received are less exact than those one would expect from a focused study on the topic. They do, however, give a starting place for discussion.

Sixty-two PHAs provided interest rate information. Eleven percent of these indicated interest rates of 5% or lower. Twenty-one percent reported rates between 5.5% and 5.8%. Twenty-two percent reported rates between 5.9% and 6%. At the low end was an interest rate of 0% (first mortgage carried by Habitat for Humanity), and at the high end was an adjustable mortgage rate of 8.85%.

The original pilot programs for S8HO were first adopted in 1999. Home mortgage rates on fixed rate, conventional mortgages since 1999 have been:

1999	7.43
2000	8.06
2001	6.97
2002	6.54
2003	5.82 <sup>21</sup>

<sup>16</sup>Funds may generally only be accessed at the end of the agreed-upon savings period (one to three years typically), and may only be used for limited purposes (such as first-time home purchase, microenterprise, or education). Financial education is generally a mandatory component of such programs. For more information on IDAs, visit the IDAnetwork at <http://idanetwork.cfed.org>.

<sup>17</sup>Those forty-nine include PHAs with at least one purchase made under the program as well as PHAs with no purchase yet made.

<sup>18</sup>See NHLP, *Promoting Implementation of the Family Self-Sufficiency Program*, 31 HOUS. L. BULL. 193 (2001).

<sup>19</sup>When the total number of responses adds up to less than 100%, that is indicative of missing information on a response. Unclear responses were not included in any of the analyses.

<sup>20</sup>See NHLP, *NHLP Survey Reveals PHAs' Interest in S8HO*, 32 HOUS. L. BULL. 127 (2002). PHAs reported at that time that lack of lender interest was an impediment to implementation.

<sup>21</sup>Historical data obtained from Federal Home Loan Mortgage Corporation, posted on Federal Reserve Board site at <http://www.federalreserve.gov/releases/h15/data/a/cm.txt>.

Interest rates provided by PHAs showed that most participants in their S8HO program had obtained interest rates that were comparable to or competitive with the going rate at the time on conventional mortgage loans. The competitive interest rates also suggest that most participants are accessing loans that are not predatory (though interest rate is certainly not the only indicator of whether or not a loan is predatory).

Sixty-five PHAs out of the seventy-four with completed home purchases reported being aware of predatory lending practices in their community, and 111 PHAs had safeguards in place to help participants avoid predatory practices. These safeguards include:

- PHA review of purchase agreements before purchase is finalized
- pre- and post-purchase counseling
- predatory lending video as part of pre-purchase counseling
- working with “established” lenders
- PHA’s legal department reviews all Good Faith Estimates, Truth in Lending disclosures and closing documents
- PHA rejection of proposed lender

Nine PHAs reported in response to the survey that existing or potential Section 8 homeowners experienced “improper lending practices.” Those practices included:

- a proposed “flexible mortgage” and balloon payments
- costly loans through brokers (the respondent who offered this comment noted this may not be improper)
- proposed excessive fees, high interest rates, debt consolidation, credit insurance
- bait and switch (on loan terms), and other issues concerning the Good Faith Estimate and Truth in Lending requirements (nature of problems not specified)

The survey did not ask whether participants are being solicited by predatory lenders now that they are homeowners.

## Relationship of S8HO to FSS

PHAs have been slow to warm to developing FSS programs. Conversely, those PHAs with an FSS program have sometimes found it challenging to attract participants.<sup>22</sup>

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<sup>22</sup>Our survey did not collect data on how many PHAs were restricting homeownership program participation to FSS participants. From the past four years of our experience with the homeownership program, we have observed that those PHAs who do so also include seniors and people with disabilities on their list of eligible participants.

With that in mind, NHLP proposed to find out whether offering an S8HO program to voucher holders helped PHAs attract more participants to their FSS program.

For this question, some of the PHAs that responded did not indicate whether any homeownership program participants had any savings as yet under the FSS program. Thus the number of respondents to this question exceeds the number who indicated how much in FSS savings participants had at the time of purchase under the S8HO program.

The results are split, as follows:

- 43.6% of PHAs report an increase in FSS enrollment since adoption of the S8HO program
- 51.8% report no increase since adoption of the S8HO program

Almost 15% of PHAs reported that the increase in FSS enrollment was over 50%. Almost 44% of reporting PHAs indicate an increase in FSS enrollment contemporaneous to adoption of the homeownership program. Such a significant increase may be attributable to PHAs requiring that an S8HO participant also participate in an FSS program. There may be other variables to consider. For example, two PHAs reported that their FSS program is “capped,” or was at maximum capacity at the time of adoption of the homeownership program. The PHA could not know how many people wanted to participate in the FSS program as a result of the S8HO program without surveying or tracking of some sort.

## Participant Performance in S8HO Program

The focus of S8HO research has been largely on program development. NHLP’s 2003 survey took this area of research a step further by beginning to explore participant success in the program. One way to measure success is by examination of whether participants, as low-income, first-time homebuyers, are able to manage their new financial responsibility.

Seventy-four of the PHAs who responded to NHLP’s 2003 survey had 661 households who successfully purchased a home under the S8HO program. Out of those seventy-four PHAs, one PHA indicated that one or more participants had defaulted on the mortgage loan.<sup>23</sup> Five of the seventy-four did not respond to the question. The other 68 PHAs—approximately 92%—indicated that none of their participants had defaulted on their mortgage. The PHA with the default had, in fact, only one household in default, out of the twenty-six who had successfully completed purchase of a home. That same PHA had another three participants in escrow.

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<sup>23</sup>The survey question defined default as “stopped paying [on mortgage] for 90 days or more.”

## Earned Income Disregards Still a Hidden Treasure for Many Residents

Five PHAs reported having participants who are making late payments on their mortgage. A PHA with six participants in the program reported one family making late payments. Three other PHAs with six, thirty-seven and twenty purchases respectively reported that 1% of participants were making late mortgage payments. The fifth PHA reported 3.8% making late payments out of twenty-six participants. One family had made late payments three to six times per year. Another family was late once, a third family late twice. Two of the five PHAs did not respond to the question of how many times payments were made late. The pool of responses was too small to be useful.

Sixty-eight of the seventy-four PHAs (92%) with participants who have purchased a home under the program reported having a system in place to address default and/or late payments. Systems include:

- having the lender agree to report late payments to the PHA, at which point the PHA contacts the participant for counseling
- having the lender notify the PHA of any changes in the mortgage payment at the same time it notifies the participant
- post-purchase counseling that encompasses foreclosure prevention issues

NHLP's survey questions regarding family success in managing mortgages are a small start to an area worthy of more research. Additional data that was not gathered but could help contextualize responses to these particular questions would be the length of time that participants had been paying on their mortgage at the time of the PHAs' response, how households are managing other homeownership and living expenses, and more specific demographic data about participating families. ■

Since 1990, a little-known provision of the law, the earned income disregard (EID), has been around in one form or another.<sup>1</sup> This often hidden treasure allows some residents of public housing and disabled residents in certain other subsidized housing programs to keep all or half of any newly acquired income in certain circumstances.<sup>2</sup> The provisions of the law are simple: housing agencies are required to disregard (or not count) the income of certain residents who, after being previously unemployed or underemployed, obtain a job or experience an increase in their earned income.<sup>3</sup> As an incentive to move residents toward greater self-sufficiency,<sup>4</sup> this newly acquired income may not be used as a basis to raise residents' rents or contributions towards rent. Without such a disregard, residents' rents would rise as they moved into employment, thus providing a disincentive for them to improve their economic well-being.

In spite of the age of this law and the tremendous benefit it confers upon residents, many public housing authorities (PHAs) have only recently implemented the EID for residents. For those residents fortunate enough to have received the benefit of the EID, such savings have provided them with an opportunity to save literally thousands of dollars for use toward savings, education, a down payment on a house and many other worthwhile ventures.

### NHLP Survey on EID Implementation

In a recent NHLP survey of 293 PHAs,<sup>5</sup> only 59% reported that they had fully implemented the EID for their public housing residents, while only 42% responded that they had fully implemented such benefits for their disabled Section 8 residents. Although seventy-six agencies failed to respond entirely to this question, forty-five

<sup>1</sup>Pub. L. No. 105-276, tit. II, 112 Stat. 2469, 2472 (1998); 42 U.S.C. § 1437(a) (1998); Pub. L. No. 101-625, § 515(b), 104 Stat. 4199 (Nov. 28, 1990). See also NHLP, *Final Admission and Occupancy Regulations Issued*, 30 HOUS. L. BULL. 33, 33 (2000); NHLP, *CSH Presses HUD on Earned Income Disregards for Persons with Disabilities*, 33 HOUS. L. BULL. 441, 459 (2003).

<sup>2</sup>See 24 C.F.R. §§ 960.255, 5.617 (2004) (100% of this new income may not be counted toward annual income for the first year and 50% may not be counted for the second year).

<sup>3</sup>24 C.F.R. §§ 960.255(a), 5.617 (b) & (c) (2004).

<sup>4</sup>42 U.S.C.A. § 1437a(a)(2)(D) (West 2003).

<sup>5</sup>A four-page survey form was mailed by NHLP staff from September 2003 to January 2004. The survey consisted of two parts, one addressing public housing and the second addressing Section 8 voucher recipients with disabilities. The results were tabulated by NHLP staff in August 2004. A copy of the survey form will be available on the NHLP Web site.

of those that did acknowledged that they had either not implemented or had only partially implemented EID requirements. These agencies cited a variety of reasons for their failure including inadequate staffing, inconsistent and inadequate staff training, high caseloads, inadequate funding and not enough resources. Surprisingly, twenty of these agencies responded that they had never even heard of the EID.

## Consequences of Failure to Implement

For those agencies late in implementing the EID or who failed to do so altogether, there can be dire consequences, which include litigation, bad press and sanctions from the Department of Housing and Urban Development (HUD). Legal services advocates that have brought EID litigation on behalf of residents have had tremendous success in garnering thousands and often millions of dollars in damages for their clients. A class action lawsuit recently settled by advocates at Community Legal Services against the Philadelphia Housing Authority is expected to net residents millions of dollars in lost EID benefits.<sup>6</sup> In *Phillips v. Philadelphia Housing Authority*, advocates were able to obtain not only prospective relief, but retroactive relief, thus requiring the Philadelphia Housing Authority to re-examine tenant files going back to 1996.<sup>7</sup>

Even without litigation, advocates are often able to bring their PHAs to bear by simply threatening litigation or using the media to exert pressure. In Washington, D.C., the housing authority agreed to temporarily halt all non-payment public housing evictions and conduct employee training on the EID after successful negotiations with community housing advocates in 2002. According to an article published in the *Washington Post* last year, it was estimated that the 711 residents who received the EID benefit were able to save \$4 million.<sup>8</sup>

Aside from the possibility of being sued, PHAs also risk losing part of their operating subsidy and other funds from HUD as sanctions for their failure to comply.<sup>9</sup> These sanctions include a penalty of 10% of a PHA's monthly administrative fee for housing voucher program grantees or 5% per month of the PHA's operating subsidy.<sup>10</sup> Each year, HUD conducts audits of PHA protocols and examines tenant files under a program known as the Rental Housing Integrity Improvement Project (RHIIP), which began

in 2001.<sup>11</sup> These visits are called Rental Integrity Monitoring (RIM) reviews which are designed to assess whether PHAs are complying with their statutory, regulatory and HUD administrative requirements in properly determining family income and rent with the goal of reducing errors. In a report issued by HUD at the end of 2003, it was estimated that 60% of all subsidized rental calculations contained errors which amounted to nearly \$2 billion in overpayments of subsidies by the government and \$1.2 billion in underpayments.<sup>12</sup> These estimates include \$107.5 million in subsidy underpayments on behalf of public housing residents and \$326.7 million in the Section 8 housing choice voucher and moderate rehabilitation programs.<sup>13</sup> These subsidy underpayments represent quite a significant overcharge to residents.

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One recent failed RIM review occurred in a follow-up inspection by HUD of the Housing Authority of the City of Baltimore on November 20, 2003, during which time it was discovered that all 95 files examined contained errors.<sup>14</sup> Those errors included missing verifications in tenant files, failure to adopt flat rents, unsigned Authorization for Release of Information/Privacy Act notices, discrepancies on eligible immigration status, failure to offer families a choice of rent, miscalculations of tenant rents and lack of quality control procedures.<sup>15</sup>

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<sup>11</sup>An FAQ RHIIP sheet is available at [http://www.hud.gov/offices/pih/programs/ph/rhiip/faq\\_rim](http://www.hud.gov/offices/pih/programs/ph/rhiip/faq_rim).

<sup>12</sup>HUD, OFFICE OF INSPECTOR GENERAL, PERFORMANCE AND ACCOUNTABILITY REPORT FISCAL YEAR 2003, § 3.2.3 (2003) available at <http://www.huduser.org/publications/pubasst/qualitycontrol.html>; See also RANDY W. MCGINNIS, GAF AUDIT OF THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD) FINANCIAL STATEMENTS FOR FISCAL YEARS 2003 AND 2002, CASE NO. 2004-FO-0003 (2003), available at <http://www.hud.gov/utilities/intercept.cfm?oig/ig4f0003.pdf>.

<sup>13</sup>RANDY W. MCGINNIS, GAF AUDIT OF THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD) FINANCIAL STATEMENTS FOR FISCAL YEARS 2003 AND 2002, CASE NO. 2004-FO-0003, 2-51 (2003), available at <http://www.hud.gov/utilities/intercept.cfm?oig/ig4f0003.pdf>.

<sup>14</sup>BILL TAMBURRINO, HUD, REPORT ON RENTAL INTEGRITY MONITORING (RIM) FOLLOW-UP REVIEW OF THE HOUSING AUTHORITY OF BALTIMORE PUBLIC HOUSING PROGRAM 2 (2003).

<sup>15</sup>*Id.* at 1-9.

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<sup>6</sup>*Phillips v. Philadelphia Hous. Auth.*, Civ. No. 00-4275 (E.D. Pa. Aug. 21, 2000). The Settlement Agreement was signed by the parties and provisionally approved by the district court on August 17, 2004, with a December 20, 2004, hearing date for class objections to the settlement terms.

<sup>7</sup>This information provided to NHLP staff in an August 26, 2004, conversation with George Gould of Community Legal Services, counsel for Patricia Phillips and class members.

<sup>8</sup>Serge Kovaleski, *Public Housing Delay Shorts Tenant*, WASH. POST, July 28, 2003, at B1, B3.

<sup>9</sup>Sanction Notice FAQs, HUD Notice PIH 2003-34, 4 (Dec. 19, 2003).

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

On December 19, 2003, HUD posted on its Web site a frequently asked questions document on this process of review of errors and sanctions.<sup>16</sup> Interestingly, according to this document, PHAs that overcalculate a tenant's rent, thus owing the tenant money, are actually entitled to reimbursement from HUD under the Section 8 housing choice voucher program but not under the public housing program.<sup>17</sup> When asked about this difference, HUD replied

that while the housing choice voucher program has a year-end settlement process to account for such differences, the public housing program does not.<sup>18</sup> For obvious reasons, this serves as a disincentive for public housing agencies to comply with the mandatory EID in their public housing programs and is one more reason why PHA compliance with the EID requirements and any written rent policies concerning overpayment and underpayment of subsidies should be monitored closely. ■

<sup>16</sup>Sanction Notice FAQs, HUD Notice PIH 2003-34 (Dec. 19, 2003). See also HUD, *Incentives, Disallowed Costs, Sanctions and Collection of Excess Subsidies* at <http://www.hud.gov/offices/pih/programs/ph/rhiip/sanctionnoticefaq.cfm> (content updated May 17, 2004).

<sup>17</sup>HUD, *Incentives, Disallowed Costs, Sanctions and Collection of Excess Subsidies, Q & A #8*, at <http://www.hud.gov/offices/pih/programs/ph/rhiip/sanctionnoticefaq.cfm> (content updated May 17, 2004).

<sup>18</sup>*Id.*

## Who Qualifies for the Public Housing Earned Income Disregard?

In October 1999, the Department of Housing and Urban Development (HUD) published regulations making the earned income disregard (EID) provisions of the Quality Housing and Work Responsibility Act of 1998<sup>1</sup> applicable to all public housing residents.

The EID regulations mandate that public housing authorities (PHAs) disregard new income of certain residents who, after being previously unemployed, become employed or experience an increase in earned income.<sup>2</sup> Under the EID, 100% of this new income is not counted toward annual income for the first year and 50% is not counted for the second year.<sup>3</sup> Such credit is intended to provide incentives for residents to become employed and self-sufficient. Without such disregard, tenants' rents would rise as they move into employment, providing a disincentive for residents to improve their own economic well-being.

### Previously Unemployed Household Members

A tenant qualifies for the EID if family income increases as a result of the employment of a family member who was unemployed for one or more years.<sup>4</sup> The definition of previously unemployed includes a person who has earned in the past twelve months no more than the equivalent of 500 times the greater of the federal or state hourly minimum wage.<sup>5</sup>

### Family Receipt of Welfare

A household is entitled to the EID if the family member who is currently receiving or in the past six months received welfare benefits experiences an increase in earned income.<sup>6</sup> Welfare benefits include any assistance, benefits or services received under any state program for Temporary Assistance for Needy Families (TANF) funded under

continued on page 184

<sup>1</sup>Pub. L. No. 105-276, tit. V, § 508(b), 112 Stat. 2461, 2527 (1998). See NHLP, *Final Admission and Occupancy Regulations Issued*, 30 HOUS. L. BULL. 33, 33 (2000).

<sup>2</sup>24 C.F.R. § 960.255 (2003).

<sup>3</sup>*Id.* at § 960.255(a).

<sup>4</sup>*Id.* at § 960.255(a)(i); 42 U.S.C. § 1437a(d)(3)(B)(i) (2003).

<sup>5</sup>24 C.F.R. § 960.255(a) (2003).

<sup>6</sup>HUD, HUD's Admissions and Occupancy FAQ, Frequently Asked Questions about the Mandatory Earned Income Disregard from Annual Income, Section II.C, Q & A 20, at [http://www.hud.gov/offices/PIH/phr/about/ao\\_fa\\_qeid.cfm](http://www.hud.gov/offices/PIH/phr/about/ao_fa_qeid.cfm).

Part A of Title IV of the Social Security Act, as determined by the local housing agency in consultation with the local agencies administering TANF and welfare to work programs.<sup>7</sup> The TANF program is not limited to monthly income maintenance (which may be in any amount) but may also include such benefits and services as one-time payments, wage subsidies and transportation assistance provided that the total amount over a six-month period of these items is at least \$500.<sup>8</sup>

### Self-Sufficiency Programs

A household may also qualify for the EID if its income increases due to increased earnings of a household member during that member's participation in job training or an "economic self-sufficiency program."<sup>9</sup> An "economic self-sufficiency program" is defined to include any program designed to assist tenants in gaining economic independence.<sup>10</sup> This encompasses a large number and a wide variety of programs, including, but not limited to, job training, English proficiency and substance abuse programs.<sup>11</sup> It may also include enrollment in general non-vocational courses at a community college or training or activities at a sheltered workshop.

### Note on EID Individual Savings Accounts

PHAs are permitted to offer residents who qualify for the mandatory EID the alternative of receiving the credit or putting the rent overage in a savings account.<sup>12</sup> The regulations provide that amounts deposited in such a savings account may be withdrawn only for the purpose of purchasing a home,<sup>13</sup> paying education costs of family members,<sup>14</sup> moving out of public or assisted housing,<sup>15</sup> or paying any other expense authorized by the PHA for the purpose of promoting the economic self-sufficiency of residents of public housing.<sup>16</sup>

### Additional Income Disregards for Persons with Disabilities

HUD regulations also contain a separate income disregard for disabled families outside of the public housing program.<sup>17</sup> This provision is applicable only to participants in the HOME Investment Partnerships Program,<sup>18</sup> the Housing Opportunities for Persons with AIDS program,<sup>19</sup> the Supportive Housing Program,<sup>20</sup> and the Housing Choice Voucher Program.<sup>21</sup> The disregard works virtually identically to the public housing disregard, but applies when a family member who is the person with the disability experiences an increase in income due to new employment while participating in a self-sufficiency program or within six months of receiving welfare.<sup>22</sup> As with the public housing disregard, the regulations provide for a 100% disregard for twelve months, followed by a 50% disregard for twelve months, over a maximum period of four years.<sup>23</sup> It is anticipated that many public housing authorities, even if complying with the disregard for public housing residents, have not come into compliance with similar disregards for persons with disabilities.

More information on the Earned Income Disregard can be found on the NHLP Web site under *public housing*.<sup>24</sup> ■

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<sup>7</sup>*Id.* at Q & A 8.

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

<sup>9</sup>24 C.F.R. § 960.255(a)(ii) (2001); 42 U.S.C. § 1437a(d)(3)(B)(ii) (2003).

<sup>10</sup>24 C.F.R. § 5.603(b) (2003).

<sup>11</sup>*Id.* at § 5.603(b).

<sup>12</sup>42 U.S.C. § 1437a (2003); 24 C.F.R. § 960.255(d) (2003).

<sup>13</sup>24 C.F.R. § 960.255(d)(3)(i) (2003).

<sup>14</sup>*Id.* at § 960.255(d)(3)(ii).

<sup>15</sup>*Id.* at § 960.255(d)(3)(iii).

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<sup>16</sup>*Id.* at § 960.255(d)(3)(iv).

<sup>17</sup>*Id.* at § 5.617.

<sup>18</sup>*Id.* at pt. 92.

<sup>19</sup>*Id.* at pt. 574.

<sup>20</sup>*Id.* at pt. 583.

<sup>21</sup>*Id.* at pt. 982.

<sup>22</sup>*Id.* at § 5.617(b).

<sup>23</sup>*Id.* at § 5.617(c).

<sup>24</sup><http://www.nhlp.org>.

# New Prescription Drug Benefits Should Not Affect Income-Based Rents

The Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA),<sup>1</sup> provides very-low-income senior and disabled Medicare recipient households with a \$600 Medicare prescription drug credit and a discount on prescription medications purchased in excess of the \$600 credit.<sup>2</sup> The discount is also available to all participating senior households regardless of whether they qualify or receive the \$600 credit.

## Prescription Drug Benefits and the Calculation of Other Benefits

The MMA provides that

[t]he availability of negotiated prices or transitional assistance under this Section shall not be treated as benefits or otherwise taken into account in determining an individual's eligibility for, or amount of benefit under, any other Federal program.<sup>3</sup>

As the Department of Health and Human Services (HHS) has explained: "In other words, a person should not be disadvantaged under other Federal programs, . . . because he or she is getting a discount under a Medicare-Approved Drug Discount Card, and may also be getting a \$600 credit to help pay for prescription drugs."<sup>4</sup> For the housing programs, that means that the credit must be excluded from calculations of household income used to determine rent for any of the subsidized housing and voucher programs assisted by the Department of Hous-

ing and Urban Development (HUD)<sup>5</sup> or financed by the Rural Housing Service (RHS). It also means that eligible residents should be able to include the full cost of their prescription medications when determining their eligibility for HUD and RHS programs and the amount of medical expense deductions from household income.<sup>6</sup> Under the federal housing programs, elderly and disabled households may exclude from household income medical expenses exceeding 3% of gross annual income.<sup>7</sup>

## Recent HUD Notice on MMA Amendments

On July 15, 2004, HUD issued a notice informing public housing agencies, owners and managers of the MMA amendments.<sup>8</sup> This notice was issued after the National Housing Law Project (NHLP) raised the issue with HUD.<sup>9</sup> In addition to the July 15 notice, HUD should publish a notice in the *Federal Register* listing these benefits as those that should be excluded from household income and those that should be included when determining the medical cost deduction. Publication in the *Federal Register* is important because that is the procedure that HUD has established for notifying parties of all other similar exclusions mandated by other laws.<sup>10</sup> HUD's publication of such a notice would also ensure that the credits and the benefits of the prescription discounts are excluded from the rent calculations for RHS assisted housing.<sup>11</sup> If HUD were to publish such a notice in the *Federal Register*, it should also list (1) Japanese-American Concentration

<sup>1</sup>Pub. L. No. 108-173, § 1860D-31(g)(6) (2003) (codified at 42 U.S.C. § 1395w-141(g)(6)). More information regarding the Medicare Prescription Drug Discount Card and Transitional Assistance can be found at the Department of Health and Human Services Web site at <http://www.cms.hhs.gov/media/press/release.asp?Conter=990>. To be eligible for Medicare, an individual or a spouse must have worked for at least 10 years in Medicare-covered employment, be at least 65 years old, and be a citizen or permanent resident of the United States. Younger individuals may also qualify if they are disabled or have end-stage renal disease.

<sup>2</sup>Beneficiaries whose income in 2004 is not more than \$12,569 if single, or no more than \$16,862 if married (including their spouse's income), may qualify for the \$600 credit. For beneficiaries applying for the \$600 credit in 2005, their 2005 income may not exceed 135% of the federal poverty line for 2005. See Many Medicare Discount Cards Offer Big Savings, Medicare News (June 23, 2004) <http://www.cms.hhs.gov/media/press/release.asp?Counter=1094>.

<sup>3</sup>42 U.S.C.A. § 1860D-31(G)(6) (West WESTLAW current through P.L. 108-279 approved 7-22-04).

<sup>4</sup>Letter from Dennis G. Smith, HHS Center for Medicaid and State Operations, to State Medicaid Directors (July 19, 2004), available at <http://www.cms.hhs.gov/states/letters>.

<sup>5</sup>The programs affected by the MMA include public housing, Housing Choice Voucher Program, Section 221(d)(3) BMIR, Section 236, Rental Assistance Program (RAP), Section 101 Rent Supplement, Project-Based Section 8, Section 202 PAC, Section 202 PRAC and Section 811 PRAC.

<sup>6</sup>Income calculation regarding Medicare Prescription Drug Cards and Transitional Assistance, HUD Notice PIH-2004-11 and H-04-11 (July 15, 2004) ("PHAs and Owners and Management Agents must . . . [when applicable] include as a medical deduction the Medicare assistance provided for the cost of drugs pursuant to prescription drug cards, negotiated drug price, or transitional assistance subsidies.").

<sup>7</sup>24 C.F.R. § 5.611 (2003).

<sup>8</sup>Income calculation regarding Medicare Prescription Drug Cards and Transitional Assistance, HUD Notice PIH-2004-11 and H-04-11 (July 15, 2004).

<sup>9</sup>The Office of Management and Budget (OMB) also sent a memorandum to HUD and other federal agencies instructing them to implement the exclusion provision. See Memorandum from Joshua B. Bolten, Director, OMB, to the Heads of Executive Departments and Agencies (July 18, 2004) (Medicare Modernization and Federal Programs), available at <http://www.cms.hhs.gov/states/letters/>; see also *Benefits under Medicare Drug Card Won't Affect Medicaid or Other Federal Benefits: OMB Reaffirms Policy for All Federal Programs*, Medicare News, at <http://www.cms.hhs.gov/media/press/release.asp?Counter=1115> (July 19, 2004).

<sup>10</sup>See 24 C.F.R. § 5.609(c)(17) (2004). The most recent HUD notice of federally mandated exclusions from income was published at 66 Fed. Reg. 20,318 (April 20, 2001).

<sup>11</sup>7 C.F.R. pt. 1930, subpt. C, Ex B, ¶ II S (2004).

Camp Survivor benefits;<sup>12</sup> and (2) census takers' income.<sup>13</sup> Income from these sources is also now excluded from income calculations for need-based federal programs by laws other than federal housing laws and should therefore also be included in the HUD *Federal Register* list.

### RHS Regulations Exclude the MMA Credit and Benefit

The RHS regulations for multifamily assisted housing recognize that certain types of income are excluded by statute from tenant income for purposes of determining rent. The regulations provide that annual income does not include

[a]ny funds which a Federal statute specifies must not be used as the basis for denying or reducing Federal financial assistance or benefits to which the recipient would otherwise be entitled.<sup>14</sup>

The regulation also states that HUD periodically publishes a notice in the *Federal Register* identifying the programs and benefits that qualify for this exemption. However, publication by HUD is not a prerequisite. The HUD publication assists with this endeavor, but is not required to obtain compliance. The RHS rule recognizes that the provisions of federal statutes prevail.

With respect to the MMA, RHS must do more to notify owners and managers of RHS housing of the new law. RHS should have taken steps by July 26, 2004, to develop and implement a clear guidance by issuing an administrative notice applicable to subsidized RHS tenants, as well as homeowners with RHS Section 502 direct loans.<sup>15</sup>

### Conclusion

Advocates with clients who are benefitting from the MMA credit should advise them that the credit, or any portion of it, should not be used to calculate their household income. Advocates should inform housing providers in their jurisdictions of the MMA provisions and urge them to exclude the credit from income and rent calculations. Advocates should also inform local housing providers that to determine a family's eligibility for medical deduction, the provider must include the full cost of the drugs before receipt of the credit. Finally, advocates should also urge clients to contact RHS and their congressional delegation in an effort to require RHS to take affirmative steps to implement the income calculation provisions of the MMA. ■

<sup>12</sup>Letter from James Tahash, HUD, to Donna Yamashiro, Asian Law Alliance (Feb. 26, 1991); Letter from Donald Kaplan to Donna Yamashiro, Asian Law Alliance (Apr. 23, 1991).

<sup>13</sup>55 Fed. Reg. 12,622 (Apr. 4, 1990).

<sup>14</sup>7 C.F.R. pt. 1930, subpt. C, Ex B, ¶ II S (2004).

<sup>15</sup>Memorandum from Joshua B. Boltan, Director, OMB, to the Heads of Executive Departments and Agencies (July 18, 2004).

## New HUD Preservation Bill Would Address Maturing Multifamily Mortgages

Responding to a recent report of the United States General Accounting Office (GAO)<sup>1</sup> on the approaching problem of maturing subsidized mortgages, and the resulting disappearance of federal rent and other low-income occupancy restrictions, House Financial Services Ranking Member Barney Frank (D-MA) has introduced a bill that could help minimize the effects of the pending loan maturations. The Displacement Prevention Act, H.R. 4679, 108th Cong., introduced on June 24 with twenty-three Democratic cosponsors, would help preserve HUD-subsidized, low-income properties that face mortgage maturity.<sup>2</sup> The bill would authorize HUD to use \$675 million in previously appropriated, unused funds to offer three forms of grant assistance aimed at continuing the low-income affordability of these properties, either under the current ownership or by facilitating the purchase of properties by nonprofit organizations. Because there are no existing programs that specifically address maturing mortgages, this bill would also provide essential protections to those tenants facing diminished affordability when loans mature and owners are able to raise rents to market rate.

### The GAO Report

The GAO report provides a preliminary look at the problem of maturing government-subsidized mortgages for low-income housing properties, and the threat posed to affordable housing when the use restrictions that accompany those mortgages are no longer in place. The report examines properties subsidized through the Section 236, Section 221(d)(3) Below-Market Interest Rate, and Section 202 programs where mortgages were not prepaid, but the original term of the mortgages will expire over the next decade.

The report states that of the 11,267 properties with HUD-insured or HUD-subsidized mortgages, 21% (2328 properties) will reach maturity by 2013.<sup>3</sup> Of these properties, approximately 75% will mature in the last three years of the ten-year period, with the number of maturing mortgages reaching 100 for the first time in 2009, increasing to more than 200 in 2010, to about 500 in 2011 and 700 in

<sup>1</sup>U.S. GENERAL ACCOUNTING OFFICE, MULTIFAMILY HOUSING: MORE ACCESSIBLE HUD DATA COULD HELP EFFORTS TO PRESERVE HOUSING OF LOW-INCOME TENANTS, NO. GAO 04-20 (2004), available at [www.gao.gov/cgi-bin/getrpt?GAO-04-20](http://www.gao.gov/cgi-bin/getrpt?GAO-04-20) [hereinafter GAO Report]. For more on the GAO report, see NHLP, *GAO Report Warns of Maturing HUD Multifamily Mortgages*, 34 HOUS. L. BULL. 85, 92 (May 2004).

<sup>2</sup>Available at <http://thomas.loc.gov>.

<sup>3</sup>GAO Report, *supra* note 1, at 9-10.

2012.<sup>4</sup> Sixty percent of the properties with pre-2013 maturing mortgages also have project-based Section 8 or similar rental assistance contracts.<sup>5</sup> Most of the mortgages maturing before 2013 are HUD-subsidized (79%), and 85% of these properties also have rental assistance contracts.<sup>6</sup>

While there are no current statutes that protect tenants from rent increases upon mortgage maturity, the presence of rental assistance contracts will affect whether tenants face rent increases upon expiration of mortgage-based rent and occupancy restrictions. At the time of mortgage maturity, tenants living in properties with rental assistance contracts still in place will not face rent increases and those tenants residing in assisted units where owners do opt-out of their assistance contracts should be eligible to receive enhanced tenant vouchers. However, tenants living in properties without rental assistance contracts may be exposed to rent increases after mortgages mature. Unless further restrictions or other tenant protections are put in place, low-income housing may be lost and tenants may face unaffordable rent burdens.

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*Tenants living in properties without rental assistance contracts may be exposed to rent increases after mortgages mature. Unless further restrictions or other tenant protections are put in place, low-income housing may be lost and tenants may face unaffordable rent burdens.*

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## Highlights of the Displacement Prevention Act

H.R. 4679 aims to preserve the low-income affordability of properties with maturing HUD-subsidized mortgages to avoid the displacement of low-income tenants residing in such properties. H.R. 4679 would draw upon \$675 million of unused, previously appropriated funds (for Rent Supplement and certain Section 236 Rental Assistance Program contract amendments) to provide assistance to properties subsidized through the below-market interest rate mortgage programs under Section 221(d)(3) and Section 236 of the National Housing Act. Under the bill, properties with eligible mortgages within ten years of mortgage maturity will be eligible to apply for grant assistance.

The bill would provide HUD-administered assistance to owners of eligible HUD-subsidized properties and nonprofit organizations interested in purchasing these proper-

ties, in exchange for commitments to continued operation in accordance with low-income use restrictions for varying lengths of time depending on the type of assistance. The bill would also authorize provision of enhanced Section 8 vouchers to eligible families residing in properties converting to market-rate upon maturity. Finally, the bill would impose notice requirements on owners who intend to terminate or alter the affordability restrictions at maturity.

### Grant Assistance

Section 3 of the bill would authorize three forms of grant assistance: Rehabilitation Assistance, Assistance to Facilitate Purchases by Nonprofit Entities, and Annual Payment Assistance. Priority for selection among those eligible for these funds would be based on the needs of the property, the proximity of the scheduled maturity date, the number of low-income tenants residing in the property, the continuation of affordability restrictions, and other criteria as determined by HUD.

#### *Rehabilitation Assistance*

Section 3(b) of the bill would make grants available to owners of subsidized properties for the rehabilitation of the property in exchange for a commitment by the owner and future owners to continue to operate the property as low- or moderate-income housing. Funds could be used for capital improvements and non-recurring maintenance to the property. The existing low-income and occupancy restrictions would then be extended for an additional twenty years, thus ensuring an additional period of affordability.

#### *Assistance to Facilitate Purchases by Nonprofit Entities*

Under Section 3(c), one-time grants would be made available to nonprofit entities interested in purchasing eligible properties and maintaining them as low-income housing. The grants could be used to cover any direct costs, other than the purchase price, incurred by the organization in acquiring the property. For the remaining useful life of the property, all affordability restrictions previously applicable to the property continue. It remains unclear how this proposal would support the necessary and substantial costs of acquisition and rehabilitation of the eligible properties that would be transferred.

#### *Annual Payment Assistance*

Under Section 3(d), eligible maturing properties in strong rental markets could receive an annual payment grant, intended to cover the difference between existing HUD-subsidized rents and any higher comparable market rents. Such grants will be provided to properties owned by for-profit organizations in areas where there is an inadequate availability of affordable housing. Affordability restrictions would then be extended for the greater of ten years or the period of time specified in the agreement between HUD and the owner.

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<sup>4</sup>*Id.* at 8 and Fig. 2.

<sup>5</sup>*Id.* at 9-10.

<sup>6</sup>*Id.*

### **Enhanced Vouchers**

Section 4 of the bill would authorize enhanced vouchers, under the Section 8 program, for tenants residing in eligible subsidized properties where use restrictions are terminated due to mortgage maturity. This is consistent with current statutory language requiring enhanced vouchers for tenants in mortgage prepayment situations. Vouchers would be made available to low-income tenants, as well as to moderate-income tenants who are elderly, disabled or residing in low-vacancy areas.

### **Notification Requirement**

Section 5 of the bill establishes notice requirements that would apply when owners intend to terminate or alter the affordability restrictions on the property on or after mortgage maturity. Owners would be required to provide at least nine months' written notice to HUD, to the state and local government where the property is located, and to each tenant residing in the property. The notice must specify all changes to the affordability restrictions that the owner intends to make, inform residents that HUD will provide tenant-based assistance to all eligible tenants so that they may remain or move, and that, should funding become available, the owner may agree to renew the assistance and continue operating the property under the use restrictions, negating the need for vouchers. Failure to provide the required notice would prevent the owner from legally evicting tenants or raising rents until the owner has provided the required notice and one year has elapsed.

### **Reviews**

The bill would also mandate annual and semi-annual reviews to ensure compliance. The bill requires that HUD submit an annual report to Congress describing the actions taken under the bill and the resulting status of multifamily housing properties. For the first two years after the enactment of the bill, semiannual reviews must be submitted to the House Committee on Financial Services and the Senate Committee on Banking, Housing and Urban Affairs, indicating the number of assisted housing properties for which notification under Section 5 has been provided and the number of properties receiving assistance under the bill. After the first two years, only annual reports would be required.

## **Discussion**

H.R. 4679, if enacted, could help to preserve properties approaching mortgage expiration. However, numerous questions arise from the text of the bill, including the properties and owners that would be eligible to receive assistance, the continuation of use restrictions and their effect on affordability and enforceability, and the provision of Section 8 vouchers. Further refinement of the bill should address these questions in order to realize more

fully its potential to preserve vitally needed affordable housing.

### **Limited Coverage of Programs**

The current version of the bill covers only properties subsidized through the Section 236 and Section 221(d)(3) BMIR programs. While properties subsidized through these two programs comprise a majority of properties with expiring mortgages, the GAO report shows that the expiring mortgage problem also extends to properties insured or subsidized under other programs, such as Section 221(d)(3) market-rate, Section 202, and Section 231 programs.<sup>7</sup> Considering that properties assisted under these programs contained a total of 236,000 units that would be affected by mortgage maturity before 2013, the bill's purpose could be advanced by extending coverage to these properties as well.<sup>8</sup> More specifically, the bill should extend funding and protections at least to cover those HUD-insured or subsidized properties which have affordability provisions, such as budget-based rent restrictions, in their regulatory agreements.

### **Tax Disincentives Regarding Financial Assistance Grants**

The bill would authorize grant assistance either for current owners or for purchasing nonprofit entities. One problem is that the financial assistance for rehabilitation proposed for existing owners is proposed as a grant, whereas many for-profit owners might prefer to receive that assistance in the form of a low-interest loan for income tax purposes.

### **Inadequate Assistance for Nonprofit Owners and Purchasers**

The grants that would be offered to nonprofit entities to help facilitate the purchase of properties would only be available to fund direct costs associated with acquisition and could not be used to pay the actual purchase price of the property. This assistance would only be useful if nonprofit entities were able to secure other funds to cover the actual purchase price of the property. Although the grant would provide useful support for transaction costs, if the bill does not offer any assistance towards actual purchase price, nonprofits may not find themselves in a position to take advantage of the grant assistance offered because the capital costs of purchase may be infeasible. A similar problem exists with respect to project rehabilitation costs for purchasing nonprofits, although the bill does not specifically exclude their provision.

Nonprofit entities also would not have access to the bill's authorized annual payment assistance, although the GAO report states that 38% percent of properties with

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<sup>7</sup>GAO Report, *supra* note 1, at 8-9 and fig. 2.

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

maturing mortgages are owned by nonprofits.<sup>9</sup> If affordability assistance or full capital grants are not available to nonprofits, they may be forced to raise rents to keep up with deferred rehabilitation needs or rising operating costs. While nonprofit owners are rarely profit-driven, this does not mean that tenants living in properties owned by nonprofit entities are immune from rent increases. After use restrictions are lifted, nonprofit entities may find it necessary to increase rents to compensate for rising costs, thereby diminishing affordability.

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#### **Enforceability of Affordability Restrictions by Tenants**

All three forms of grant assistance would require that the use restrictions in place prior to mortgage expiration be extended for varying amounts of time, depending on the form of assistance. The bill does not define the continuing use restrictions with sufficient specificity—e.g., the rent schedule that would be used to establish future allowable rents is not clear. Whether oversight of compliance with rent restrictions would be performed by HUD or another public agency, past experience with lax agency enforcement demonstrates that tenant enforcement must supplement the agency's role to ensure compliance. The bill should expressly provide tenants with a private right of action to enforce the use restrictions that would accompany these subsidies.

#### **Enhanced Vouchers**

Further regarding the rights of tenants, the bill specifies that tenants residing in properties with expiring use restrictions due to mortgage maturity would receive enhanced Section 8 vouchers. However, the current state of the Section 8 voucher funding system calls into question Congress' appetite for supporting the additional costs of new vouchers. Because the bill could not actually provide the necessary funding for this purpose, only future appropriations bills can make good on this promised tenant protection for those facing displacement from rent increases.

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<sup>9</sup>*Id.* at 19.

Further, as is true with tenants now being affected by mortgage prepayments or project-based Section 8 contract opt-outs, some tenants facing displacement from future maturing mortgages would not be eligible for Section 8 enhanced vouchers because of heightened eligibility screening by public housing authorities—or they may be unable to remain in their homes because of household-unit size mismatches or other reasons. Without resolving these problems, some tenants in expiring mortgage properties would lose their housing subsidy or be unable to continue in residence.

In addition, the content of the owner's notice should include a statement that owners will accept enhanced vouchers, in order for tenants to understand that they have a right to remain in their units. As with notice requirements in expiring project-based Section 8 properties, owners should have to certify in the notice that the enhanced vouchers will be accepted.<sup>10</sup>

#### **Subcommittee on Housing and Community Opportunity Hearing on H.R. 4679**

On July 21, 2004, the Subcommittee on Housing and Community Opportunity held a hearing on H.R. 4679. Testimony was heard from, among others, the National Housing Trust, the National Alliance of HUD Tenants, HUD and the GAO.<sup>11</sup> A number of House members also provided statements including Maxine Waters (D-CA), David Scott (D-GA), and Barney Frank (D-MA). All witnesses called to testify before the Subcommittee supported H.R. 4679. The major issues noted by the testimony included a few of those noted in this review. The bill has been referred to the Financial Services Committee for further unspecified action. ■

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<sup>10</sup>42 U.S.C.A. § 1437f(c)(8)(A) (West 2003) currently requires that owners provide notice to tenants when they opt-out of project-based Section 8 contracts. A tenant's right to remain is granted by 42 U.S.C.A. § 1437f(t) (West 2003): tenants receiving enhanced Section 8 vouchers upon opt-out have the right to remain in their units as long as the units are offered for rental housing. To give effect to these rights, HUD's Section 8 Renewal Policy Guide further requires that the owner's notice also inform tenants that owners will honor the tenant's right to remain in the unit with the voucher. HUD, SECTION 8 RENEWAL POLICY app. 11-1 (2001).

<sup>11</sup>Transcripts of the testimonies are available at the Web site of the House Committee of Financial Services at: <http://financialservices.house.gov/hearings.asp?formmode=detail&hearing=324>.

# New Jersey Court Rejects Fair Housing Challenge to LIHTC Allocation

The Appellate Division of the New Jersey Superior Court has upheld New Jersey's allocation of Low-Income Housing Tax Credits against a fair housing challenge brought by public interest organizations.<sup>1</sup> The organizations had sought to obtain redirection of the credits away from distressed urban neighborhoods in favor of suburban locations on the theory that the existing plan violated the agency's affirmative duties under federal law, had a discriminatory impact and illegally perpetuated segregation. However, the appellate division, while ruling that the state allocation agency had a duty to "affirmatively further" fair housing and civil rights goals, found no fair housing violations because of the broad powers and goals of the tax credit program. The court also rejected the organizations' other state constitutional and statutory claims challenging the plan.

## The Low-Income Housing Tax Credit Program

Low-Income Housing Tax Credits (LIHTC) provide the largest existing federal subsidy for the development and rehabilitation of new affordable housing units. The program provides financial incentives for the construction and rehabilitation of low-income rental housing by lowering its overall cost through the use of tax credits.<sup>2</sup> The credits are distributed among the states according to population, and then administered through each state's housing credit agency, which must adopt a Qualified Allocation Plan (QAP). New Jersey's agency is the Housing Mortgage Finance Agency (HMFA). Under the relevant federal statute, QAPs must include specific selection criteria for properties receiving tax credit allocations.<sup>3</sup> The projected racial composition of the property and the surrounding area are not specifically listed among these criteria.<sup>4</sup>

## Facts and Procedural History

Although the decision technically concerned only the 2003 QAP, the procedural history of the case began with the 2002 QAP. In 2002, the New Jersey HMFA distributed \$15 million in tax credits through six different "cycles," with a majority of the funding allocated to urban locations.<sup>5</sup>

<sup>1</sup>In re Adoption of the 2003 Low Income Housing Tax Credit Qualified Allocation Plan, 2004 WL 902145 (N.J. Super. Ct. App. Div. Apr. 28, 2004) [hereinafter *In re 2003 Qualified Allocation Plan*].

<sup>2</sup>*Id.*; Pub. L. No. 99-514, 100 Stat. 2189 (1986).

<sup>3</sup>26 U.S.C.A. § 42(m)(1)(C) (West, WESTLAW through P.L. 108-279, approved 7-22-04).

<sup>4</sup>*Id.*

<sup>5</sup>*In re 2003 Qualified Allocation Plan*, 2004 WL 902145, at \*3.

Appellant Fair Share Housing Center first filed notices of appeal with the Appellate Division of the Superior Court, as permitted by state law, seeking judicial review of the 2002 QAP, as well as certain specific awards. Appellant claimed that the QAP disproportionately funded the development of LIHTC housing in urban areas with a higher percentage of minority residents, thereby encouraging racial segregation in violation of the federal Fair Housing Act<sup>6</sup> and other laws.

Likely responding to these claims, the HMFA issued its 2003 QAP, which contained some changes from the prior year, ostensibly to provide incentives to deconcentrate poverty and encourage developments in suburban neighborhoods. Appellants had also sought a trial-type administrative hearing prior to issuance of final rules, but this request was also rejected. Among other things, the final 2003 QAP included a new "family cycle" with set-asides for mixed-income housing developments, HOPE VI public housing revitalization projects, as well as projects sponsored by community-based nonprofit organizations that are located within qualified census tracts.<sup>7</sup> This 2003 QAP became effective July 21, 2003.

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*The appellate division, while ruling that the state allocation agency had a duty to "affirmatively further" fair housing and civil rights goals, found no fair housing violations.*

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Still dissatisfied with the 2003 plan because it would have resulted in about 75% of the tax credits going to projects in "racially segregated neighborhoods," the Fair Share Housing Center sought judicial review of the agency's 2003 QAP,<sup>8</sup> basing its claim on the Fair Housing Act, Internal Revenue Service (IRS) regulations, New Jersey's Law Against Discrimination, the *Mount Laurel* doctrine, and sections of the New Jersey Constitution that prohibit segregation of public schools.<sup>9</sup> The prior appeal on the 2002 QAP was dismissed and other nonprofit organizations (including two NAACP chapters) were added as appellants seeking judicial review of the 2003 QAP.<sup>10</sup>

<sup>6</sup>42 U.S.C.A. §§ 3601 *et seq.* (West 2003).

<sup>7</sup>*Id.* "Qualified census tracts" are areas in which at least 50% of the households have an income less than 60% of the area median gross income or with a poverty rate of at least 25%. 26 U.S.C.A. § 42(d)(5)(C)(ii)(I) (West, WESTLAW current through P.L. 108-279 approved 7-22-04). The LIHTC statute requires preference for such projects. 26 U.S.C.A. § 42(m)(1)(B) and (C) (West, WESTLAW current through P.L. 108-279 approved 7-22-04).

<sup>8</sup>*In re 2003 Qualified Allocation Plan*, 2004 WL 902145, at \*4.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at \*1.

Appellants presented expert testimony to support their claims that the QAP must shift tax credits to areas that are not predominantly inhabited by minorities. Appellants' expert David Rusk warned that the QAP would prevent affordable housing from being built in suburban communities and "perpetuate racial and economic segregation, above all, of children in public schools, with very negative impact on their education and preparation for adult lives."<sup>11</sup>

In response, HMFA claimed to promote integration by setting aside funds for HOPE VI and other "mixed income" projects, instead of giving greater weight to projects intended exclusively for low-income households.<sup>12</sup> HMFA also contested appellants' argument that funding suburban projects would yield greater integration.<sup>13</sup> In addition to taking away necessary tax credits from urban areas, HMFA asserted, "suburban affordable residential units are often occupied by fully-eligible, low-income *suburban* residents."<sup>14</sup> Instead of merely shifting credits to the suburbs, HMFA offered that the answer was in urban revitalization—specifically, replacing dilapidated housing with mixed-income housing, which is thought to promote integration by making cities more vibrant communities in which people of all races and economic means may reside.<sup>15</sup>

## The Appellate Division's Decision

The appellate division's decision focused primarily on whether federal fair housing laws required HFMA to develop an allocation plan that would generally locate affordable housing in areas that are not already home primarily to people of color.<sup>16</sup> The court also addressed appellants' claims regarding New Jersey's *Mount Laurel* decision and the state's constitutional guarantee to education.

### HMFA "Affirmatively Furthered" Fair Housing Goals

The federal Fair Housing Act, Title VIII of the Civil Rights Act of 1968, prohibits racially discriminatory hous-

ing practices.<sup>17</sup> Under Title VIII, HUD and other federal agencies must administer housing initiatives in a manner "affirmatively to further" the policies of Title VIII. Courts have emphasized that "racial integration" is a basic component of the fair housing goals of Title VIII.<sup>18</sup> Relying on court decisions, an Executive Order, and agency practice, the court agreed that HMFA, not just HUD, was subject to this "affirmatively furthering" requirement.<sup>19</sup>

Appellants contended that the court should order HMFA to adopt the site-selection procedure set forth in HUD regulations to satisfy its Title VIII obligations. These regulations generally prohibit siting new construction projects in areas of minority concentration, absent "over-riding needs."<sup>20</sup> Appellants argued that IRS regulations incorporate the HUD siting regulations because the IRS regulations provide that a unit is not eligible for tax credits unless it is rented in a manner consistent with housing policy governing non-discrimination, as evidenced by HUD rules and regulations.<sup>21</sup>

HMFA responded, and the court agreed, that no HUD or IRS regulation makes the HUD regulation directly applicable—adding that the IRS's role as a funding agency does not encompass site selection for tax credit projects and that the tax credit regulation applies only to an LIHTC's owner's rental practices, not the agency's allocation criteria. Moreover, HMFA argued that to comply with the LIHTC statutory requirements—most significantly, the preference for properties serving the lowest-income tenants in qualified census tracts—the agency's QAP must focus primarily on the economic status of the tenants, housing needs, and sponsor qualifications, not the racial composition of the area or proposed project.

The appellate division agreed, holding that HMFA's affirmative duty to further fair housing must be defined congruently with its other statutory obligations.<sup>22</sup> As such, the court ruled that HMFA must advance the goals of Title VIII, including racial integration, in its administration of the tax credit program and pursuit of a broader housing agenda—although, as critics have correctly pointed out, these statutory provisions (and now this decision) often work to allow government agencies to "pass the buck" on civil rights enforcement.<sup>23</sup> The court appears to have been influenced by both the extent of the agency's LIHTC

<sup>11</sup>*Id.* at \*4. See also Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011,1021 (1998).

<sup>12</sup>*In re 2003 Qualified Allocation Plan*, 2004 WL 902145, at \*5. NHLP has expressed skepticism of "the effectiveness of strategies to advance desegregation through policies that remove large numbers of federally assisted housing developments." NHLP, *Fair Housing Litigation to Prevent the Loss of Federally Assisted Housing: The Duties of Public Housing Authorities and Project Owners*, 31 HOUS. L. BULL. 74, 74 (2001).

<sup>13</sup>*In re 2003 Qualified Allocation Plan*, 2004 WL 902145, at \*5; see also HUD's *Fair Housing Duties and the Loss of Public and Assisted Housing*, 30 HOUS. L. BULL. 1, 1 (Jan. 1999).

<sup>14</sup>*In re 2003 Qualified Allocation Plan*, 2004 WL 902145, at \*5.

<sup>15</sup>*Id.* A fundamental problem with this approach is the displacement of poor people. See NHLP, *Fair Housing Litigation to Prevent the Loss of Federally Assisted Housing: The Duties of Public Housing Authorities and Project Owners*, 31 HOUS. L. BULL. 74 (Apr. 2001).

<sup>16</sup>*Id.*; see also Roisman, *supra* note 11, at 1022-1049.

<sup>17</sup>42 U.S.C.A. § 3604(a) (West, WESTLAW through P.L. 108-279 approved 7-22-04).

<sup>18</sup>See cases cited in *In re 2003 Qualified Allocation Plan*, 2004 WL 902145, at \*7.

<sup>19</sup>*In re 2003 Qualified Allocation Plan*, 2004 WL 902145, at 8-9.

<sup>20</sup>24 C.F.R. § 941.202 (West 2004); see also Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011,1042-43 (1998).

<sup>21</sup>26 C.F.R. § 1.42-9(a) (West 2004).

<sup>22</sup>*In re 2003 Qualified Allocation Plan*, 2004 WL 902145, at \*10-11.

<sup>23</sup>See Roisman, *supra* note 11, at 1032-1049.

obligations and several of the agency's recent efforts to revise its QAP to balance housing and revitalization needs with distributional concerns, such as its policies concerning mixed-income and "smart growth" areas. It was unpersuaded by appellants' contention that such policies were inadequate because they all result in allocating tax credits to urban areas.

The court also referenced the possible constitutional infirmity of a state agency's basing tax credit allocations primarily on race.<sup>24</sup> The court also determined the constitutional equal protection concerns raised by HFMA to be legitimate, supporting its conclusion that HFMA took the available, reasonable steps to "affirmatively further" fair housing goals.

### No Discriminatory Effect by QAP

Using recent judicial standards concerning discriminatory effect litigation,<sup>25</sup> the court also disposed of the appellants' claim that the QAP had an illegal disparate impact on people of color protected by the Fair Housing Act.<sup>26</sup> Although recognizing that various public funding and other land use decisions likely have some impact on the racial composition of the affected areas, the court found such impacts insufficient to establish a prima facie case.<sup>27</sup> As justification for this conclusion, the court relied on the QAP's nominal authorization for tax credits throughout the state, not just in urban areas of concentrated poverty, as well as a belief that a different state agency's delay in promulgating local fair share obligations under *Mount Laurel* could have been responsible for the tax credit funding disparity. For the same reason, the court also found that the 2003 QAP did not illegally perpetuate segregation. In this regard, the court also found that there was less developer interest for tax credits in suburban areas,<sup>28</sup> and that projects in suburban areas had a relatively better chance of securing credits than urban areas.<sup>29</sup>

<sup>24</sup>*In re 2003 Qualified Allocation Plan*, 2004 WL 902145, at \*13 (citing *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) and *Walker v. City of Mesquite*, 169 F.3d 973 (5th Cir. 1999)).

<sup>25</sup>E.g., *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (cited favorably for the applicable legal standard, not for its result).

<sup>26</sup>The court also dismissed intentional discrimination claims based on the constitution, Title VIII and state law, finding "no support for appellants' claim that HMFA's policy to allocate tax credits to areas of greatest need, irrespective of the probable racial makeup of the project being funded or the impact on the racial composition of the neighborhood, demonstrates an intention to discriminate." *In re 2003 Qualified Allocation Plan*, 2004 WL 902145, at \*22.

<sup>27</sup>*Id.*

<sup>28</sup>That developers will first pursue opportunities where profits are greater because sites are more available and often less expensive is no surprise, but this should have demonstrated only the greater importance of more sophisticated QAP allocation criteria.

<sup>29</sup>*In re 2003 Qualified Allocation Plan*, 2004 WL 902145, at \*16.

Even if there was a prima facie case of discrimination, the court ruled that HMFA still had a legitimate governmental interest, articulated in the LIHTC statute, in serving its lowest-income tenants and projects located in qualified census tracts.<sup>30</sup> HFMA argued, and the court agreed, that revitalizing the state's urban areas is in the public interest.<sup>31</sup> Moreover, the HOPE VI projects designed to foster mixed-income housing are often located in urban areas. Once these needs were addressed, and HMFA then attended to special needs and senior properties, the court saw little discretion remaining, thus concluding that no realistic alternative means were available to serve these interests with less discriminatory effect.<sup>32</sup>

### No Violation of the *Mount Laurel* Doctrine or State Constitution by QAP

New Jersey's *Mount Laurel* decision states that the constitutional power to zone must be exercised for the general welfare.<sup>33</sup> The decision is carried out through Council on Affordable Housing (COAH) *Mount Laurel* compliance plans.<sup>34</sup> The court ruled that the HMFA honored any *Mount Laurel* obligation by awarding "extra points" for mixed-income housing and to fair share assistance programs. The court found more troublesome appellants' challenge to HMFA's policy limiting the amount of tax credits for those developers who had already received density bonuses, but nevertheless upheld the policy as consistent with applicable laws and regulations.<sup>35</sup> The court also ruled that appellants' suggestion that HFMA should take additional actions, such as condemning land in suburban areas, to facilitate LIHTC construction, was not required by *Mount Laurel*.<sup>36</sup>

Relying on state constitutional guarantees to free, non-segregated public education, appellants also argued that the QAP would perpetuate segregation in the public schools.<sup>37</sup> The court ruled that this argument would be better taken up with the Commissioner of Education, asserting that HFMA's purpose is to allocate tax credits, and that HMFA lacked jurisdiction over public education, and that increasing investments in housing in urban areas was consistent with similar efforts in the schools.<sup>38</sup>

<sup>30</sup>*Id.* at \*17.

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

<sup>33</sup>*See Southern Burlington County N.A.A.C.P. v. Mount Laurel*, 67 N.J. 151 (1975).

<sup>34</sup>*See Southern Burlington County N.A.A.C.P. v. Mount Laurel*, 92 N.J. 158 (1983).

<sup>35</sup>*In re 2003 Qualified Allocation Plan*, 2004 WL 902145, at \*21.

<sup>36</sup>*Id.*

<sup>37</sup>*Id.* at \*17-\*18.

<sup>38</sup>*Id.*

## Conclusion

While mindful of civil rights principles, the court's analysis and conclusions do little to ensure that the state agency's LIHTC allocation decisions in fact reflect a targeted effort to improve housing opportunities for low-income people of color outside urban areas. Absent further changes through the political and administrative process to develop more diverse QAPs that promote a more balanced geographical distribution of tax credits, the LIHTC program in New Jersey, as in other states, will continue to restrict housing opportunities for low-income families primarily to urban areas—often perpetuating segregation in homes, schools and neighborhoods. ■

## Claims Court Rules USDA Liable for Damages in ELIHPA Prepayment Case

On August 30, 2004, on remand from the Federal Circuit, the Court of Federal Claims issued a 72-page opinion in *Franconia Assocs. v. United States*.<sup>1</sup> The claims court's decision is a serious set-back to efforts to preserve low-income housing assisted under the Section 515 program.

The opinion decided claims brought by owners of pre-1989 Section 515 projects who sought to prepay their Section 515 mortgages.<sup>2</sup> The Franconia plaintiffs initially filed their case in 1997. Grass Valley plaintiff-owners filed an identical action in 1998, and the two cases were later consolidated. Post-1989 owners, meaning owners who entered into loans after December 15, 1989, are precluded by statute from ever prepaying and thus are not exposed to the prepayment process which is the subject of the litigation. The claims court found that no Fifth Amendment takings claims existed against the federal government.<sup>3</sup> However, it found that the United States Department of Agriculture

(USDA) Rural Housing Services (RHS)<sup>4</sup> was liable to project owners who sought to prepay their USDA-issued loans and were required to go through the Emergency Low Income Housing Preservation Act (ELIHPA)<sup>5</sup> prepayment process.<sup>6</sup> Based on a breach of contract theory, the court ruled that owners of thirty-seven of the forty-two projects at issue were due compensation.<sup>7</sup> The court withheld entry of judgments and ordered the parties to confer about liability calculations.<sup>8</sup> It reserved its right to appoint a special master should the parties fail to come to an agreement by a November 2004 deadline set by the court.<sup>9</sup>

This recent decision follows the court's January 2002 ruling that the enactment of ELIHPA was not a public and general act within the meaning of the sovereign acts doctrine, and therefore RHS was not protected from the owners' damage claims. The case, which has an extensive procedural history, was previously reviewed by the Federal Circuit and the United States Supreme Court.<sup>10</sup> The Supreme Court held that the statute of limitations period for the owners' damages claims began to run at the point of attempted prepayment, and not at the time of ELIHPA's enactment.<sup>11</sup> Therefore, owners' damage claims under the Tucker Act accrued when prepayment was tendered.<sup>12</sup>

At the time of this writing, it is not known whether the government will appeal the decision. Nevertheless, it is believed that the final outcome of this matter will have an immense impact on the manner in which RHS administers the Section 515 prepayment program. A full review of the decision will appear in next month's *Housing Law Bulletin*. ■

<sup>1</sup>*Franconia Assocs. v. United States*, 2004 WL 1941215 (Fed. Cl. Aug. 30, 2004) (Allegra, J.).

<sup>2</sup>Since 1962, Section 515 loans have been, and continue to be, made by the Department of Agriculture to nonprofit, for-profit and public entities for the construction of rental or cooperative housing in rural areas, including Indian reservations. This program is called the Rural Rental Housing Program (also known as the Section 515 Program). 42 U.S.C.A. § 1485(a) (West 2003).

<sup>3</sup>*Franconia Assocs.*, 2004 WL 1941215, at \*14.

<sup>4</sup>As a division of the U.S. Department of Agriculture, RHS administers the Section 515 Rural Rental Housing Program.

<sup>5</sup>Pub. L. No. 100-242, 101 Stat. 187 (1988), codified as amended at 42 U.S.C.A. § 1472(c) (West 2003); 7 C.F.R. §§ 1965.201 *et seq.* (2003) (implementing regulations).

<sup>6</sup>*Franconia Assocs.*, 2004 WL 1941215, at \*41.

<sup>7</sup>*Id.*

<sup>8</sup>*Id.* at \*43.

<sup>9</sup>*Id.*

<sup>10</sup>*Franconia Assocs. v. United States*, 240 F.3d 1358 (Fed. Cir. 2001) (affirming dismissal upon timeliness grounds), *vacated by* 536 U.S. 129 (2002); *see also* NHLP, *ELIHPA's Prepayment Restrictions May Subject RHS to Damages*, 32 Hous. L. Bull. 37, 56 (2002).

<sup>11</sup>*Franconia Assocs.*, 536 U.S. 129 at 149. The Tucker Act, 28 U.S.C.A. §§ 1346(a)(2), 1491 (West, WESTLAW through P.L. 108-279 approved 7-22-04), provides jurisdiction for the Court of Claims over "claims founded upon the constitution, act of Congress, or executive department regulations, as well as claims for liquidated or unliquidated damages in cases not sounding in tort." BLACK'S LAW DICTIONARY 1055 (abridged 6<sup>th</sup> ed. 1991).

<sup>12</sup>*Franconia Assocs.*, 536 U.S. at 149.

## Recent Cases

The following are brief summaries of recently reported federal and state 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,<sup>1</sup> Lexis,<sup>2</sup> or, in some instances, the court's Web site.<sup>3</sup> Copies of the cases are not available from NHLP.

### **Emergency Low Income Housing Preservation Act (ELIHPA); Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA)**

*Independence Park Apts. v. United States*, 2004 WL 1918718 (Fed. Cl. Aug. 27, 2004). On remand from the Federal Circuit, the Court of Federal Claims considered the calculation of damages to Plaintiff owners of HUD-assisted housing developments for temporary regulatory takings claims related to the Emergency Low Income Housing Preservation Act of 1987 and the Low-Income Housing Preservation and Resident Homeownership Act of 1990. This case is an offshoot of *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003). The claims court adopted Plaintiffs' model for the calculation of damages, which was based on rents Plaintiffs were unable to receive as a result of being unable to prepay their federally insured mortgages, plus interest.

### **Fair Housing — Disability**

*United States v. Edward Rose & Sons*, 2004 WL 1882662 (6th Cir. Aug. 25, 2004). Plaintiff-Appellee United States filed suit against Defendant-Appellants property developers and architects for violation of the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*, related to inaccessible front entry doors at 19 apartment buildings being developed by Defendant-Appellants. The district court preliminarily enjoined the construction and occupancy of the buildings. Defendant-Appellants appealed. The court of appeals affirmed the district court's granting of preliminary relief holding that entrances are "common areas" required to be accessible under 42 U.S.C. § 3604(f)(3)(C)(i).

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<sup>1</sup><http://www.westlaw.com>.

<sup>2</sup><http://www.lexis.com>.

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

### **Housing Choice Voucher Program — Enhanced Vouchers**

*Jeanty v. Shore Terrace Realty Assoc.*, 2004 WL 1794496 (S.D.N.Y. Aug. 10, 2004). Plaintiff resident filed suit against Defendant project-based Section 8 property owner challenging Defendant's refusal to accept Plaintiff's enhanced Section 8 voucher as a violation of 42 U.S.C. § 1437f(t). The district court declared that Defendant's refusal to accept Plaintiff's enhanced voucher violated 42 U.S.C. § 1437f(t) and HUD regulations and permanently enjoined Defendant to accept Plaintiff's voucher and to renew Plaintiff's lease so long as she retained the voucher and other conditions are met.

### **Multifamily Assisted Housing Reform and Affordability Act (MAHRAA)**

*Englewood Terrace L.P. v. United States*, 2004 WL 1869647 (Fed. Cl. Aug. 10, 2004). In this case by Plaintiff owner of federally assisted housing against Defendant HUD, the claims court held that Section 524(a) of the Multifamily Assisted Housing Reform and Affordability Act (MAHRAA), 42 U.S.C. § 1437f note, requires HUD to offer renewal project-based Section 8 subsidy contracts to eligible project owners, unless certain exceptions apply. The court further narrowly construed Section 516(c) of MAHRAA and rejected Defendant's argument that that provision deprived the court of jurisdiction to decide Plaintiff's Section 524(a) claim. ■

# 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 in August of 2004. 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,<sup>1</sup> (2) bound volumes of the *Federal Register*, (3) HUD Clips,<sup>2</sup> (4) HUD,<sup>3</sup> and (5) USDA's Rural Development Web page.<sup>4</sup> Citations are included with each document to help you secure copies.

## HUD Federal Register Proposed Rule

### **69 Fed. Reg. 46,210 (Aug. 2, 2004)** **HUD Multifamily Rental Projects and Health Care Facilities: Regulatory Revisions**

*Summary:* This proposed rule would amend certain Federal Housing Administration (FHA) regulations to update these regulations to reflect current HUD policy in the area of multifamily rental projects and health care facilities. In developing a set of comprehensive documents for use in the FHA mortgage programs for multifamily rental projects and health care facilities (excluding hospitals), HUD identified outdated language and policies that not only needed to be changed in closing documents but also in HUD's regulations.

*Comment Due Date:* October 1, 2004.

## HUD Federal Register Notices

### **69 Fed. Reg. 47,171 (Aug. 4, 2004)** **Consolidated Delegation of Authority for the Office of Public and Indian Housing**

*Summary:* This notice is a comprehensive delegation of authority for administration of HUD's Public and Indian Housing programs from the Secretary of Housing and Urban Development to the Assistant Secretary for Public and Indian Housing.

*Effective Date:* July 27, 2004.

### **69 Fed. Reg. 47,250 (Aug. 4, 2004)** **Notice of Regulatory Waiver Requests Granted for the Fourth Quarter of Calendar Year 2003**

*Summary:* Section 106 of the Department of Housing and Urban Development Reform Act of 1989 (the HUD Reform Act) requires HUD to publish quarterly *Federal Register* notices of all regulatory waivers that HUD has approved. Each notice covers the quarterly period since the previous *Federal Register* notice. 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 period beginning on October 1, 2003, and ending on December 31, 2003.

### **69 Fed. Reg. 47,947 (Aug. 6, 2004)** **Notice of Draft Report of the U.S. Department of Housing and Urban Development Review of the Fair Housing Accessibility Requirements in the 2003 International Building Code Accessibility Provisions and Solicitation of Comments**

*Summary:* HUD has announced a draft report of its review of the Fair Housing Act's accessibility requirements in the 2003 International Building Code. The Department conducted this review in response to a request from the International Code Council. The draft report identifies the variances between the Fair Housing Act's design and construction requirements and the 2003 International Building Code. The draft report discusses only variances that may not meet the Fair Housing Act's design and construction requirements. The draft report is a precursor to a final report that HUD will publish in the *Federal Register*.

*Comments Due Date:* September 7, 2004.

### **69 Fed. Reg. 48,040 (Aug. 6, 2004)** **Proposed Fair Market Rents for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program Fiscal Year 2005**

*Summary:* This notice proposes Fair Market Rents (FMRs) for FY 2005. The proposed numbers would amend FMR schedules used to determine payment standard amounts for the Housing Choice Voucher program, to determine initial renewal rents for some expiring project-based Section 8 contracts, and to determine initial rents for housing assistance payment (HAP) contracts in the Moderate Rehabilitation Single Room Occupancy program. Other programs may require use of FMRs for other purposes. Proposed FY 2005 FMRs are based on fortieth percentile recent mover FMR estimates for most areas, but FMRs for thirty-eight metropolitan areas are shown at the fiftieth percentile FMR standard. The fiftieth percentile FMRs were initiated in 2001 to increase housing choice opportunities in metropolitan areas where high percentages of vouchers were being used in high poverty census tracts. For informational purposes, fortieth percentile FMRs for the thirty-eight areas that currently have fiftieth percentile FMRs are also listed. The proposed FY 2005

<sup>1</sup>At [http://www.access.gpo.gov/su\\_docs](http://www.access.gpo.gov/su_docs).

<sup>2</sup>At <http://www.hudclips.org/cgi/index.cgi>.

<sup>3</sup>To order notices and handbooks from HUD, call (800) 767-7468 or fax (202) 708-2313.

<sup>4</sup>At <http://www.rdinit.usda.gov/regs>.

FMRs in this notice are the first to utilize new Office of Management and Budget area definitions and 2000 Census data (which became available in September 2003). The FMR estimates have been trended to April 2005, the midpoint of FY 2005.

**Comments Due Date:** September 7, 2004. Due to a number of technical and policy issues associated with rebenchmarking the FY 2004 FMRs with 2000 Census data, the proposed FY 2005 FMRs are being published later than usual. HUD is required to publish FMRs for effect by October 1, 2004. To meet this requirement, HUD has allowed a thirty-day comment submission period for the FMRs proposed in this notice. Reviews of these comments will be reflected in a *Federal Register* notice issued on or about October 1, 2004. HUD will accept comments during the sixty-day period following the initial thirty-day comment period. Comments received during the sixty-day period will be considered for inclusion in a subsequent FY 2005 *Federal Register* FMR notice.

**69 Fed. Reg. 48,274 (Aug. 9, 2004)  
Notice of Funding Availability for HOPE VI Neighborhood Networks Grants Fiscal Year 2003**

**Summary:** This NOFA announces the availability of approximately \$5 million in Fiscal Year 2003 funds to implement and expand a Neighborhood Networks program in support of public housing agency-owned affordable housing.

**Application Due Date:** September 8, 2004.

**69 Fed. Reg. 50,208 (Aug. 13, 2004)  
Notice of Certain Operating Cost Adjustment Factors for 2005**

**Summary:** This notice establishes annual factors used in calculating rent adjustments under Section 524 of MAHRA as amended by the Preserving Affordable Housing for Senior Citizens and Families into the 21st Century Act of 1999, and under LIHPRHA.

**Effective Date:** February 11, 2005.

**69 Fed. Reg. 51,100 (Aug. 17, 2004)  
Notice of Funding Availability (NOFA) for Revitalization of Severely Distressed Public Housing; Availability of Additional Fiscal Year (FY) 2003 Funds for HOPE VI Demolition Grants and Reopening of NOFA Application Due Date**

**Summary:** On October 21, 2003, HUD published a NOFA announcing the availability of approximately \$40 million in FY 2003 funds for the HOPE VI Demolition Program. This notice announces the availability of approximately an additional \$20 million in FY 2003 funds for HOPE VI Demolition grants, and reopens the due date for submission of Demolition Grant applications under the NOFA. HUD will award the additional FY 2003 funds in accordance with the application submission and selection requirements contained in the October 21, 2003, NOFA, as

corrected by the technical correction published on December 9, 2003.

**Application Deadline:** September 17, 2004.

**69 Fed. Reg. 51,699 (Aug. 20, 2004)  
Credit Watch Termination Initiative**

**Summary:** This notice advises of the cause and effect of termination of Origination Approval Agreements taken by HUD's Federal Housing Administration (FHA) against HUD-approved mortgagees through the FHA Credit Watch Termination Initiative. This notice includes a list of mortgagees which have had their Origination Approval Agreements terminated.

**69 Fed. Reg. 51,932 (Aug. 23, 2004)  
HUD-2004-0005; Changes in Certain Multifamily Mortgage Insurance Premiums**

**Summary:** In accordance with HUD regulations, this notice changes the mortgage insurance premiums for the Section 221(d)(4) and the Section 232 Federal Housing Administration mortgage insurance programs whose commitments will be issued in Fiscal Year 2005.

**Comment Due Date:** September 22, 2004.

**69 Fed. Reg. 52,026 (Aug. 24, 2004)  
Conference Call Meeting of the Manufactured Housing Consensus Committee**

**Summary:** This notice sets forth the schedule and proposed agenda of an upcoming meeting of the Manufactured Housing Consensus Committee to be held via telephone conference call. This meeting is open to the general public.

**Dates:** Wednesday, September 1, 2004, from 2 p.m. to 4 p.m. Eastern time.

## HUD Housing Notices

**Notice H 2004-16 (August 19, 2004)  
Fiscal Year 2004 Policy for Capital Advance Authority Assignments, Instructions and Program Requirements for the Section 202 and Section 811 Capital Advance Programs, Application Processing and Selection Instructions, and Processing Schedule**

**Summary:** This notice transmits for Fiscal Year 2004:

- A. Changes to Application/Selection Process
- B. Application Processing Schedule (ATT. 1)
- C. Submission Requirements for Selection Materials (ATT. 2)
- D. Section 202 Allocation Chart (ATT.3)
- E. Section 811 Allocation Chart (ATT.4)
- F. Section 811 Workshop Instructions (ATT.5)
- G. Section 202 Funding Notification (ATT.6)
- H. Section 811 Funding Notification (ATT.7)
- I. Applications Processing and Selections Policy (ATT.8)

- J. Section 202 Minority Business Enterprise Goals (ATT.9)
  - K. Section 811 Minority Business enterprise Goals (ATT. 10)
  - L. Initial Screening for Curable Deficiencies (ATT.11)
  - M. Technical Review Sheets (ATT. 12)
- Expires:* August 31, 2005.

**Notice H 2004-17 (August 20, 2004)**  
**Prepayments Subject to Section 250(a) of the National Housing Act**

*Summary:* This notice is intended to provide background and up-to-date guidance on HUD's policy and procedure regarding the prepayment of HUD-insured/held mortgages pursuant to the National Housing Act. This notices does not apply to projects insured under Section 223(f) of the National Housing Act because that section of the Act contains its own provisions governing prepayment approval. This notice supersedes all prior directives on the subject.

*Expires:* August 31, 2005.

**HUD PIH Notices**

**Notice PIH 2004-13 (HA) (August 5, 2004)**  
**New Codes for Special Programs Reported on the Family Report (Form HUD-50058)**

*Summary:* This notice implements six new codes to be used with data submitted on Form HUD-50058 that will allow the Department to track the usage of funds awarded or assigned to public housing agencies through the Housing Choice Voucher program for special populations, particularly non-elderly disabled families. These codes must be entered in line 2n of the Form HUD-50058 for families who receive vouchers tied to these special programs.

*Expires:* August 31, 2005.

**Notice PIH 2004-14 (HA) (August 9, 2004)**  
**Guidance on Methods and Schedules for Calculating Federal Fiscal Year 2005 Operating Subsidy Eligibility and Issuance of Local Inflation Factors, Formula Expense Level Equation Multipliers, and Related Tables**

*Summary:* This notice provides Public Housing Agencies (PHAs) with information needed to complete their Federal Fiscal Year (FFY) 2005 operating budgets and subsidy eligibility calculations. It includes a schedule for the submission of certain items to HUD, as well as local inflation factors, data needed for the recalculation of the Formula Expense Level, and other special notes related to the operating subsidy calculation and processing. Following a review of the submitted material, HUD will determine funding levels. The amount obligated by HUD will be available for electronic Line of Credit Control System drawdown.

*Expires:* August 31, 2005.

**Notice PIH 2004-15 (August 9, 2004)**  
**Fiscal Year 2004 Capital Fund Grants Processing Notice**  
*Summary:* This notice provides public housing agencies with information and guidance on the Fiscal Year 2004 Capital Fund and provides guidance on the Replacement Housing Factor grants.

*Expires:* August 31, 2005.

**Notice PIH 2004-16 (PHA) (August 18, 2004)**  
**Section Eight Management Assessment Program (SEMAP) Guidance to HUD Field Offices Assisting SEMAP Troubled and Near-Troubled PHAs**

*Summary:* This notice replaces Notice PIH 2002-27 and provides guidance for Hub Directors and Program Center Coordinators to follow in assisting Public Housing Agencies determined troubled, near-troubled, or non-troubled under the Section Eight Management Assessment Program for the Housing Choice Voucher Program.

*Expires:* August 17, 2005.

**Notice PIH 2004-17 (August 18, 2004)**  
**Recipient Inspection of Housing Units Assisted Under the Native American Housing Assistance and Self Determination Act of 1996 and those Assisted Under the 1937 Housing Act**

*Summary:* This notice serves to clarify the requirements for recipient inspection of housing assisted under Native American Housing Assistance and Self Determination Act of 1996 (NAHASDA) (the Act) and those assisted under the 1937 Housing Act. Questions have been received by HUD concerning the applicability of inspection requirements found in Section 403(b) of the Act to the various types or categories of housing assistance provided and the required frequency of such inspections.

*Expired:* August 31, 2005.

**RHS Federal Register Proposed Rule**

**69 Fed. Reg. 48,174 (Aug. 9, 2004)**  
**Definition Clarification of State Nonmetropolitan Median Household Income**

*Summary:* The Rural Housing Service, Rural Business-Cooperative Service, and the Rural Utilities Service, agencies delivering the United States Department of Agriculture's Rural Development Housing, Business, and Utilities Programs, are proposing to amend their regulations to reflect the clarification of the definition of State Nonmetropolitan Median Household Income. The definition will in essence state "the median household income of the state's nonmetropolitan counties and portions of metropolitan counties outside of cities, towns or places of 50,000 or more population." This minor modification will enable RD to serve more communities across rural America. The loan and grant eligibility or priority scoring will be positively impacted for Rural Development Housing, Business, and Utilities Programs.

*Comments Due Date:* September 8, 2004. ■

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