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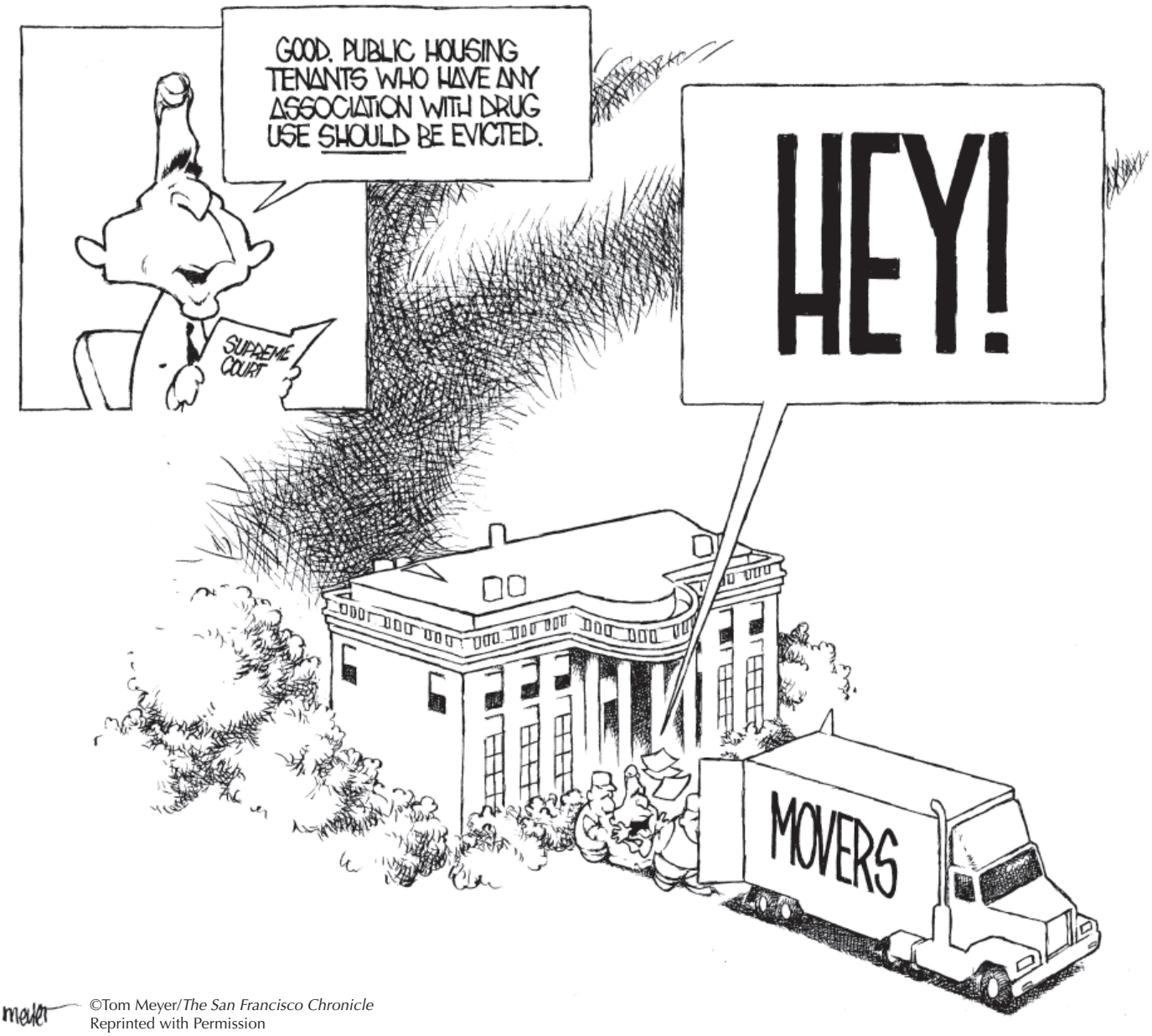

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U.S. Supreme Court Finds No "Innocent Tenants" in Application of One-Strike Law

On March 26, 2002, the U.S. Supreme Court reversed the judgment of the Ninth Circuit Court of Appeals which, sitting *en banc*, had upheld a federal district court's decision to issue a preliminary injunction preventing the termination of the separate tenancies of four elderly residents by the Oakland Housing Authority (OHA) under the HUD "one-strike" law.[1] Whereas the Ninth Circuit had concluded that the one-strike law could not be interpreted to permit eviction of "innocent tenants,"[2] the Supreme Court found that the law properly and unambiguously vested local public housing agencies (PHAs) with the authority to do just that.[3]

According to this ruling, any drug-related criminal activity or certain other criminal activity that threatens other tenants, if perpetrated by a tenant, household member or guest, or any other person under the tenant's control, may be a sufficient ground for an eviction with no judicial review of the tenant's knowledge or responsibility for the offence.

Facts and Procedural History

The case stems from the OHA filing eviction actions against four separate elderly tenants for breaching a lease provision required by federal law. That law, 42 U.S.C. § 1437d(1)(6),[4] requires PHAs to include the following in all their leases:

> [A]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy…[5]

Three of the tenants presented very similar fact patterns. Ms. Rucker, a grandmother, was threatened with eviction because her daughter was found with cocaine three blocks from the unit. Ms. Rucker asserted she regularly searched her daughter's room for evidence of drugs or alcohol and never found anything or witnessed other behavior that would indicate that her daughter was involved with drugs. OHA proceeded against two other elderly tenants because their grandsons were caught smoking marijuana in the apartment complex parking

[1] 42 U.S.C.A. § 1437d(l)(6)(West Supp. 2001).

[2] *Rucker v. Davis*, 237 F.3d. 1113, 1115-1116 (9th Cir. 2001), *rev'd*, 122 S.Ct. 1230 (2002).

[3] *Department of Housing and Urban Development v. Rucker,* 122 S.Ct. 1230, 1236 (2002).

[4] Originally codified in 1988 as 42 U.S.C. § 1437d(l)(5), amended slightly since then, and redesignated as subsection (l)(6) in 1998.

[5] 42 U.S.C. § 1437d(1)(6)(West Supp. 2001).

lot. The tenants contended that they had no prior knowledge of any drug involvement of their grandchildren.[6]

The fourth tenant, Herman Walker, is an elderly man who requires an in-home caregiver. The caregiver and two other people were found three times with cocaine in Mr. Walker's unit. Mr. Walker fired the caregiver after receiving the eviction notice.[7]

All four tenants filed an affirmative action in federal court seeking a preliminary injunction preventing their eviction and enjoining the enforcement of HUD regulation and the OHA lease provision implementing § 1437d(l)(6). They asserted that HUD's interpretation of the statute was unlawful under the Administrative Procedure Act (APA),[8] and, alternatively, that if HUD's interpretation was correct, the statute was unconstitutional.[9] The district court found serious issues regarding the validity of HUD's interpretation of the statute and concluded that the tenants' loss of their homes outweighed the delay in eviction proceedings. Accordingly it granted the injunction to all four tenants.

OHA appealed, and a panel of the Ninth Circuit reversed the district court. The tenants then successfully sought an *en banc* review, resulting in a second decision that upheld the injunction. The Ninth Circuit decision supported an interpretation of the statute that protects from eviction tenants who did not know or have any reason to know of any drug activity occurring outside their leased unit, or who took all reasonable steps to prevent the activity from occurring. The Supreme Court reversed that decision.

The Decision of the Court

The Supreme Court summarily swept aside the Ninth Circuit's legislative analysis by finding that the court erred in relying on the statute's legislative history in order to discern congressional intent in the first place. The Court found that the statutory language was clear, and that the term "under the tenant's control" only modifies "other person[s]". In other words, if "any member of the tenant's household, or any guest" were engaged in the type of criminal conduct covered by the statute, then the tenant is subject to eviction. The Court agreed with HUD that "under the tenant's control" meant merely "… control in the sense that the tenant has permitted access to the premises." 66 Fed. Reg. 28,781 (2001).[10] Thus, the Court concluded that the statute, on its face, vests PHAs with "the discretion to evict without regard to the tenant's knowledge of the criminal activity."

The word "any" was critical in the Court's analysis of whether there was any knowledge requirement in the statute. In a reading that appears to subordinate all other forms of statutory construction, the Court found that "…use of the term 'any' to modify 'drug-related criminal activity' precludes any knowledge requirement."[11]

Notwithstanding its conclusion that the Ninth Circuit should never have examined the statute's legislative history, the Court critiqued that examination and offered its own interpretation. Part of the Ninth Circuit's finding that Congress had intended to protect innocent tenants was based on the fact that a pre-existing federal forfeiture law that had an "innocent owners" provision was extended to leaseholds in the same chapter and subtitle of the Anti-Drug Abuse Act of 1988 that contained the one-strike law. The Ninth Circuit reasoned that the two statutes had to be read consistently, particularly because they both shared the purpose of implementing Congress' anti-drug policies in public housing. However, because of the explicit nature of the "innocent owners" provision of the forfeiture statute, the Supreme Court found that the lack of such similarly explicit language in §1437d(1)(6) indicated that Congress did not want to have the same defense for innocent tenants. The court concluded that "[i]t is entirely reasonable to think that the Government, when seeking to transfer private property to itself in a forfeiture proceeding, should be subject to an 'innocent owner defense' while it should not be when acting as a landlord in a public housing project." [12] The legal basis for that distinction does not appear in the opinion.

The Ninth Circuit's analysis of the statute's legislative history referenced an excerpt from a Senate Committee Report accompanying the 1990 amendment to the one-strike law, which states that eviction of innocent tenants would not be appropriate.[13] While acknowledging that Congress intended to grant PHAs broad discretion in these eviction matters, the Ninth Circuit did not accept HUD's argument that that discretion could override Congress' clearly expressed intent to protect innocent tenants.[14] The Supreme Court rejected this argument, observing that the language was part of a 1990 Senate amendment that was never enacted.[15] In fact, however, the changes between the rejected version and that which was adopted dealt only with the scope of the cause required for termination and were completely irrelevant to the question of Congress' intent with respect to an innocent tenant defense.[16]

The absurdity of a strict liability interpretation of §1437d(l)(6) went largely unaddressed by the Supreme

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[6] *See* 237 F.3d 1113, 1118, *rev'd*, 122 S.Ct. 1230 (2002).

[7] *Id.* at 1117.

[8] 5 U.S.C.A. §§ 701-706.

[9] *Rucker,* 237 F.3d 1113, 1117, *rev'd*, 122 S.Ct. 1230 (2002). Mr. Walker also made a claim under the Americans with Disabilities Act.

[10] *Department of Housing and Urban Development v. Rucker,* 122 S.Ct. 1230, 1234 (2002).

[11] *Id*. at 1233.

[12] *Id.* at 1234.

[13] *Rucker,* 237 F.3d 1113, 1123, *rev'd*, 122 S.Ct. 1230 (2002)(quoting S.Rep.No. 101-316, at 179 (1990) *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941: "The committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.").

[14] *Id.*

[15] *See* 136 Cong. Rec. 15,991, 16,012 (1990)(reproducing S. 566, 101st Cong., 2d Sess., §§521(f) and 714(a) (1990)), rejected at Conference. See H. R. Conf. Rep. No. 101-943, p. 418 (1990).

[16] *Cranston-Gonzales National Affordable Housing Act,* Pub. L. No. 101-625, § 504104 Stat. 4185 (1990).

Court. The Ninth Circuit had noted that such an interpretation raised various troubling possibilities.

> HUD ha[d] also taken the position that the statute would apply and permit eviction of an entire family if a tenant's child was visiting friends on the other side of the country and was caught smoking marijuana, even if the parents had no idea the child had ever engaged in such activity and even if they had no realistic way to control their child's actions 3,000 miles away.[17]

Rather than address this, or any other disturbing possibility, the Supreme Court concluded that "[i]t is not 'absurd' that a local housing authority may sometimes evict a tenant who had no knowledge of the drug-related activity" but rather such liability is simply "a common 'incident of tenant responsibility under normal landlord-tenant law and practice.'"[18] The Supreme Court suggests that tenants in federally subsidized housing should be treated the same as tenants in "normal," unsubsidized housing without any recognition of the role of the public housing program in meeting the needs of low-income people, or the public benefit nature of the program. Unlike many unsubisized private market tenants, evicted public housing tenants lose a substantial and deep subsidy and cannot just move to other housing.

By not acknowledging the need for or providing any legal limits on how broadly the one-strike law can be applied, the Supreme Court left this legal decision in the hands of local PHAs:

> The statute does not require the eviction of any tenant who violated the lease provision. Instead, it entrusts that decision to the local public housing authorities, who are in the best position to take account of, among other things, the degree to which the housing project suffers from "rampant drug-related or violent crime," 42 U. S. C. §11901(2)(1994 ed. and Supp. V), "the seriousness of the offending action," 66 Fed. Reg., at 28803, and "the extent to which the leaseholder has… taken all reasonable steps to prevent or mitigate the offending action."[19]

With regard to the issue of due process, the Supreme Court found that the tenants have a property interest in their leasehold interest. However, the Court noted that there was no procedural due process claim made by them that OHA had not given them notice of the eviction. In addition, "[a]ny individual factual disputes about whether the lease provision was actually violated can, of course, be resolved…" in the state court eviction proceedings.[20]

Turning to the substantive due process issues that were raised but not decided by the Ninth Circuit because of the doctrine of constitutional avoidance, the Court distinguished *Rucker* from cases cited by the Ninth Circuit.[21] The Ninth Circuit had used forfeiture case law to reason that "HUD's interpretation of § 1437d(l)(6), which would permit the deprivation of a tenant's property interest when the property was not used in the commission of a crime and when the tenant did not know of the illegal activity, would raise serious due process concerns."[22]

The Supreme Court, however, declared that both cases cited by the Ninth Circuit to support its conclusion dealt with the acts of government as sovereign, while in *Rucker*, "[t]he government is not attempting to criminally punish or civilly regulate respondents as members of the general populace. It is instead acting as a landlord of property that it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required."[23]

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[17]*Rucker,* 237 F.3d 1113, 1125, *rev'd*, 122 S.Ct.1230 (2002).

[18]*Department of Housing and Urban Development v. Rucker,* 122 S.Ct. 1230, 1235 (2002), citing to 56 Fed. Reg. at 51,567 (1991).

[19]*Id.* (Emphasis in original)

[20]*Id.*

[21]*See*, 237 F. 3d 1113, 1124-1125 (*Scales* v. *United State*s, 367 U.S. 203, 224-225 (1961); *Southwestern Telegraph & Telephone Co. v. Danaher,* 238 U.S. 482 (1915)).

[22]*Rucker,* 237 F.3d 1113, 1125, *rev'd*, 122 S.Ct. 1230 (2002).

[23]*Department of Housing and Urban Development v. Rucker*, 122 S.Ct. 1230, 1236 (2002).

Save the Dates

2002 Housing Justice Network Meeting Set for December 8-9

The next meeting of the Housing Justice Network (HJN)(formerly known as LALSHAC) is scheduled to take place on December 8-9 in the Washington, D.C. area.

The 2002 HJN meeting is intended to provide housing advocates and clients an opportunity to discuss and address critical issues affecting the rights of residents of federally assisted housing.

HJN meetings are not training conferences. We prefer attendance by housing advocates and clients who are familiar with federal housing programs and are willing to participate actively in HJN's ongoing activities (exchanging information on local housing strategies, permissible legislative and administrative advocacy on low-income housing issues at the federal, state and local levels).

The National Housing Law Project is also planning a one-day training session on the federal housing programs for Saturday, December 7, immediately preceding the HJN meeting. The training will also take place in the Washington, D.C. area and should benefit those advocates that are not familiar with recent changes to the federal housing programs. The training event will be separate from the HJN meeting, although advocates and clients are welcome to attend both.

A more detailed announcement about the 2002 HJN meeting and the training event will appear in a future issue of the *Housing Law Bulletin*, and a summary of the planned activities and registration requirements for both events will be sent to the HJN mailing list and to housing specialists at legal services and other programs. In the meantime, reserve the dates on your calendar.

Unfortunately, the Court's finding conveniently ignores the general imbalance in bargaining power that exists between practically all landlords and tenants and the particular imbalance that exists in the subsidized housing market. Poor people who live in public housing have no bargaining power to change lease clauses. Their choices are to sign the lease that is put in front of them, pay rents that they cannot afford, live in substandard or overcrowded housing, or be homeless.[24]

New Developments

There are two post-*Rucker* developments that should be of interest to advocates. First, the Oakland Housing Authority decided not to evict three out of the four tenants who challenged their eviction and HUD's interpretation of the one-strike law.

Second, in a strongly worded letter issued shortly after the Supreme Court's decision, HUD Secretary Martinez encouraged public housing directors "… to be guided by compassion and common sense in responding to cases involving the use of illegal drugs. Consider the seriousness of the offense and how it might impact other family members."[25] The letter also states that the lease provision required by the one-strike statute "… should be applied responsibly. Applying it rigidly could generate more harm than good."[26] Advocates should feel free to draw upon the language of this letter when negotiating with PHAs about application of the one-strike statute.

Conclusion

The Supreme Court's *Rucker* decision holds that the language of §1437d(l)(6) plainly and unambiguously grants local PHAs the authority to enforce the statute as a one-strike rule with no quarter given to tenants who did not know, had no reason to know, or took reasonable steps under the circumstances to prevent the offending activity. The opinion's vesting of complete discretion in the hands of local PHAs is likely to result in wide-spread abuses in enforcement that leave innocent tenants homeless.

The Court's decision throws the issue of how innocent tenants are to be treated back to Congress, which may decide to revisit the issue. In the meantime, arguments about how PHAs exercise their discretion remain to be made in the courts as do arguments about particular classes of tenants, such as victims of domestic violence. Moreover, advocates can and should not forget that PHAs have discretion in how they exercise their authority under the one-strike law and that negotiations can lead to reasonable enforcement policies and various procedural protections. Next month's issue of the *Housing Law Bulletin* will examine in more detail the steps that advocates can take to protect residents' interests after *Rucker*. ■

[24]Lastly, though not addressed by the Ninth Circuit, the Supreme Court stated in its opinion that the First Amendment free association and excessive fines issues raised by respondents were not substantial. *Id*.

[25]Letter from Mel Martinez, Secretary of HUD, to Public Housing Directors, (April 16, 2002)(available on NHLP's Web site at www.nhlp.org).

[26]*Id.*

Omnibus Housing Bill Introduced in the House

On March 19, 2002, Representative Marge Roukema (R-NJ), along with Mark Green (R-WI) and Michael Oxley (R-OH), introduced the *Housing Affordability for America Act of 2002*.[1] This bill, which is the first omnibus housing bill in eight years, addresses a wide range of housing issues—from a housing production program within the HOME program to elimination of the Public Housing Authority (PHA) Plan process for some PHAs. Although introduced by three Republicans, the bill does not seem to be the result of partisan politics, but rather the result of a growing recognition that low-income housing issues are of critical importance. This article outlines many of the proposals contained in the bill and offers some comments on both positive and negative aspects of the legislation.

HOME Program

The bill's first section is a welcome acknowledgment of the need for production and preservation of low-income housing units. The bill would amend the HOME program to establish a housing production and preservation program targeting very low-income and extremely low-income families.[2] This program would be funded by Section 8 recaptures, and thus the bill does not propose any new funding for production, a bit of a disappointment for housing advocates. However, the program is not a carve-out from the HOME program; it is meant to be a separate program within HOME. When questioned, staff of the bill's sponsors stated that they were "totally flexible" on the program's size. The goal of the legislation, they state, is to get production and preservation "on the books," let the program work, and then argue for expanded funding if it works. While this strategy may well be the best option for getting this portion of the proposed legislation passed, it would have been a stronger proposal for housing advocates had it come with new money.

The production and preservation program is designed to help very and extremely low-income households, with at least 50 percent of the funding targeted for use of production and preservation of units for extremely low-income families.[3] Tenants would pay no more than 40 percent of the family's gross monthly income as their portion of the rent,[4] a substantial increase from the 30 percent standard used in most other programs. The funds for the program would be distributed as follows: 60 percent to local governments, and 40 percent to states, by a formula based on need for afford-

[1]The Housing Affordability Act of 2002, H.R. 3995, 107th Cong. (2002) is available online from Thomas at http://thomas.loc.gov/cgi_bin/query/z?c107:H.R.3995.IH.

[2]*The Housing Affordability Act of 2002*, H.R. 3995, 107th Cong. § 101(c) (2002).

[3]*Id.*, § 101(c)(2).

[4]*Id.*

able housing within the jurisdiction, including factors such as vacancy rates and proportion of substandard housing.[5]

The bill would also remove Fair Market Rents (FMRs) from HOME rent level determinations, addressing the problem of FMRs that are unable to support the debt service for some properties.[6] On the downside, this change could make it difficult for voucher holders to rent units produced with HOME funds.

Other changes in HOME include: permitting religious organizations to receive HOME funding for their secular activities that qualify under the program;[7] allowing room additions for grandparents and grandchildren eligible for HOME funding;[8] and letting participating jurisdictions to base HOME rents on the greater of state or area median income.[9]

Section 8

One of the more creative aspects of the bill is the deployment of "thrifty production vouchers" to be used in conjunction with the production and preservation program within the HOME program.[10] These vouchers are the brain child of the National Housing Trust Fund Campaign[11] and are less costly than regular Section 8 vouchers. With a Thrifty Voucher, the payment standard for the unit is based on the property's operating cost, instead of the fair market rent (FMR). Since operating costs are generally substantially lower than the FMR, a Thrifty Production Voucher would save considerable money. Use of Thrifty Vouchers would be limited to 25 percent of the units in a property (with some exceptions) in order to create an incentive for an owner to keep operating costs low, since they would have to bear at least 75 percent of any unnecessary expenses.[12] In order to receive the project-based Thrifty Vouchers, owners would have to agree to accept the subsidy for 40 years, subject to appropriations. These vouchers could be used in conjunction with other subsidies, such as Low Income Housing Tax Credits or Community Development Block Grants. Tenants of the units would receive priority for regular Section 8 vouchers.

Inclusion of these vouchers is an encouraging sign, both because it introduces a new way to fund operating subsidies for low-income housing and because it demonstrates some Republicans' willingness to listen to and adopt ideas generated by advocates.

There are also provisions designed to improve Section 8 voucher utilization. One significant change is the proposed alteration of the 40 percent rental limit.[13] The Section 8 rent cap would be changed from 40 percent of adjusted net income to 40 percent of gross income. Currently, new voucher recipients can only spend 40 percent of adjusted net income as their portion of the rent. The change would increase the amount of their own money these voucher holders could spend on their rent, opening up the housing market a bit more in areas where the payment standard does not afford tenants a realistic opportunity to rent a decent apartment. The risk is that allowing tenants to pay an even higher portion of their income for rent will set them up for failure and take away scarce resources from other necessities such as food and health care.

One of the more creative aspects of the bill is the deployment of "thrifty production vouchers" to be used in conjunction with the production and preservation program within the HOME program.

Also designed to improve voucher utilization is a proposal to allow PHAs to use up to 5 percent of their funds to directly support their Section 8 voucher program.[14] These monies could be used for housing counseling, down payment assistance, security deposits and other supportive services. Again, this positive aspect of the legislation is diminished somewhat by the lack of additional funding to support it.

One proposal geared toward improving voucher utilization that did not make it into the final bill would have permitted PHAs to set the voucher payment standard up to 120 percent of FMR without HUD approval. Earlier drafts of the bill had included such a proposal. Unfortunately, due to the high cost of the proposed change, it was dropped before the bill was introduced.

The bill also includes a performance incentive for PHAs in the form of increased administrative fees for those PHAs that achieve high SEMAP scores or show substantial improvement in their current scores.[15]

Among the potentially most significant proposals in the bill are the provisions relating to enhanced vouchers. Here, the drafters seemed to have tried very hard to address the issues brought to them by low-income housing advocates, but they have failed to smoothly execute solutions.

One notable change is a prohibition on rescreening of tenants who become eligible for enhanced vouchers when formerly subsidized buildings convert to market rent. Enhanced vouchers have an increased payment standard that allows tenants to remain in their converted units by paying

[5] *Id.*, § 101(d)(2).

[6] *Id.*, § 102.

[7] *Id.*, § 110.

[8] *Id.*, § 106.

[9] *Id.*, § 103.

[10] *Id.*, § 401.

[11] For more discussion of Thrifty Vouchers, *see* 33 HOUS. L. BULL. 47, 49 (Feb. 2002).

[12] *The Housing Affordability Act of 2002*, H.R. 3995, 107th Cong. § 401 (2002).

[13] *Id.*, § 402.

[14] *Id.*, § 403.

[15] *Id.*, § 405.

market rent, provided that rent is reasonable. Currently, advocates have been concerned that tenants who become eligible for such vouchers are not receiving them because PHAs are rescreening the tenants as if they are new applicants for vouchers, and declaring them ineligible. The legislation would eliminate that practice, prohibiting PHAs from making families requalify for assistance before receiving an enhanced voucher.[16] This provision is the result of the tireless efforts of advocates lobbying to change the law, and its inclusion in the bill is to be applauded.

Other enhanced voucher provisions do not fare quite as well, however. The bill prohibits an owner of a multi-family housing project for which the tenants become eligible for enhanced vouchers from refusing to rent to families because they are enhanced voucher recipients.[17] While at first blush this seems to address the problem of owners refusing to accept enhanced vouchers, advocates have raised concerns that this standard replaces or eliminates the current standard that permits eviction only upon good cause in such situations. This does not seem to be the intent of the drafters, and it is hoped that work with committee staff will garner clearer language and better results.

Similarly, there is encouraging—but not perfect—language regarding "over-housed" families. The bill provides protection to voucher tenants who have experienced a "significant life event," such as the death of a spouse or a child moving away, and, as a result, are occupying units that the PHA deems to be too large for the reduced family size. The legislation prohibits PHAs from moving such tenants unless there is a suitable unit in the same building or the immediate neighborhood.[18] Again, this language is well-intentioned and will provide many tenants, especially elderly tenants, with some piece of mind that they will not have to move whenever their household naturally shrinks. However, the language stops short of forbidding PHAs from moving such tenants at all. In the case of tenants who have received enhanced vouchers, this poses a serious problem. If such tenants are forced to move from the building, they will lose the benefits of the enhanced voucher because the enhancements do not survive relocation. With an ordinary, "unenhanced" voucher, many of these tenants might not be able to afford decent units in the immediate neighborhood, or at all. This problem could be cured with language that permits enhanced voucher holders to receive a voucher with a payment standard that is the higher of the enhanced voucher payment standard for an appropriately sized unit in the building or the regular payment standard for an appropriately sized unit outside the building. It is also highly questionable whether PHAs would have any authority to reassign a tenant to another unit in the building, as they would have no control over the building itself, since the building would have converted to market rent and cut virtually all ties to the housing authority.

Another potential problem is that the provision applies to all voucher holders who have significant life events after they have started to receive the voucher assistance. Conversions of project-based Section 8 buildings once again raise questions. If the life event occurred before the issuance of an enhanced voucher, it is unclear whether the right to remain unless there is an appropriate unit in the building or immediate neighborhood would apply to the tenant now receiving the enhanced voucher instead of the project-based subsidy. These are issues that will require further discussion with congressional staff to ascertain their intent and clarify the language to best help affected tenants.

The bill also extends project-based Section 8 contract renewals[19] and extends the 1999 manufactured housing demonstration program[20] through 2004.[21]

Public Housing

Many of the bill's proposals regarding public housing are perhaps the most troublesome for housing advocates, as they would take away many of the hard-won tenant participation provisions included in current law and result in a further reduction in the number of public housing units. Other public housing provisions offer new proposals that are of questionable merit at best.

The bill would allow HUD to waive the requirement that PHAs have at least one resident on their governing board if reasonable efforts have been made to remove any barriers to appointing or electing resident commissioners. There is no time limit on the waiver provision and it apparently applies not just to an individual PHA, but rather all PHAs in a state.[22] Thus, in affected states, tenants who now have direct, required participation on the Board of Commissioners would be denied, perhaps indefinitely, the right to participate in major decisions affecting their housing.

The bill's other proposal would suspend for three years the requirement that PHAs with fewer than 100 units file an annual PHA plan.[23] This is especially troubling because it is based on the number of public housing units controlled by the PHA and would therefor exempt those PHAs that run large voucher programs but have no public housing units. In California, for example, Berkeley with 1,841 vouchers, Long Beach with 5,972 vouchers and Pasadena with 1,315 vouchers would all be exempt from the PHA plan process because they have no or few conventional public housing units. Additionally, the exemption from the PHA plan process more than likely would also mean that there would be no way to monitor PHA decisions with respect to PHA discretionary polices adopted pursuant to the *Quality Housing Work Responsibility Act of 1998*.[24] In essence, the objectives of

[16] *Id.*, § 404.

[17] *Id.*, § 406(a).

[18] *Id.*, § 406(b).

[19] *Id.*, § 408.

[20] Pub. L. No. 105-276, §557, 112 Stat. 2,461, 2,613 (Oct. 21, 1998).

[21] *The Housing Affordability Act of 2002*, H.R. 3995, 107th Cong. § 407 (2002).

[22] *Id.*, § 501.

[23] *Id.*, § 504.

[24] Pub. L. No. 105-272 (Oct. 21, 1998).

the PHA plan process—making PHAs accountable at the local level and providing an information source about basic PHA policies—may also be lost. These two proposals would greatly weaken the hard-won resident participation requirements incorporated into the 1998 legislation and would leave tenants voiceless regarding the future of their own housing. They are, perhaps, the most unfortunate aspects of H.R. 3995.

Another public housing proposal would grant HUD the authority to develop a prototype of a PHA evaluation system that would be an alternative to the troubled Public Housing Assessment System (PHAS).[25] PHAS has taken over two years to be fully implemented and is still not in full use. Replacing it might lead to an improved system, but it may also lead to further frustrating delays in implementation.

The extension of HOPE VI is questionable since it can be argued that the program has accomplished its original goal of removing from use the approximately 100,000 units identified as the worst public housing.

The bill also extends and alters the HOPE VI program. It extends the program, currently slated to expire at the end of 2001, through 2004[26] and authorizes appropriations through that year, as well.[27] The extension of HOPE VI is questionable since it can be argued that the program has accomplished its original goal of removing from use the approximately 100,000 units identified as the worst public housing. It has also displaced thousands of public housing tenants from their current homes, rehoused a vast majority in housing other than that revitalized by HOPE VI, and rebuilt only a limited number of those that were demolished. But the bill does not stop at reauthorization; it expands the selection criteria to include smaller public housing authorities by permitting "redevelopment or modernization efforts that are large-scale in relation to the size of the agency," rather than only "large-scale" projects.[28] The program's expansion is without justification and of debatable merit.

The bill would also limit the federal government's review of PHA activities to exclude joint ventures by PHAs and their subsidiaries as long as federal funds or proceeds or income from such funds are not involved. This provision would allow PHAs greater flexibility to engage in activities that might increase their revenue without restrictive regulation.[29]

H.R. 3995 also would allow PHAs to convert public housing units to project-based Section 8 units with HUD approval on a project-by-project basis.[30] The purpose of this provision is to facilitate the financing of capital needs and foster development-based financial management. The PHA would have to secure loans to finance the capital improvements, but the bill also authorizes the raiding of the public housing capital fund to make the proposal feasible. The bill requires HUD to approve a PHA's proposal but it does not make the planning requirements of the voucher conversion statute applicable to this new proposal.[31] Moreover, while the converted projects would be required to remain low-income housing for at least 40 years, the bill is totally silent about tenant displacement or uses beyond 40 years. Experience with the opt-outs from the project-based Section 8 program and with the expiration of 20-year use restrictions on the old Section 236 and 221(d)(3) programs suggests that there will be a multitude of preservation and displacement problems at the end of the 40th year that are better addressed now than later. For example, if the property significantly increases in value, will the benefits be restricted to continuing to assist the lowest-income families?

The proposed legislation also sanctions a reduction in the number of units serving the lowest-income households during the 40-year term.[32] As the units become vacant, the bill would allow for up to one-third of them to be converted to market-rate apartments.[33] However, the PHA would still be required to use the money it would have otherwise used to provide the project-based units to provide tenant-based voucher assistance to other qualifying families. This proposal could allow PHAs to increase their revenue and, theoretically, give them the opportunity to provide more assistance to those in need. There is no guarantee, however, that the funds generated for tenant-based voucher assistance will approximate the number of units that have been converted to market rate. Moreover, it would also reduce the amount of available low-income housing stock, while increasing the number of Section 8 vouchers. Lastly, additional units may be lost from the program because of the elimination of the capital fund. Some developments will simply fail because of deferred maintenance and unexpected repairs that inevitably lead to Housing Quality Standards violations.

Supportive Housing for Elderly and Disabled Families

H.R. 3995 also includes provisions addressing the needs of the elderly and disabled, including a demonstration program for addressing the modernization needs of Section 236 elderly housing projects[34] and proposing to make religious

[25] *Id.*, § 503; *see* 24 C.F.R. § 902 (2002).

[26] *The Housing Affordability Act of 2002*, H.R. 3995, 107th Cong. § 523 (2002).

[27] *Id.*, § 522.

[28] *Id.*, § 521.

[29] *Id.*, § 502.

[30] *Id.*, § 505(a).

[31] *See* 42 U.S.C.A. § 1437t (West Supp. 2001)(Requires *inter alia* an analysis of the market value of the property before and after the rehabilitation and before and after the conversion, consultation with the residents and consistency with the PHA plan.).

[32] *Id.*

[33] *Id.*

[34] *Id.*, § 301.

organizations eligible to own projects under the supportive housing for the elderly and supportive housing for the disabled programs.[35]

Homeless Assistance

Also included in the bill are several provisions regarding assistance for the homeless. It would move Shelter Plus Care renewals[36] and the Supportive Housing Program[37] to the Housing Certificate Fund, a move applauded by many advocates. The bill also extends those programs[38] as well as the Emergency Shelter Grants Program,[39] the Interagency Council on the Homeless,[40] and the Federal Emergency Management Agency Food and Shelter Program[41] through 2004. Section 8 Assistance for Single Room Occupancy Dwellings would receive increased budget authority and be extended through 2004.[42] The bill provides for a 30 percent set-aside for permanent housing.[43]

Housing Impact Analysis

One encouraging provision is the requirement that certain federal agencies publish a Housing Impact Analysis as part of the rulemaking process, unless they certify that a rule would have no significant impact on housing affordability.[44] The bill defines a "significant impact" as one that could increase consumers' housing costs by $100 million per year or more,[45] and "housing affordability" as housing that is affordable to families with incomes that do not exceed 150 percent of the area median income.[46] Both an initial and a final Housing Impact Analysis would be required,[47] but the initial analysis could be waived by an agency head with a written finding that the rule is being promulgated on an emergency situation.[48]

Other Provisions

The bill also makes a number of changes to the FHA mortgage insurance program, including the indexing of multifamily mortgage limits under the FHA program to the annual construction cost indices.[49] It allows HUD to discount HUD-held single family properties by 50 percent to qualified teachers and public safety officers. It extends the Native American Housing and Self-Determination Act of 1996,[50] Housing Opportunities for People with AIDS,[51] and Assistance for Self-Help Housing Providers[52] through 2007. Additionally, the bill would create a single office in HUD to administer and coordinate housing counseling programs.[53] Lastly, the bill would make religious organizations eligible for CDBG funding for their secular activities.[54]

Conclusion

Although H.R. 3995 is flawed in some respects—failing to adequately address some of the issues it tries to tackle and containing provisions that undo some of the progress tenants have made—Congresswoman Roukema and her colleagues should be commended for their effort to remedy many of the ills in low-income housing and for bringing housing issues back to the fore of the Congressional consciousness. Many provisions of the bill are long-awaited and very welcome changes in the law. Her current plan to hold three hearings on the bill prior to markup should further promote the importance of housing in the national debate. Since Congresswoman Roukema is retiring at the end of the term, it is believed that the bill has a legitimate chance to gain significant support. Even if it is not passed as separate legislation, it seems quite possible that aspects of the bill could be adopted and passed within an appropriations bill, a common practice for nearly 10 years. Advocates are urged to intensify their lobbying efforts to make any legislation that results the best possible for low-income residents. ■

[35] *Id.*, § 302.

[36] *Id.*, § 603(b).

[37] *Id.*

[38] *Id.*, §§ 603(b) (Emergency Shelter Grants program) and 604 (Supportive Housing Program).

[39] *Id.*, § 603.

[40] *Id.*, § 601.

[41] *Id.*, § 602.

[42] *Id.*, § 605.

[43] *Id.*, § 604(c).

[44] *Id.*, § 801 et seq.

[45] *Id.*, § 810(5).

[46] *Id.*, § 810(3).

[47] *Id.*, §§ 804 and 805.

[48] *Id.*, § 809.

[49] *Id.*, § 201.

[50] *Id.*, § 701.

[51] *Id.*, § 904.

[52] *Id.*, § 903.

[53] *Id.*, § 902.

[54] *Id.*, § 905.

HUD Technical Assistance Debacle Continues

In the January issue of the *Bulletin*,[1] we reported on HUD's suspension of funding for the Outreach and Technical Assistance and the Intermediary Technical Assistance Grant programs (OTAG and ITAG). The suspension was purportedly due to technical violations of the *Anti-Deficiency Act* (ADA) by the previous administrations. These grant programs fund nonprofit organizations involved in the preservation of Department of Housing and Urban Development (HUD) multifamily rental housing through the provision of technical and other assistance to residents and other organizations involved in the preservation process. In the same issue we also reported that Congress enacted corrective legislation[2] that was to restore funding to the organizations funded under the OTAG and ITAG programs, notwithstanding the ADA violations, and we optimistically reported that the legislation resolved the issue. Unfortunately, our prediction was premature. Although the corrective legislation provides HUD with significant latitude to resolve the crisis that it created, many grantees currently remain unpaid for much of the work that they completed in the last six months and the funding for future project-specific work remains uncertain.

A month after the corrective legislation was signed into law, HUD had neither resumed funding of the programs nor given any time frame for their resumption. Thus, when Secretary Martinez appeared before the House and Senate oversight committees on February 13, 2002, he was subjected to harsh bipartisan questioning. In a surprising response, Secretary Martinez revealed that HUD's Office of Inspector General had found, provisionally, that no ADA violation exists and that the Department would shortly release a report to that effect.[3] The Secretary further committed to authorizing payment of all outstanding invoices as of September 30, 2001 by early March. While this was welcome news, grantees and others were disturbed to learn that the ADA violation that served as the justification for the funding interruption proved to be unsubstantiated.

Unfortunately, the Secretary's commitment also did not extend to all the HUD grantees. It primarily focused on the 2001 OTAG program, which provides support to approximately 35 nonprofit organizations around the country that work with tenants in buildings threatened by expiring Section 8 contracts. HUD has restored most of the funding for these organizations and approved billing for current and future work under the existing grant agreements.[4] For a variety of programmatic reasons, grantees under the ITAG program have only received funding for invoices for work that was completed before September 30, 2001 and approved by the intermediary grantees sometime in October. They have not received payments for invoices submitted under their pre-development, resident capacity, or public entity grants for work completed before September 30, 2001 but not processed by the Intermediaries until after October 2001.[5] To compound the problem, HUD has not authorized any additional work under preexisting ITAG grants, has not restored the Intermediaries' funding to pay for it and has not granted intermediaries the authority to enter into new grants for additional work. This delay has paralyzed the ITAG network and the ability of its grantees to meet existing commitments, let alone future needs. Also, despite expressing a willingness to continue the Volunteer in Service to America (VISTA) program that provides outreach to tenants at affected properties, HUD has failed to restore funding to this program as of the date of the writing of this article.

In response to bipartisan congressional requests, Secretary Martinez has recently designated Frederick Tombar, Acting Deputy Assistant Secretary for Multifamily Housing, as the responsible official for managing the remaining issues regarding program implementation. One issue of critical concern is the source of the funds that are to be used for meeting existing obligations. At issue is whether HUD will use the funds already reserved from prior fiscal years for these purposes (as directed by the Inspector General), or whether it will use the $11.3 million provided in the FY 2002 *Defense Appropriations Act*. If HUD uses the current appropriations, thereby leaving prior appropriations unspent, it is likely not to have sufficient funding to meet both prior commitments and near-term needs.

For the OTAG and ITAG grantees there is yet more unfortunate fallout from the entire ADA debacle. When Congress approved the new funding for the programs, it also ordered the OIG to undertake audits of the grantee's activities. The OIG has recently commenced those audits and it appears that compliance with the audits will consume additional significant and scarce resources. Continuing bipartisan interest in these issues will hopefully encourage HUD to promptly take all of the steps necessary to fully reactivate the program and provide tenants with the services intended by Congress. ■

[1]*Congress Resolves HUD Technical Assistance Funding Fiasco*, 32 HOUS. L. BULL. 11 (Jan. 2002).

[2]Pub. L. No. 107-117, § 1303, 115 Stat. 2230, 2340 (Jan. 10, 2002)(*Fiscal Year 2002 Defense Appropriations Act*).

[3]The HUD Inspector General's report was issued on March 22, 2002, and is available online *at* www.hud.gov/oig/ig280801.pdf.

[4]Some 1998 OTAG grantees have amounts yet to be expended under their grants and HUD has not indicated a willingness to extend the performance period for these grants to permit complete use of the funds awarded.

[5]Only amounts invoiced to HUD were made available and in some cases invoices submitted by ITAG sub-grantees to the intermediaries have not yet been billed to HUD.

HUD Releases SuperNOFA 2002

Introduction

On March 26, 2002, HUD released its Super Notice of Funding Availability (SuperNOFA) announcing the availability of approximately $2.2 billion in 41 grant categories and 29 HUD programs.[1] This article very briefly highlights some changes in the SuperNOFA and outlines relevant deadlines and other information. Potential applicants are strongly advised to read the entire SuperNOFA carefully before applying for a grant. For the NOFA and application kit, call the SuperNOFA information center at (800) HUD-8929. HUD will also hold satellite broadcasts about the programs in the SuperNOFA and application preparation. For more information about these broadcasts, interested parties should consult the HUD Web site at www.hud.gov.

New Strategic Goals

One item of note in the SuperNOFA is the introduction of HUD's new Strategic Goals, which the activities funded through the SuperNOFA are meant to support.[2] Those goals include:

1) make the home-buying process less complicated, the paperwork less demanding and the mortgage process less expensive;
2) help families move from rental housing to homeownership;
3) improve the quality of public housing and provide more choices for its residents;
4) strengthen and expand faith-based and other community partnerships that enhance communities;
5) effectively address the challenge of homelessness;
6) embrace high standards of ethics, management and accountability;
7) ensure equal opportunity and access to housing; and
8) support community and economic development efforts.

Applicants should bear in mind these new strategic goals—along with changes in policy priorities, which include faith-based and other community-based organizations in program development and implementation, and an emphasis on services to the Colonias[3]—when developing grant proposals.

Program Changes

There are also a number of new programs and removed programs of which applicants should take note. Perhaps of greatest interest in the area of new programs is Housing Counseling Services Targeting the Colonias; Public Housing Resident Opportunity and Self-Sufficiency (ROSS) for Homeownership Supportive Services; and ROSS for Neighborhood Networks Program. The Family Self-Sufficiency Program Coordinators Program has been renamed as the Housing Choice Voucher Family Self-Sufficiency Coordinators Program. The most significant programs lost from the 2001 SuperNOFA are a number of drug elimination programs.

The SuperNOFA does not include the HOPE VI grants for Fiscal Year 2002; they will be released at a later date.

Application Information

What follows is very basic information as to select grants that may be of particular interest to our readers. This list is not exclusive either as to the information about the programs listed or as to the funding available for other programs. We include only the amount of the approximate funding available, the application due date and the submission location and room numbers.[4] More details about the application process for these programs and information about other programs are available in the SuperNOFA. ■

PROGRAM NAME	FUNDING AVAILABLE	DUE DATE	WHERE TO SUBMIT
HOME TA	Up to $5 million	June 7, 2002	HUD Headquarters Room 7251 and local HUD office
McKinney–Vento Homeless Assistance Programs TA	Up to $3 million	June 7, 2002	HUD Headquarters Room 7251 and local HUD office
HOPWA TA	Up to $2 million	June 7, 2002	HUD Headquarters Room 7251 and local HUD office
CDBG for Indian Tribes and Alaskan Villages	Up to $70 million	June 6, 2002	HUD Area ONAP Office

[1] *See* 67 Fed. Reg. 13,825 (Mar. 26, 2002); available at www.access.gpo.gov/su_docs/fedreg/a020326c.html and at www.hud.gov/offices/adm/grants/fundsavail.cfm.

[2] *See* 67 Fed. Reg. 13,827-13,828.

[3] *See* 67 Fed. Reg. 13,829.

[4] *See* 67 Fed. Reg. 13,830-13,835.

PROGRAM NAME	FUNDING AVAILABLE	DUE DATE	WHERE TO SUBMIT
Housing Counseling – Local Housing Counseling Agencies	Up to $6.6 million	May 17, 2002	HUD Homeownership Center
Housing Counseling – National and Regional Intermediaries	Up to $10.4 million	May 17, 2002	HUD Headquarters Room 9166
Housing Counseling – Colonias	Up to $250,000	May 17, 2002	Santa Ana Homeownership Center
Self-Help Homeownership Opportunity Program	Up to $22 million	June 19, 2002	HUD Headquarters Room 7251
ROSS Grants	Up to 78.2 million total	varies with program	Grants Management Center
ROSS for Resident Management and Business Development	Up to $6 million	May 14, 2002	Grants Management Center
ROSS for Capacity Building	Up to $5 million	May 14, 2002	Grants Management Center
ROSS for Resident Service Delivery Models	Up to $21 million	June 18, 2002	Grants Management Center
ROSS for Service Coordinator Renewals	Up to $20 million	May 14, 2002	Grants Management Center
Ross for Neighborhood Networks	Up to $15 million	July 10, 2002	Grants Management Center
ROSS for Homeownership Supportive Services	Up to $11.2 million	July 10, 2002	Grants Management Center
Homeless Assistance – Continuum of Care Homeless Assistance Supportive Housing; Shelter Plus Care; Section 8 Moderate Rehabilitation Single Room Occupancy	Up to $950 million	June 21, 2002	HUD Headquarters Room 7270 and HUD Field Office
Section 202 Supportive Housing for the Elderly	Up to $485.6 million	June 5, 2002	Appropriate local HUD Multifamily Hub Office or Multifamily Program Center
Section 811 Supportive Housing for Persons with Disabilities	Up to $117.5 million	June 5, 2002	Appropriate local HUD Multifamily Hub Office or Multifamily Program Center
Housing Opportunities for Persons with AIDS	Up to $27.5 million	Renewals – May 16, 2002; New Projects – June 25, 2002	HUD Headquarters Room 7251 and HUD Field Office
Rental Assistance for Non-Elderly Persons with Disabilities Related to Certain types of Section 8 Project-Based Development and Section 202, 221(d) and 236 Developments	Up to $20 million	July 2, 2002	Grants Management Center
Service Coordinators in Multifamily Housing	Up to $25 million	July 3, 2002	Appropriate local HUD Multifamily Hub Office or Multifamily Program Center
Housing Choice Voucher Family Self-Sufficiency Program Coordinators	Up to $46.4 million	May 21, 2002	Grants Management Center

D.C. Adopts Progressive Housing Legislation

In April, the *District of Columbia Housing Act of 2002* (hereinafter "the Act") became law.[1] The Act has been described as the most comprehensive piece of legislation since the District was granted Home Rule. It is expected that the Act will help build and rehabilitate 4,300 units of housing for low and moderate-income families in addition to preserving 2,700 such units. The Act is also expected to generate much-needed revenue—almost $15 million—over the next 10 years and to provide hundreds of additional construction jobs over that time.

The core of the Act consists of a Housing Production Trust Fund, provisions preventing discrimination against housing choice voucher holders, sections facilitating the ability of the District to condemn and sell deteriorated properties, and a number of tax incentives to improve the state of low-income housing in the District. Given that the District's housing policies have come into question in the past—most prominently in 2000, when the city threatened to close down a number of deteriorating lower-income properties in the Columbia Heights area without a coherent plan for tenant relocation—and considering that the District administers more than 8,000 Section 8 vouchers that are becoming harder and harder for tenants to use, this legislation is a very welcome advance for low-income tenants in our nation's capital. This article summarizes the major provisions of the Act.

Preservation of Federally Subsidized Units

Following the lead of several other jurisdictions that have implemented similar legislation,[2] the Act includes several provisions aimed at preservation of federally subsidized rental units.[3] It broadly defines the properties that are covered to include any project-based Section 8 property and any property that was financed in whole or in part by a mortgage held or insured by the Department of Housing and Urban Development (HUD).[4] It requires that if an owner of such property intends to opt out of the Section 8 contract or otherwise not continue to participate in the federal assistance program in any way,[5] he or she must provide any federally required notice to the Mayor, the Director of the Department of Housing and Community Development, the Director of Consumer and Regulatory Affairs, and the Executive Director of the Housing Authority.[6] The owner must also provide these parties a one-year notice that the federal assistance program would expire if the owner does not extend the contract or renew participation in the program.[7] The Act also provides that any owner who terminates participation in a federally subsidized housing program in any way "shall be deemed to have consented to reasonable inspection" of the property.[8]

The teeth of the preservation provisions come with the Act's granting the District the right of first refusal to purchase Section 8 properties. It provides that before an owner can sell such housing, the owner must provide the Mayor with the same opportunity as the tenants in the building to purchase the property.[9] The Mayor may also assign the opportunity to purchase the property to a nonprofit or other interested party, so long as the assignee agrees to maintain the income restrictions on the property for a period of at least 30 years.[10] One caveat is that the District may not exercise its option to purchase unless the sale would result in the discontinuance of the property as a federally assisted housing accommodation or in the discontinuance of any low-income residency requirements.[11]

The Act authorizes fines of up to five times the costs and damages sustained due to noncompliance with the law payable to the City's Housing Production Trust Fund.[12]

It also mandates that the city will provide any displaced tenants of buildings where the federal assistance has terminated with up to $500 per tenant for relocation expenses.[13]

All of these measures should give low-income tenants of federally subsidized buildings in the District some hope of being able to maintain residence in their units, assuming that the District actively pursues its right of first refusal by either purchasing the property itself or, perhaps preferably, assigning that right to a qualified nonprofit.[14]

Tax Incentives

There are tax incentives strewn throughout the legislation that are aimed toward preserving low-income housing. The Act provides property tax relief for owners who renew or extend Section 8 Housing Assistance Payment (HAP) contracts that are, or were, scheduled to expire after December 31, 2001.[15] The relief is scaled differently depending on the length of the renewal or extension and is only available to housing in areas designated as "qualified"

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[1] *The District of Columbia Housing Act of 2002* (hereinafter "the Act") is available online at www.dcbiz.dc.gov/services/housing_initiative_ 2002a.shtm. As the Act is not yet available in the D.C. Code, the cites in this article are to the Act itself by section number.

[2] *See* www.nhlp.org/html/pres/state/index.htm for more information about other jurisdictions' similar efforts. *See also* 32 HOUS. L. BULL. 1 (Jan. 2002).

[3] Act, Title II.

[4] § 202(6).

[5] § 203(b)(2).

[6] § 203(a).

[7] § 203(b)(1).

[8] § 203(c).

[9] § 204(a).

[10] § 204(d).

[11] § 204(c).

[12] § 207.

[13] § 205.

[14] *See* 32 HOUS. L. BULL. 1 (Jan. 2002) for a discussion of similar laws in other jurisdictions.

[15] § 291(b).

by the city.[16] If the contract is renewed for five years, the tax abatement equals 75 percent of the amount due for each year. If the contract is renewed for 10 years, the abatement is 100 percent for each year.[17] Abatement is also available for owners of certain Section 8 properties who make improvements of at least $10,000 to the property.[18]

Other tax incentives include abatements for new residential mixed-income developments, with the incentives varying depending on where the development is built.[19] In two designated areas, abatements are available for developments that reserve 10 percent of the units for low-income[20] residents for a period of 20 years, with penalties of up to $10,000 per year for failure to meet the 10 percent requirement.[21] In a third, higher-cost area, abatements are available if 5 percent of the housing units are reserved for low-income residents and an additional 10 percent are reserved for households below 60 percent of AMI for 20 years.[22] An even higher abatement is available for new developments in the same area that reserve 5 percent of the units for low-income households, 10 percent for those with income below 60 percent of AMI and another 5 percent for extremely low-income families.[23]

The Act caps the total amount of abatements to be awarded under the new development program.[24]

There are additional tax incentives for homeownership[25] and historic preservation.[26]

Anti-Discrimination Against Voucher Holders

Also significant are the Act's provisions regarding discrimination against housing choice voucher holders. It establishes that the subsidy received by voucher holders must be considered as income for the purposes of any minimum-income requirements imposed by a landlord.[27] Additionally, the Act states that the "owner of a housing accommodation shall not refuse to rent a dwelling unit to a person because the person will provide his or her rental payment, in whole or in part, through a section 8 voucher."[28] If an owner discriminates against a voucher holder, the Act provides for a civil fine of up to five times the costs and damages incurred by the tenant.[29] Hopefully, this measure will assist District residents in using their vouchers in a very tight market. Coupled with the possibility of increased production of low-income housing, this could go a long way toward alleviating the low-income housing crisis in the District of Columbia.

Condemnation and Sale of Deteriorated Properties

In an effort to increase the revenue available to provide for the trust fund and tax incentives discussed below, the Act focuses on giving the District greater ability to acquire and dispose of abandoned and deteriorated properties. It authorizes the Mayor to acquire such property for the "purpose of eliminating slum and blight"[30] and requires the Mayor to adopt a tenant relocation plan for occupied buildings after allowing at least a 30-day public review and comment period.[31] The Mayor must also issue his plan for the property's redevelopment before acquiring it.[32] Additionally, there must be a public hearing before the Mayor disposes of the property.[33] The Mayor may transfer an acquired property, including property that the city may have altered or improved, and forgive up to one-half of the outstanding taxes owed on the property and all penalties and interest accrued if the property is transferred to a nonprofit entity that covenants that it will maintain the rental units as affordable to low-income, very low-income, or extremely low-income residents for a period of at least 20 years.[34] Any displaced tenants are required to receive relocation costs.[35] Any funds raised through rehabilitation and resale of properties or through penalties assessed to owners are required to be placed in a trust fund created to abate nuisance properties.[36]

Housing Production Trust Fund

The legislation includes modifications to the District's formerly nearly dormant housing trust fund that are encouraging to advocates who have been lobbying for a national housing trust fund.[37] The District has had such a fund for many years, but local advocates state that the fund had very little money in it and that it was rarely employed. After much debate, the Act targets the funds monies reasonably deeply, requiring that at least 40 percent of the funds disbursed be used to assist very low-income households and another 40 percent be used for extremely low-income households.[38] The

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] § 601(b).

[20] Throughout the Act, the terms "low-income," "very low-income," and "extremely low-income" are defined as they are typically defined by HUD in such situations. "Low-income" individuals are those with income that is 50 to 80 percent of area median income (AMI). "Very low-income" is 30 to 50 percent of AMI. "Extremely low-income" is less than 30 percent of AMI. *See, e.g.*, Section 202(5), (10), and (16).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] § 701.

[26] § 302.

[27] § 206(a).

[28] § 206(c).

[29] § 207.

[30] § 102.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *See* 32 HOUS. L. BULL. 47 (Feb. 2002).

[38] § 501.

funds are to be used "for the purposes of assisting in the provision of housing opportunities" for these families, including "maximizing the possibility of home ownership."[39] Fifty percent of the funds must be used for rental housing needs; however, the Mayor has the option to waive that requirement if the city does not receive enough rental housing proposals by the third quarter of the fiscal year.[40]

The Act provides for revenue for the trust fund by requiring that 15 percent of the real property transfer tax and 15 percent of the deed recordation tax be placed into the fund.[41] Also, any proceeds of the sale of abandoned property must be placed into the fund.[42] To administer the fund, the Act establishes a nine-member Housing Trust Fund Board comprised of individuals from a variety of backgrounds, including one member from the nonprofit housing development community, one member of a low-income tenant association, one advocate for the disabled, and one preservation and production advocate.[43]

Other Provisions

The Act also includes provisions that modify the District's Homestead Housing Preservation Program to encourage the sale of properties to low- to moderate-income individuals,[44] a section providing for matching funds for employer-assisted home purchase programs,[45] and establishment of a homeownership counseling program.[46]

Conclusion

The *District of Columbia Housing Act of 2002* contains many welcome provisions aimed at the preservation of low-income housing in a city that desperately needed such legislation. With D.C. public housing still emerging from receivership and housing costs skyrocketing, low-income housing was becoming virtually impossible to obtain. This legislation should alleviate much of that problem. It remains to be seen how aggressively the city will use its trust fund and its newly created right of first refusal, but if the unanimous vote in favor of the bill by the city council is any indication, perhaps the nation's capital is turning a housing corner. We congratulate all the advocates in the District who worked so hard to pass this legislation and to target the relief to those most in need. ■

[39] *Id.*

[40] *Id.*

[41] *Id.* It should be noted that this provision is already being considered for alteration. It was thought that 15 percent of these taxes would amount to approximately $11 million annually. It now looks like it will generate closer to $25 million. Thus, the Mayor is discussing the possibility of reducing the percentage to 7.5 percent, which would garner the originally intended amount, but would garner less if the taxed revenue is reduced in the future.

[42] *Id.*

[43] *Id.*

[44] § 801.

[45] § 901.

[46] § 1001.

Voucher Protection Ordinance for Los Angeles

A recent ordinance enacted by the Los Angeles City Council offers important protections for voucher tenants by making it unlawful for landlords in that rent-controlled jurisdiction to terminate or fail to renew a voucher contract and then charge the voucher holder rent in excess of the tenant's share under the Housing Assistance Payment Contract.

The city of Los Angeles, like other California jurisdictions with rent control, had its rent control ordinance modified in 1995 by a California State statue known as the *Costa Hawkins Rental Housing Act* that requires rent decontrol whenever a unit is vacated voluntarily.[1] California law also provides that a landlord who fails to renew a Voucher Housing Assistance Payment (HAP) contract in effect on January 1, 2000, may not take advantage of the vacancy decontrol provisions of the law by establishing a new initial rent for the voucher unit for a period of three years.[2] Accordingly, if a new tenancy is created during the three-year period, the initial rent for that tenancy must be set at the rental rate provided for in the Voucher HAP contract plus any rent increases authorized after the termination of the Section 8 contract.[3] Moreover, unless it is held vacant, the unit remains under rent control beyond the three years, subject only to the vacancy decontrol provisions of the *Costa-Hawkins Rental Housing Act*. In short, under the *Costa Hawkins Rental Housing Act*, an owner who previously rented a unit under the voucher program may not claim the benefits of vacancy decontrol if the unit is re-rented within three years after a non-renewal or termination of a voucher contract.

Unfortunately, because of inadequate enforcement mechanisms, many landlords were violating the state law by terminating the Voucher HAP contract and increasing the rent in violation of state law and the Los Angeles Rent Stabilization Ordinance. Tenants were without meaningful remedies because state law did not protect residents from eviction if the landlord raised rents in violation of the rent control statute.

About six months ago, Los Angeles housing advocates began a process to remedy the situation with a local ordinance. They identified an interested city council member to sponsor the legislation and presented drafts to the city council. Ultimately, the Los Angeles City Council recognized that "[i]t is impossible to track and enforce these violations [of the state and local law]"[4] and acknowledged that the practice resulted

[1] California Civil Code Section 1954.50-1954.535 was originally enacted in 1995. Generally, it preempts local rent-control ordinances that limited the rent that a landlord can charge to a new tenant after the unit has been vacated voluntarily.

[2] Cal. Civil Code Section 1954.53(a)(1)(A)(West Supp. 2000). If the owner cannot establish the "initial rent," it means that the unit is still subject to rent control.

[3] *Id.*

[4] Los Angeles Ordinance No.174501, § 151.04 sec. 3 (2002)

in the "cancellation of approximately 6,000 [tenant based] contracts and the displacement of thousands of tenants."[5] To help remedy the situation, the Los Angeles City Council declared it unlawful to terminate or fail to renew a Voucher HAP contract with the Housing Authority of the City of Los Angeles (HACLA) and then charge the voucher recipient rent in excess of the tenant's share of the rent under the HAP.[6] Under the ordinance, voucher landlords who engage in such conduct may not evict voucher recipients for non-payment of rent. Voucher recipients affected by such illegal acts may raise the ordinance as an affirmative defense in any eviction action.[7] Significantly, the voucher tenant may raise this affirmative defense at any time prior to final judgement.[8]

Los Angeles housing advocates are now engaged in efforts to inform and educate residents, landlords and local judges about the new ordinance in order to maximize its impact. ■

[5]*Id.*

[6]*Id. at* § 151.04A and B.

[7]*Id. at* § 151.04 sec. 2.

[8]*Id.*

America did not invent human rights. In a very real sense, it is the other way around. Human rights invented America.

—Former President Jimmy Carter

Baltimore Housing Desegregation Plaintiffs Receive $1.5 Million Interim Fee Award

In February of this year, the U.S. District Court for the District of Maryland approved a magistrate's recommendation[1] for a $1,496,597.85 interim attorney fee award for plaintiffs in *Thompson v. U.S. Department of Housing and Urban Development*, a Baltimore public housing desegregation case.[2]

The Thompson Fee Award

Thompson was a class action challenge to *de jure* segregation in Baltimore public housing brought by African-American public housing residents against HUD, Baltimore city officials, and the Housing Authority of Baltimore City (HABC) in 1995.[3] In 1996, the parties entered into a partial consent decree which required the development of desegregative housing opportunities for HABC public housing residents.[4]

Plaintiffs sought an interim fee award pursuant to 42 U.S.C. § 1988 for the issuance of the partial consent decree, the enforcement of the decree, plaintiffs' successful appeal of defendants' attempt to modify the decree, and their fee petition.[5] Defendants did not appeal the district court's adoption of the magistrate's recommendation and have paid the full amount indicated in the order.[6]

The Magistrate's Discussion of Attorney Fees in Civil Rights Cases

The magistrate's extremely detailed recommendation raised two noteworthy issues regarding the award of attorney fees in civil rights cases. The recommendation addressed the importance of enforcement activities and the need to take into account the arduous nature of prosecuting civil rights cases.

Stating that it is obvious, under "even the most cursory reading," that plaintiffs are the "prevailing parties" under

[1]*Thompson v. U.S. Department of Housing and Urban Development* ("*Thompson*"), 2001 WL 1,636,517 (D.Md.)(Grimm, Magistrate J.).

[2]*Thompson*, No. MJG-95-309 (D.Md. Feb. 26, 2002)(Garbis, J. (Memorandum and Order Re Award of Fees and Costs)).

[3]*See Thompson*, 220 F.3d 241, 243 (4th Cir. 2000).

[4]*See id.* at 243-4.

[5]*See Thompson*, 2001 WL 1,636,517, *1. Plaintiffs were represented by the American Civil Liberties Union of Maryland; Brown, Goldstein and Levy; and Jenner and Block. The fee petition was handled primarily by Chris Brown and Andy Freeman of Brown, Goldstein and Levy.

[6]While the fee award is substantial, it does not fully reflect all of the work performed by plaintiffs' counsel. Plaintiffs' counsel exercised a scrupulous amount of billing discretion. *See id.* at *11. A full award for all the work performed by plaintiffs' counsel would have amounted to approximately twice what was ordered by the court.

the consent decree for the purposes of § 1988,[7] the magistrate's recommendation also emphasized the importance of awarding fees for civil rights consent decree enforcement activities.[8] It stated:

> [D]iscrimination-free housing placement for the residents of public housing is nothing more than a dream without the aid of enforcement lawsuits to identify and redress illegal behavior. It follows that … monitoring and enforcement activities become the very sine qua non of the obligations to remedy past discriminatory activity, without which the residents may come to view the decree as just one more unfulfilled dream, or worse.[9]

In determining the lodestar amount, or reasonable amount,[10] of attorney fees to be awarded, the magistrate followed the 12-factor test set forth in Johnson v. Georgia Highway Express.[11] One of these factors involves the " 'undesirability' of the case."[12]

The magistrate flatly rejected the local defendants' claim that the case was "very desirable," instead determining that the "undesirability" factor strongly supported the award.[13] The recommendation noted the "prolonged" nature of the litigation and the vigorous opposition by the defendants and praised plaintiffs' counsel for undertaking such a "daunting commitment."[14] ■

[7]The magistrate rejected defendants' argument that plaintiffs could seek fees only under the *Equal Access to Justice Act* (EAJA) 28 U.S.C.A. § 2412(d). *See id.* at *2.

[8]*Id. at* *3.

[9]*Id. at* *4. The magistrate further cited a Baltimore Sun article which "quoted Lawrence Campbell, a former tenant at Lexington Terrace, one of the housing developments covered by the partial consent decree. Mr. Campbell stated that Julius Henson, the former Baltimore Housing Commissioner, 'told us to dream, dream about what this neighborhood could be [but] he didn't tell us...that the dream meant we wouldn't be included.'" Walter F. Roche, Jr., Housing Reform's Victims, *Balt. Sun*, September 24, 2001, at A1, A4.

[10]"Section 1988 grants this Court discretion to award a prevailing party a reasonable attorney's fee. This is done by determining the lodestar amount, which is the number of hours reasonably expended on the litigation multiplied by an hourly rate that also is reasonable." *Id. at* *6.

[11]488 F.2d 714, 717-19 (5th Cir. 1974). This test was adopted by the Fourth Circuit in *Barber v. Kimbrell's*, Inc., 577 F.2d 216, 226 (4th Cir. 1978)(cited in *Thompson*, 2001 WL 1636517, *6).

[12]See *Thompson*, 2001 WL 1636517, *6, n.19 (setting forth the 12 factors).

[13]*Id.* at *6.

[14]*Id.* at *8.

Ordinance Requiring Housing Replacement Fee Upheld By California Supreme Court

The California Supreme Court recently upheld the constitutionality of a San Francisco ordinance that requires landlords who convert single room occupancy housing to tourist hotels to provide replacement housing or pay an in-lieu fee to the city.[1]

In 1979, in response to a dramatic loss of affordable residential hotel units that was estimated at more than 6,000 units over a five-year period, the City of San Francisco enacted a Hotel Conversion Ordinance (HCO) designed to limit the number of residential hotel conversions to tourist use. The HCO requires owners of residential hotels to report the number of units rented as a guest room to tourists and the number of units rented to permanent residents, defined as those occupying a room for at least 32 consecutive days. The HCO makes it unlawful to eliminate a residential hotel unit that was in use as of September 23, 1979, without obtaining the permission of the Bureau of Building Inspection or first securing a conditional use permit.

Plaintiff, San Remo Hotel Limited Partnership (San Remo), operated a 62-unit residential hotel that was subject to the HCO. Prior to 1990, San Remo was allowed by the Bureau of Building Inspection to use some of the units for tourist occupancy during the summer months. In 1990, the HCO was amended to preclude such use, at which time San Remo sought to permanently convert the project to tourist use through a conditional-use permit process. The City Planning Commission approved the conversion conditioned upon offering lifetime leases to long-term residents and making a contribution of $567,000 as an in-lieu fee to replace the residential units lost. After losing an appeal to the Board of Supervisors, plaintiff paid the fee, changed the use to a full tourist hotel, and sought relief through a legal challenge to the conditions. The trial court upheld a demurrer by the City on all counts in the complaint, but the Court of Appeals reversed, holding that the conditions imposed amounted to an unconstitutional taking since the fee failed the "essential nexus" and "rough proportionality" tests required by the heightened or intermediate scrutiny analysis which the court decided was appropriate.

In a 4-3 opinion,[2] the California Supreme Court affirmed the trial court's judgment for the city. In reaching its decision, the court first considered whether the City of San Francisco properly required a conditional use permit for full tourist use

[1]*San Remo Hotel L.P. v. City and County of San Francisco*, 117 Cal.Rptr.2d 269 (Ca. March 4, 2002).

[2]Justice Baxter, joined by Justice Chin, concurred in part and dissented in part; Justice Brown dissented. The concurring and dissenting opinion agreed with the majority opinion insofar as it holds that the housing replacement fee should not be reviewed under a standard of heightened scrutiny. *Id. at* 298. Therefore, the constitutional analysis, discussed below, was not a closely split decision.

of the project. Under a 1987 ordinance applicable to the district in which San Remo was located, tourist rentals were a conditional use requiring a permit. However, a grandfather clause in the ordinance conditionally permits a use which "lawfully existed" on the effective date of the 1987 ordinance.[3] With respect to San Remo, the court found that as of that date, residential and tourist uses were both significant uses of the San Remo hotel. However, since full tourist use was not previously "existing," nor permitted for more than some units on a temporary basis under the HCO, the court concluded that the zoning administrator properly determined that a conditional use permit was required for the San Remo conversion.

Turning to the takings issue, the court first decided the level of judicial scrutiny that should be applied to the imposition of the in-lieu fee under both the United States and California constitutions taking clauses,[4] which the court found sufficiently similar to enable consideration of both federal and state precedent. The issue for the court was whether to subject the HCO in-lieu fee to a heightened level of scrutiny that requires the city to show that the land use regulation substantially advanced legitimate state interests or to a lower, more deferential standard that merely requires a reasonable relationship between the fee and the deleterious impacts for mitigation of which the fee is collected.

After an extensive review of its cases, the court concluded that heightened scrutiny is reserved to those cases where the government exacts an interest in a specific property but not where it requires the payment of money.[5] It distinguished one fee case in which it had applied the higher standard on the ground that the fee in that case was imposed on an ad-hoc basis against a single owner of property. By contrast, it found that the HCO is generally applicable legislation that applies without discretion or discrimination to every residential hotel in the City of San Francisco, provides owners with several choices by which the ordinance's replacement requirements can be met, and, when the owner decides to pay an in-lieu fee, the fee is set according to a set formula.[6] Accordingly, it held that the HCO fee would be reviewed under the reasonable relationship standard.[7]

Turning to the merits of San Remo's claim, the court first addressed its facial challenge to the HCO, which was based on three arguments. First, that there was no connection between the housing replacement fee and the housing lost to conversion to tourist use. Second, that the fee was a revenue-raising measure rather than a housing mitigation measure. And, third, that the HCO does not preserve housing because rooms without kitchens or baths are not housing.

The court rejected all three arguments. It found that the fee was reasonable in that it was based on the number of units being converted and that that number was determined reasonably through a self-reported use survey conducted when the ordinance was first adopted.[8] San Remo's argument that the ordinance was an impermissible revenue-raising measure was predicated on the fact that the city raised the fee from 40 percent of replacement cost to 80 percent of replacement cost. The court found the argument without merit because the city raised the fee when it found that other governmental funds were insufficient to make up the actual shortfall between the assessed fee and the actual replacement costs. This, it concluded, is a legitimate purpose of more fully funding the replacement of housing lost through conversion. Moreover, the court found that the structure of the HCO undercut San Remo's claim insofar as the owners were not required to pay a fee, but could instead build replacement housing or contribute to other entities that would construct replacement housing. In addition, the fact that the funds were segregated into a separate hotel preservation account further undermined the contention that the fee was a revenue-raising measure.[9] The court summarily rejected San Remo's third argument, finding that single rooms without kitchens and baths accommodate many individuals who cannot afford other shelter and that maintaining the availability of residential hotel rooms is a reasonable means of serving one segment of San Francisco's housing needs.[10]

San Remo also made three "as applied" challenges to the ordinance, all of which the court rejected. In its first claim, San Remo argued that the fee imposed by the ordinance has no connection at all to the tourist use of the San Remo hotel because it simply allowed an existing use to continue. The court rejected the existing use argument since there was no allegation that at any time the exclusive use of the project was tourist use and, as noted earlier, the fee actually imposed was based on the owner's reported use of the hotel at the time the HCO was adopted. It rejected San Remo's second argument, that no housing was lost because the HCO required it to provide lifetime tenancies to all residents of the hotel at the time of conversion, on the grounds that the ordinance was intended to protect the supply of housing in the city—not merely the tenancies of the residents. Lastly, it rejected San Remo's claim that the size of the fee may not constitutionally be based on the loss of the property's prior use on the ground that it was reasonable related to the impact of the proposed change in use.[11]

The court's finding with respect to the lifetime tenancies offered to residents has significance in the Section 8 preservation context, where owners may choose to argue that the issuance of enhanced vouchers protects the housing from conversion. The court correctly recognized that rooms vacant or "temporarily rented to tourists at the time of

[3]S.F. Planning Code, § 179, subd. (a)(2).

[4]The takings clause of the California Constitution (art. I, § 19) provides: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." The federal takings clause (U.S. Const., 5th Amend.) provides: "nor shall private property be taken for public use without just compensation."

[5]117 Cal.Rptr.2d 291-2.

[6]*Id. at* 289.

[7]*Id. at* 292.

[8]*Id. at* 293.

[9]*Id.* 294.

[10]*Id.*

[11]*Id. at* 298.

conversion were nonetheless housing units that would be lost in the conversion" and that the application of the ordinance "would have preserved the residential availability of those units after the lessees moved or passed away."[12]

The court's San Remo decision is welcome in that it provides needed guidance to other cities wishing to adopt measures that seek to preserve the stock of available rental housing. Advocates are urged to review the decision carefully when proposing or drafting local ordinances that seek to impose in-lieu fees in order to avoid constitutional taking arguments. ■

Recent Housing Cases

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

Department of Housing and Urban Development v. Rucker, 2002 WL 451,887 (U.S., March 26, 2002).[4] See separate article on page 95 of this issue.

Lohmann v. Members of the Board of the New York City Housing Authority, 738 N.Y.S. 2d 43 (Feb. 19, 2002). A public housing tenant challenged his eviction on the grounds that he allowed excessive noise to emanate from his apartment, claiming there was insufficient evidence. The New York Supreme Court, Appellate Division, upheld the eviction. It held that the hearing officer's finding, which was based on the testimony of four witnesses, that the tenant's apartment was excessively loud, was more credible than that of tenant and, therefore, was not an abuse of discretion. An 11-month quiet period during the extended administrative hearing did nothing to offset the years of noise before and after that period.

Housing Authority of County of Salt Lake v. Snyder, 2002 WL 362,869 (Utah, March 8, 2002)(not yet released for publication; subject to revision). The Utah Supreme Court reversed a judgment against a public housing tenant who was evicted for allegedly assaulting a public housing employee on the grounds that the housing authority failed to provide the tenant with a grievance procedure. The tenant had confronted the manager of his apartment complex about a fee. The confrontation led to the manager filing a police complaint and the housing authority serving the tenant with a three-day notice of lease termination. The notice informed the tenant that he was not entitled to a grievance hearing under federal or state law. On appeal, the tenant challenged the jurisdiction of the lower court because he did not get a grievance hearing.

The housing authority argued that it did not have to give the tenant a grievance hearing because it had exempted evictions based on a tenant's threat to the health or safety of a public housing employee from the grievance procedures. The court noted that federal regulations generally require that a public housing agency (PHA) afford a tenant the right to a grievance procedure before terminating a tenancy. It also noted, however, that the law permits PHAs to exempt certain evictions—specifically those based on threats to the health of public housing employees—from the grievance procedure. Nevertheless, in the case at bar, the tenant's lease did not include, or incorporate by reference, information that the conduct in question was not subject to a grievance hearing. Virtually all of the language in the lease was either ambiguous or to the contrary, directly suggesting that the tenant was entitled to a grievance hearing. Because the exemption was not included in the tenant's lease, the court held that the federal rule mandating a grievance procedure remained in effect. Accordingly, the court held that the housing authority failed to exhaust its administrative remedies, and that the court lacked jurisdiction over the unlawful detainer action. Thus, it dismissed the unlawful detainer action.

Occhino v. Grover, 640 N.W. 2d 357 (Minn. Ct. App., Mar. 12, 2002). The Minnesota Court of Appeals upheld summary judgment against a Section 8 voucher tenant in his lawsuit against his landlord for compensatory damages due to the landlord's alleged failure to provide adequate notice to vacate. The new owner of the duplex in which the tenant lived notified the tenant that he intended to renovate the building and increase the rent to a level in excess of the amount permitted by the Section 8 program. The owner gave the tenant notice that he had to vacate the property by the end of the following month. The tenant vacated, but filed a suit for compensatory damages, claiming that he did not receive adequate notice to quit. A Minnesota statute requires the landlord of "federally subsidized rental housing" to provide a one-year written notice if: a federal Section 8 contract will expire; the landlord will opt out of a federal Section 8 contract and mortgage; the landlord will prepay a mortgage, terminating any federal use restrictions; or the landlord will terminate a federal housing subsidy program. "Federally subsidized housing" was not defined in the statute.

The tenant argued that the statute applied to his Section 8 voucher. The court held that it did not. It concluded that common usage of the phrase "federally subsidized rental housing" refers to project-based subsidies only. It also concluded that "federally subsidized" modified "housing," and, that in the case of a Section 8 voucher, it is not the "housing" that is subsidized, but the tenant's rent. The court noted the similarities between the Minnesota and federal statutes and

[12]*Id. at* 297.

[1]westlaw.com

[2]lexis.com

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

[4]For discussion of the en banc decision, see 31 HOUS. L. BULL. 29 (Feb. 2001).

found no indication in the state law that it intended to deviate significantly from the federal provision that excluded tenant-based voucher holders from the one-year federal notice requirement. The court was also influenced by the fact that the tenant's lease indicated that the term of the tenancy would convert to a month-to-month tenancy after one year. Thus, it concluded that the one-year notice provision did not apply to tenant-based voucher holders and affirmed the entry of summary judgment against the tenant. ■

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD), and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued through March 31, 2002. For the most part, the summaries are taken directly from the summary of the regulation in the Federal Register or each notice's introductory paragraphs.

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

HUD SuperNOFA

67 Fed. Reg. 13,826 (March 26, 2002)
Super Notice of Funding Availability (SuperNOFA) for HUD's Discretionary Grants Programs for Fiscal Year 2002

Summary: This Fiscal Year (FY) 2002 SuperNOFA announces the availability of approximately $2.2 billion in Department of Housing and Urban Development (HUD) program funds covering 41 grant categories within programs operated and administered by HUD offices. The General Section of this SuperNOFA provides the application procedures and requirements that are applicable to all the programs in this SuperNOFA. The Program Section of this SuperNOFA provides a description of the specific programs for which funding is made available and describes any additional procedures and requirements that are applicable to a specific program. [A more complete description of the some of the program funding available under the SuperNOFA is available on page 104 of this issue.]

Application Due Dates: Application due dates can be found in the HUD FY 2002 SuperNOFA Funding Chart located in the General Section. Information for each program is reiterated in the appropriate Program Section of this SuperNOFA.

HUD Federal Register Proposed Rules

67 Fed. Reg. 10,818 (March 8, 2002)
Administrative Wage Garnishment

Summary: This proposed rule would implement the authority established under the Debt Collection Improvement Act of 1996 (DCIA) for HUD to collect the Department's past due indebtedness through administrative wage garnishment. The proposed rule would adopt, without change, the hearing procedures issued by the Department of the Treasury implementing administrative wage garnishment under the DCIA. This proposed rule would apply only to individuals who are not federal employees. The proposed rule also would amend regulations on procedures for the collection of claims to conform HUD regulations to applicable provisions of the DCIA.

Comments Due Date: May 7, 2002.

67 Fed. Reg. 11,208 (March 12, 2002)
Implementation of the Freedom of Information Act

Summary: This proposed rule amends The Office of Inspector General's Freedom of Information Act (FOIA) (5 U.S.C. §552) regulation, and implements the statutory requirements of the Electronic Freedom of Information Act (EFOIA) (Pub. L. 104-231).

Comments Due Date: May 13, 2002.

HUD Federal Register Notices

67 Fed. Reg. 11,844 (March 15, 2002)
Public Housing Assessment System (PHAS); Notice Adopting Interim Scoring Methodologies for PHAS Physical Condition and Financial Condition Indicators

Summary: This notice announces to Public Housing Agencies (PHAs) and the public that PHAs with fiscal years ending September 30, 2001, through and including September 30, 2002, will be assessed under the PHAS in accordance with interim scoring procedures described in notices published in the Federal Register on November 26, 2001. This notice also addresses public comments received in response to a request for comments in the November 26, 2001, notices. The Department considered all comments but has decided to make no changes to the interim scoring procedures in response to the public comments. This notice also advises that if the Department determines that the effective period of the interim scoring processes should be extended beyond September 30, 2002, the Department will notify PHAs and the public by notice published in the Federal Register.

Effective Date: March 15, 2002.

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

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

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

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

67 Fed. Reg. 12,042 (March 18, 2002)
Statutory Waiver Granted to New York State for Recovery from the September 11, 2001 Terrorist Attacks

Summary: This notice advises the public of a waiver of statutory provisions granted to the State of New York for the purpose of assisting in the recovery from the September 11, 2001, terrorist attacks on New York City. HUD is authorized by statute to waive statutory and regulatory requirements for this purpose. This notice lists the provisions being waived.

67 Fed. Reg. 13,790 (March 26, 2002)
Delegation of Authority to Regional Directors

Summary: In this notice the Deputy Secretary, through the Assistant Deputy Secretary for Field Policy and Management, delegates operational management authority to the HUD Regional Directors. The delegation provides the authority necessary to manage programs and resources located in HUD regional and field offices nationwide. Pursuant to this authority, HUD Regional Directors are delegated specific authorities pertaining to cross program coordination, personnel management, administrative management, resource management, and representation regarding matters under their respective jurisdictions. Except as otherwise specified, Regional Directors are authorized to redelegate operational management authority to Field Office Directors under their respective jurisdictions. In accordance with this delegation, performance elements will be standardized for all field managers and supervisors. In addition to overall management and supervision, the elements shall include communication, customer service, representation, equal employment opportunity, and a subject-matter specific critical element. This delegation further authorizes the Regional Directors to enter into co-sponsorship agreements with the concurrence of the General Counsel and the relevant program Assistant Secretary or equivalent. Under this delegation, the title of the 10 Field Assistant General Counsel is changed to Regional Counsel.

Effective Date: March 18, 2002.

HUD Notices

Notice PIH 2002-4 (HA)(February 11, 2002)
Single Audit Act (A-133) Independent Auditor Report Submission for Public Housing Agencies

Summary: This notice reimposes the requirement that a public housing agency (PHA) shall provide one copy of the completed audit report package and the Management Letter, performed under the Single Audit Act Amendments of 1996 (P.L. 104-156) and issued by the Independent Auditor (IA), to the local HUD Office having jurisdiction over the PHA.

Effective Date: The report submission requirement is effective on the date this
Notice is issued for audit reports issued for FYE 03/31/01.

Expires: February 28, 2003.

Notice PIH 2002-5 (HA)(March 6, 2002)
FY 2002 Operating Fund Local Inflation Factors, Formula Expense Level Equation Multipliers, and Related Tables

Summary: This notice provides information needed by Public Housing Agencies (PHAs) in their determination of operating subsidy eligibility for their respective fiscal years beginning January 1, April 1, July 1, or October 1, 2002.

Expires: March 31, 2003.

Notice PIH 2002-6 (HA)(March 8, 2002)
Housing Choice Voucher Annual Contributions Contract (ACC) Reserves

Summary: This notice provides notification of a change in the housing choice voucher ACC reserve level from two months to one month as required by the current HUD appropriation. The Notice also provides guidance on the use of ACC reserves by Public Housing Agencies (PHAs).

Expires: March 31, 2003.

Notice PIH 2002-7 (HA)(March 12, 2002)
Housing Choice Voucher Program: PHA Administrative Fees

Summary: This notice provides instructions to public housing agencies (PHAs) and HUD field staff about the administrative fees authorized under the housing choice voucher program. The administrative fees identified in this notice are the only fees approved by HUD field staff. Any other administrative fees must be submitted to Headquarters for approval.

Effective Date: March 12, 2002.

Expires: March 31, 2003.

RHS Administrative Notices

RD AN No. 3,718 (1924-A)(March 6, 2002)
Residential Lead-Based Paint Hazard Reduction

Summary: This administrative notice (AN) provides guidance to Rural Development staff on implementation of the HUD Final Rule on Lead-Based Paint (LBP) Hazards in Federally Owned Housing and Housing Receiving Federal Assistance (LBP regulation). This guidance is intended to simplify and expedite efforts to comply with the final rule on LBP, which took effect on September 15, 2000. This AN does not prohibit or restrict the financing of homes constructed prior to 1978.

Expiration Date: March 31, 2003.

RD AN No. 3,725 (1930C)(March 25, 2002)
Actions Rural Housing Service (RHS) Can Take to Control Potential Abuse by Identity-of-Interest (IOI) Firms

Summary: The purpose of this AN is to address concerns expressed by Congress and the Office of the Inspector General (OIG) regarding potential abuse by Identity-of-Interest (IOI) firms during the operation and management of Multi-Family Housing (MFH) projects. Provisions established under RD Instruction 1930-C, Exhibit B, paragraph V B address this concern and require that all IOI relationships be identified and fully justified. Paragraph V E 3 of Exhibit B requires that borrowers justify all expenses that appear unreasonable during the budget review process by an official of the Servicing Office. It must be clearly documented in all IOI requests as to why the use of an IOI firm is in the best interest of the tenants and the Government.

Expiration Date: March 31, 2003. ■

Publication Order Form

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

	PRICE	QTY.	TOTAL
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