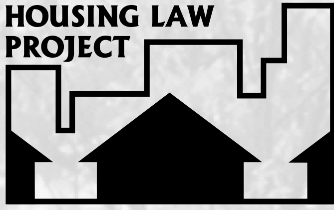

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Demolitions, Conversions, Sales—
How the Loss of Affordable Units Can Violate the Fair Housing Act —page 73

The Bush Budget—What it Means for Affordable Housing —pages 92 and 95

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Table of Contents

Page

Fair Housing Litigation to Prevent the Loss of Federally Assisted Housing: The Duties of Public Housing Authorities and Project Owners . . .73

$27 Million Available for Tenant Participation Activities 87

HUD Budget Cuts Public Housing, Modestly Increases Vouchers and Leaves Most Other Programs at Current Funding Levels 92

RHS Housing Programs to Stagnate Under Administration's FY 2002 Budget. 95

Pennsylvania Appellate Court Again Rejects Strict "One-Strike" Eviction Policy 96

Recent Housing Cases 97

Recent Housing-Related Regulations and Notices . . . 98

Announcements

NLADA Substantive Law Conference. 75

Publication List/Order Form 101

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Fair Housing Litigation to Prevent the Loss of Federally Assisted Housing: The Duties of Public Housing Authorities and Project Owners*

Part One of Two Articles: Federal Fair Housing Law

Introduction: The Erosion of the Federally Assisted Affordable Housing Stock and Its Effect on Families of Color

Thousands of units of rental housing affordable to very low-income families are being lost because of a recent series of changes to the federal housing programs. Public housing projects are being demolished outright or replaced with "mixed-income" developments, often containing drastically fewer units affordable to the average public housing family, and thereby excluding the original residents and other eligible families.[1] In 1996, the Department of Housing and Urban Development (HUD) initiated a "modernization" campaign to demolish 100,000 public housing units by the year 2000.[2] As of October 2000, 109,623 public housing units have been approved for removal across the country. Of these, 59,407 have actually been disposed of[3] or demolished.[4] Further, these figures do not include the units that will be lost as a result of HOPE VI demolition and revitalization awards in recent years.[5] Despite HUD's having reached and surpassed

* *This article is an extension of an article written by David Bryson on the fair housing duties of HUD regarding the loss of federally assisted housing. See HUD's Fair Housing Duties and the Loss of Public and Assisted Units, 20 HOUS. L. BULL. 1 (Jan. 1999) (available on-line at www.nhlp.org/html/hlb/199/199fairhsg.htm). NHLP extends its special thanks to Henry Korman formerly of Cambridge and Somerville Legal Services and Professor Duncan Kennedy of Harvard Law School for their generous assistance in the preparation of this article.*

[1] *See Survey of the Proportion of Family Public Housing Rental Units in HOPE VI Revitalization Sites: FY 1998, 1999, 2000 Awards*, 31 HOUS. L. BULL. 45 (Feb. 2001) (finding a bias against family public housing rental units in HOPE VI revitalizations).

[2] *See, e.g.*, 62 Fed. Reg. 47,740 (Sept. 10, 1997). This goal was based on a study by a "blue ribbon" commission, in which it was determined that six percent, approximately 86,000 units, of the nation's public housing stock was "severely distressed." *See* NATIONAL COMM'N ON SEVERELY DISTRESSED PUB. HOUS., THE FINAL REPORT 2 (1992) (cited in M. Schill and S. Wachter, THE SPATIAL BIAS OF FEDERAL HOUSING LAW AND POLICY: CONCENTRATED POVERTY IN URBAN AMERICA, 143 Univ. Penn. L. Rev. 1285, 1292, n.27 (1995)). It is unclear whether there is any relation between the units initially identified as "severely distressed" in the 1992 report and the 109,623 units that have been approved for removal to date.

[3] *e.g.*, sold or transferred.

[4] *See* Memo, U.S. Department of Housing and Urban Development Special Applications Center, "Demo/Dispo Units (State Total Recap)" (Oct. 26, 2000) (on file at NHLP).

[5] The demolition and disposition of public housing mentioned previously is authorized pursuant to § 18 of the *U.S. Housing Act of 1937*, 42 U.S.C. § 1437p, as amended by *the Quality Housing and Work Responsibility Act of 1998* (QHWRA), § 531, Pub. L. No. 105-276, 112 Stat. 2518, 2570-4 (Oct. 21, 1998).

its target, public housing losses continue at a high rate.[6] HUD has received significant support from Congress in this regard, recently passing legislation limiting resident protections in public housing demolitions and dispositions, expanding opportunities for the conversion of public housing to voucher assistance, and providing more permanent statutory authority for the HOPE VI program.[7]

Owners of federally assisted, multifamily projects are exiting subsidy and mortgage insurance programs and leasing low-income families' units at often drastically higher rents. As of December 31, 1998, approximately 100,000 assisted multifamily units had been converted to higher-income use nationally, with an average rent increase of 50 percent.[8] Families in residence at the time of the conversion of an assisted development have had their rights recently clarified, allowing them to remain in their homes with "enhanced" tenant-based Section 8 vouchers.[9] However, when owners take action to undercut residents' rights, HUD does little to ensure that owners actually accept enhanced vouchers and allow families to remain in their homes after the conversion of a development. Further, as with public housing, despite the improvement of resident protections, the conversion of assisted multifamily projects reduces the availability of rental housing guaranteed to be affordable to families with the lowest incomes.

This erosion of the federally assisted housing stock has a stark racial significance. Families of color rely on federal housing programs to a disproportionate extent, which means that it is families of color who will unfairly and disproportionately bear the burdens of losses to the federal housing stock. Even though African Americans comprise only 12 percent of the national population,[10] 27 percent of project-based Section 8 Substantial Rehabilitation and New Construction families are headed by African Americans.[11] Forty-eight percent of families living in federal public housing are headed by African Americans; 20 percent of public housing families are headed by Latinos.[12]

Since the days of the Federal Housing Administration (FHA), federal housing programs have always had a racial aspect.[13] Public housing developments, in particular, have often been constructed with the purpose of imposing and strengthening racial segregation in housing. Some of the most celebrated fair housing cases involving the federal housing programs, such as *Gautreaux v. Romney*[14] and *Young v. Pierce*,[15] were efforts to disestablish the racial segregation and isolation of African-American families created and maintained by public housing programs.

Much of the push to reduce the federal housing stock today is done in the name of, or under the veneer of, desegregation or the "deconcentration of poverty."

Much of the push to reduce the federal housing stock today is done in the name of, or under the veneer of, desegregation or the "deconcentration of poverty." The National Housing Law Project (NHLP) is deeply skeptical of the effectiveness of the strategies to advance desegregation through policies that remove large numbers of federally assisted housing developments. Increasingly, we suspect that "deconcentration" is invoked as a convenient excuse to displace low-income families when the land on which their homes sit is wanted for other purposes.

We suspect that demolishing, disposing of, or converting federally assisted housing developments will not always leave families who reside in these developments or other eligible families better off. Not all federally assisted housing developments, even public housing developments, were constructed to further segregationist purposes[16] or promote segregation today.[17] Despite its reputation, public housing developments, which on average each contain less than 100 dwelling units, provide some of the best quality housing

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The 1998 QHWRA included separate statutory authority for HOPE VI demolitions—but not dispositions, which are still governed by Section 18. *See* 42 U.S.C. § 1437v, as amended by QHWRA, § 531, Pub. L. No. 105-276, 112 Stat. 2518, 2581-6 (Oct. 21, 1998). *See also* Notice PIH-99-19 (Apr. 20, 1999) (*Demolition/Disposition Processing Requirements Under the New Law*) (extended until Apr. 30, 2001 by Notice PIH-2000-16 (Apr. 18, 2000)).

[6] *See, e.g.,* 66 Fed. Reg. 11,638, 11,913 (Feb. 26, 2001) (FY 2001 SuperNOFA, including $75 million in HOPE VI public housing demolition funding available through a competitive application process). *See also* HUD Special Applications Center Work In Progress web page, www.hud.gov:80/pih/sac/workprog.html (listing public housing demolition, disposition, and other applications currently entered in the Special Application Center's (SAC) Assignment Planning System (APS)).

[7] *See Quality Housing and Work Responsibility Act of 1998,* Pub. L. No. 105-276, Title V, 112 Stat. 2,461, 2,518 (1998).

[8] *See* Michael Bodaken, National Housing Trust, Statement to the House Committee on Banking and Financial Services, Subcommittee on Housing & Community Opportunity (May 4, 1999).

[9] *See* Pub. L. No. 106-246, § 2801 (July 13, 2000).

[10] *See* Census 2000 PHC-T-1., Population by Race and Hispanic or Latino Origin for the United States: 1990 and 2000, Table 1 (available on-line at www.census.gov/population/cen2000/phc-t1/tab01.pdf).

[11] *See* HUD Multifamily Tenant Characteristics System Guest Login Page, www.hud.gov:80/mtcs/public/guest.cfm (Mar. 2001).

[12] *See id.*

[13] *See generally* Charles L. Nier, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. Marshall L. Rev. 617 (1999).

[14] 448 F.2d 731 (7th Cir. 1971). *See also Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969).

[15] 544 F. Supp. 1010 (E.D. Tex. 1982) and 628 F. Supp. 1037 (E.D.Tex. 1985).

[16] *See, e.g.,* Center for Community Change, *How to Save and Improve Public Housing: An Action Guide,* 11 (1994) ("Public housing expanded during [World War II], adding nearly 200,000 units of worker housing that was needed near factories or military bases.").

[17] A March 1995 HUD study, *The Location and Racial Composition of Public Housing in the United States,* p. 3, found that: "While 59 percent of African-American [public housing] residents are concentrated in [census] tracts that are more than 60 percent African American, 50 percent of African-American residents live in areas with less than 20 percent African-American population."

opportunities for very low income families.[18] Similarly, we suspect that the public housing developments currently being targeted for demolition are not necessarily the most severely distressed since, for example, HUD's 100,000-unit removal goal was met last year.[19]

A major reason that the loss of federally assisted housing is a crisis has to do with problems with the Section 8 voucher program that HUD and PHAs have been unable or unwilling to resolve. When units are removed from the federally assisted inventory, they are typically replaced, all or in part, with tenant-based Section 8 vouchers. In some areas for some families, Section 8 vouchers can work well by allowing families access to quality housing in well-served neighborhoods.[20] In other areas and for other families, Section 8 vouchers do not work well, with families only able to use vouchers to secure housing in certain neighborhoods or not able to find a landlord willing to accept their vouchers at all.[21] We suspect that in some, perhaps many, areas voucher families are fed into existing local patterns of residential segregation.[22] HUD does not adequately take the realities of voucher utilization into account in its decisions regarding the loss of federally assisted housing. Half of the 44 HOPE VI demolition and revitalization awards made by HUD in 2000, which involve the planned net loss of at least 10,000 public housing units, were made in areas that HUD has recognized as having serious voucher utilization problems.[23]

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[18]*See, e.g., How to Save and Improve Public Housing* at 11-16.

[19]*See* n. 2, *supra*. There are other possible explanations: the previous estimates of the numbers of distressed units may have been too low or additional units may have deteriorated after estimates were made. Nonetheless, HUD has not explained this apparent discrepancy in any detail, nor has it announced a new target number to replace the previous goal.

[20]Even when vouchers work well, voucher housing after the 1998 QHWRA has drawbacks that public housing and project-based assisted housing does not—in particular, voucher families now have no security of tenure after their initial lease term and voucher families may pay more than 30 percent of their income for housing costs.

[21]HUD finally began publicly to recognize voucher utilization problems late last year in a press release identifying 39 metropolitan areas nationwide with severe geographic concentrations of voucher households and an additional 10 areas in which public housing authorities have complained of a high incidence of failure in families seeking housing with their vouchers. *See* HUD No. 00-223 (Sept. 12, 2000) (*CUOMO EXPANDS RENTAL OPPORTUNITY FOR HUNDREDS OF THOUSANDS OF LOW-INCOME FAMILIES), available at* www.hud.gov/pressrel/pr00-223.html. *See also* 65 Fed. Reg. 58,870 (Oct. 2, 2000) (interim regulations authorizing modest increases in Fair Market Rent levels in those areas with voucher utilization problems).

[22]In its Sept. 2000 press release, addressing the geographic concentration of voucher families (*see* n. 21, *supra*), HUD made no mention of any potential fair housing implications of voucher utilization problems. This is despite the fact 11 of the 39 areas in which HUD identified serious geographic concentrations of voucher families—Atlanta, Buffalo, Chicago, Cleveland, Dallas, Detroit, Fort Worth, Kansas City, Newark, Philadelphia, and St. Louis—are considered "hypersegregated" by race. *See* Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of an Underclass*, 8th printing, Table 3.4, p. 76 (1998).

[23]While this figure owes to the large number of awards that Chicago received in 2000, the fact that half of the FY 2000 HOPE VI awards were made in areas with voucher concentration problems remains.

NLADA Substantive Law Conference July 25-July 29, Berkeley, California

The National Legal Aid and Defender Association's annual Substantive Law Conference is the legal services community's premier national training event. Trainers from national support centers and allied organizations, including the National Housing Law Project, as well as substantive experts from field programs will cover the latest legal developments and strategies affecting clients.

This year's conference will provide participants with comprehensive coverage of issues which are the focus of 10 training tracks. Additionally, participants have the opportunity to attend workshops addressing issues that cut across traditional poverty law specialty areas as well as a separate skills-based training track for participants who want to strengthen their ability to develop partnerships, collaborations and coalitions.

This year's training tracks include:

- Federal Housing
- Consumer Law
- Social Security
- Welfare
- Native American Law
- Women & Family Law
- Children & Youth Law
- Community Economic Development
- Employment Law
- Health Law

A detailed conference announcement with a registration form and preliminary agenda was sent out by NLADA to its members and others. For a copy of the form and for information about the conference, contact Marc Holladay at (202) 452-0620 or by e-mail at m.holladay@nlada.org.

More information about the Federal Housing Law Track will appear in the next issue of the *Bulletin.*

This two-part series of articles will describe how fair housing litigation against PHAs and owners of assisted housing projects[24] under the federal *Fair Housing Act* may be used to stem the erosion of the federal affordable housing stock. Part One will address federal fair housing law and the rules of decision applied in "discriminatory effect" cases under the *Fair Housing Act*. Part Two will focus on the application of these fair housing authorities in specific examples involving the demolition, disposition, or conversion of federally assisted housing.

A Brief Overview of the Legal Mechanisms Permitting Demolitions, Dispositions, and Conversions in the Federally Assisted Housing Stock

A summary of the mechanisms permitting demolitions and conversions in the federally assisted housing[25] stock is provided below. A full treatment of the different schemes is beyond the scope of this discussion and has already been presented in detail elsewhere.[26]

The Privately Owned Federally Assisted Housing Stock

The privately owned stock can be separated into two categories: the "older assisted stock" and the "newer assisted stock." The older stock was constructed in the 1960s through the § 221(d)(3) and § 236 federal mortgage programs. Of the approximately 700,000 units of older stock, around 450,000 are additionally subsidized through the Section 8 Loan Management Set-Aside (LMSA) Program which was created to prop-up financially troubled projects in the late 1960s.[27] The newer stock, which includes approximately 675,000 units, was often constructed or rehabilitated through the § 221(d)(4) federal mortgage program and has always been subsidized through long-term Section 8 Housing Assistance Payments contracts.[28]

Units are "lost"—or rather, the guaranteed affordability of units is lost—from the older stock when project owners prepay their insured mortgages and are no longer subject to the low-income use restrictions included in their mortgage insurance regulatory agreements. In 1996, Congress authorized most older stock owners to prepay their mortgages and convert their projects to higher-income use.[29] Units are lost from the newer stock when owners' long-term Section 8 subsidy contracts expire and owners elect to opt-out of the Section 8 program and convert their projects to higher-income use. When owners opt-out or prepay, tenants may be eligible for special "enhanced" vouchers that would allow them to remain in their units.[30]

The Public Housing Stock

The federal public housing stock, comprised of over 1 million units, essentially all belongs to a single category.[31] *The Quality Housing and Work Responsibility Act* (QHWRA)[32] of 1998 is the primary basis for the threat to the federal public housing stock today. The QHWRA amended Section 18 of the *U.S. Housing Act of 1937*,[33] which historically had been the principal statutory authority for public housing demolitions.[34] The QHWRA provided a permanent statutory basis for the HOPE VI program, a federal grant program funding the demolition[35] of distressed public housing projects or the "revitalization" of these projects, often with drastically fewer affordable units.[36] The QHWRA also added Sections 22 and 33 to the *U.S. Housing Act* for the voluntary[37] and mandatory[38] conversion of public housing to tenant-based assistance, also termed "vouchering out." HUD has not yet implemented these provisions, but has issued draft regulations.[39]

Because of the dramatic adverse impact on families of color nationwide, the mounting erosion of federally assisted housing has become a national fair housing crisis. In addition to bringing claims to enforce procedural requirements relating to the demolition and conversion of this housing,

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[24]This discussion focuses on the fair housing duties of PHAs and private Section 8 project owners. For a discussion of HUD's duties, see *HUD's Fair Housing Duties, id.* In addition, although the legal standards are often quite similar, only fair housing protections relating to race and ethnicity or national origin, not other protected classes such as gender, disability or familial status, will be addressed here. For a detailed discussion of familial status discrimination, *see* Adam Culbreath, *Housing Discrimination Against Section 8 Families Calls for Creative Advocacy*, 20 Youth Law News 1 (Mar.-Apr. 1999).

[25]For the purposes of this discussion, public housing and Section 8 housing will be referred to generally as "federally assisted housing."

[26]*See National Housing Law Project, HUD Housing Programs: Tenant's Rights (2nd Ed.) and 1998 supplement (HUD Housing Programs and 1998 Supplement)*, § 15.1.1, *et seq;* David Smith ("Smith"), *Mark-to-Market: A Fundamental Shift in Affordable Housing Policy,* 10 Housing Policy Debate 143, 150 (1999). Note that the regulatory or statutory scheme under which a project is removed from the assisted housing stock will often be highly relevant to a fair housing analysis: program-specific requirements will often provide useful handles to bolster fair housing claims or will provide the basis for separate claims not directly related to civil rights requirements.

[27]*See* Smith, 10 Housing Policy Debate at 145.

[28]*See id.*

[29]*See* Pub. L. No. 104–134, § 101(e), tit. II, 110 Stat. 1321 (1996).

[30]*See HUD Housing Programs and 1998 supplement*, § 15.1.1.1.

[31]*But see id.* at § 15.2.6. (describing the vestigial § 23 stock).

[32]Pub. L. No. 105-276, Title V, 112 Stat. 2,461, 2,518 (1998).

[33]Codified at 42 U.S.C.A. § 1437p (West Supp. 2000).

[34]Pub. L. No. 105-276, Title V, § 531, 112 Stat. 2,518, 2,570-4 (1998).

[35]The QHWRA provided a new statutory basis for HOPE VI public housing demolitions apart from Section 18.

[36]*See id.* at Title V, Subtitle B, Part 3, codified at 42 U.S.C.A. § 1437v (West Supp. 2000).

[37]*See id.* at § 533, 112 Stat. 2,518, 2,576-9, codified at 42 U.S.C.A. § 1437t (*Authority to Convert Public Housing to Vouchers*).

[38]*See id.* at § 537, 112 Stat. 2,518, 2,588-92, codified at 42 U.S.C.A. § 1437z-5 (*Required Conversion of Distressed Public Housing to Tenant-Based Assistance).*

[39]*See* 64 Fed. Reg. 40,231 (Jul. 23, 1999) (*Required Conversion of Developments From Public Housing Stock; Proposed Rule*); 64 Fed. Reg. 40,239 (Jul. 23, 1999) (*Voluntary Conversion of Developments From Public Housing Stock; Proposed Rule*).

advocates should regard PHAs and private project owners as potential defendants in claims brought under federal civil rights statutes. In addition to federal constitutional protections, the *Civil Rights Act of 1866*[40] and Title VI of the *Civil Rights Act of 1964*[41] prohibit intentional discrimination in housing programs. Most important, however, is Title VIII of the *Civil Rights Act of 1968*,[42] which has also been interpreted to prohibit those actions that have a disparate impact with respect to race or national origin regardless of discriminatory purpose. In addition, it has been interpreted to prohibit those actions that perpetuate patterns of housing segregation and used to impose affirmative duties to promote fair housing on HUD and recipients of HUD funding.

Overview of the Legal Framework of Discriminatory Effect Under Title VIII of the Civil Rights Act of 1968[43]

Title VIII of the *Civil Rights Act of 1968*, also known as the *Fair Housing Act*, as amended by the *Fair Housing Amendments Act of 1988*, makes it unlawful, among other things, to refuse to rent or negotiate for the rental of a dwelling or "otherwise [to] make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[44] Title VIII is most important because it has been interpreted to prohibit both purposeful discrimination ("disparate treatment")[45] and actions that have a harmful "discriminatory effect"[46] on members of minority groups or on communities generally even when there is no discriminatory purpose on the part of the defendant.[47]

Four main strands of reasoning in the case law have contributed to the availability of discriminatory effect theories under Title VIII. One is the availability of this theory in Title VII employment discrimination cases.[48] The exact similarity of the statutory language of Title VII and Title VIII, each prohibiting adverse employment and housing decisions made "because of ... race"[49] has encouraged the application by analogy of the theory to Title VIII cases.[50] Two, courts have recognized the difficulties faced by plaintiffs in proving discriminatory purpose. In *U.S. v. City of Black Jack*, the Eighth Circuit explained in an often-quoted phrase: "Effect, and not motivation, is the touchstone [of Title VIII liability], in part because clever men may easily conceal their motivations."[51] Three, courts have recognized the equivalence of the harm of disparate treatment and discriminatory effect. The Eighth Circuit in *Black Jack* went on to cite the following passage from the D.C. Court of Appeals: "[W]hatever our law was once, ... we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."[52] Four, while the Supreme Court has not directly addressed discriminatory effect under Title VIII, it has recognized that the language of the *Act* is "broad and inclusive" and should be given a "generous construction."[53]

The discriminatory effect theories of Title VIII are the focus of this discussion of fair housing and the dismantling of the federally assisted housing programs because they should have a broad applicability given the extent to which members of protected classes rely on federally assisted housing. Advocates should also be watchful for potential purposeful discrimination claims. Such claims may be proven by indirect

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[40]42 U.S.C.A. §§ 1981, 1982.

[41]42 U.S.C.A. § 2000d, *et seq.*

[42]42 U.S.C.A. § 3601, *et seq.*

[43]For a further summary and analysis of fair housing law, *see* Florence Wagman Roisman, *An Outline of Principles, Authorities for Fair Housing Litigation* (July 1997) (on file at NHLP); Florence Wagman Roisman and Philip Tegeler, *Improving and Expanding Housing Opportunities for Poor People of Color* ("Roisman and Tegeler"), 24 Clearinghouse Rev. 312, 325-337 (1990); Robert G. Schwemm, *Housing Discrimination: Law and Litigation* ("Schwemm") (1996); Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle* ("Mahoney"), 47 Emory L.J. 409 (1998) (a revisionist account of the origins and development of discriminatory effect fair housing law; (available online at www.law.emory.edu/ELJ/volumes/spg98/mahoney.html).

[44]*Id.* at § 3604(a).

[45]"Disparate treatment means treating a person differently because of his race; it implies consciousness of race, and a purpose to use race as a decision-making tool. Proof of discriminatory motive is critical ... although it can in some situations be inferred from the mere fact of differences in treatment." *Village of Bellwood v. Dwivedi ("Dwivedi")*, 895 F.2d 1521, 1533–34 (7th Cir. 1990) (citing *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 335 n.15 (1977); internal quotations omitted).

[46]For clarity, "disparate impact," as the term is used in this discussion, refers *only* to a disproportionately harmful effect on members of a protected class. Following Roisman and Tegeler, the term "discriminatory effect," used here, will refer generally to *both* of the non-intentional theories that may be the bases of Title VIII claims—i.e., disparate impact and the non-intentional perpetuation of segregation. The case law uses a number of different terms to describe these concepts. *See, e.g., Metropolitan Housing Development Corp. v. Village of Arlington Heights ("Arlington II")*, 558 F.2d 1283 (7th Cir. 1977) (using "disparate impact" and "discriminatory effect" interchangeably).

[47]The Supreme Court's recent decision in *Alexander v. Sandoval (Sandoval)*, 2001 WL 408983 (2001), barring a private right to bring disparate impact claim related to the provision of government services, does not have any direct relevance to this discussion. *Sandoval* had to do with regulations issued under *Title VI of the Civil Rights Act of 1964*, not Title VIII or its regulations. Further, the Court's decision in *Sandoval* was based in large part on the fact that disparate impact claims are not permitted under Title VI. *See Washington v. Davis*, 426 U.S. 229 (1976). This is not the case with Title VIII or with Title VII, which has provided analogical support for discriminatory effect claims under Title VIII. *See* n. 48-50, *infra*.

[48]*See Griggs v. Duke Power Co. ("Griggs")*, 401 U.S. 424 (1971).

[49]42 U.S.C.A. § 2000e-2 (West 1999); 42 U.S.C.A. § 3604 (West 1999).

[50]*See generally Mountain Side Mobile Estates Partnership v. Sec'y of HUD ("Mountain Side")*, 56 F.3d 1243, 1251, n.7 (10th Cir. 1995) (citing *Honce v. Vigil*, 1 F.3d 1085, 1088 (10th Cir. 1993)). *But see* Mahoney, *supra*.

[51]508 F.2d 1179, 1185 (8th Cir. 1974).

[52]*Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C.1967), *aff'd sub nom. Smuck v. Hobson*, 132 U.S.App.D.C. 372, 408 F.2d 175 (1969) (en banc); *See also Mountain Side"*, 56 F.3d at 1250–51 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) ("the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination")).

[53]*City of Edmonds v. Oxford House*, 514 U.S. 725, 730-32 (1995); *Trafficante v. Metro. Life Ins. Co. ("Trafficante")*, 409 U.S. 205, 209, 212 (1972).

evidence,[54] but direct evidence of racial motive, even in written form, can sometimes be found with surprising ease.[55]

Divergence Among the Circuits on Title VIII Discriminatory Effect in the Absence of Clear Direction from the Supreme Court

Although discriminatory effect litigation under Title VIII shows promise as a preservation strategy, it is also a largely untested strategy. The Supreme Court has dealt extensively with discriminatory effect under Title VII, which prohibits discrimination in employment, but it has never ruled directly on the issue of discriminatory effect under Title VIII. The closest the Court came to deciding the issue was in *Huntington Branch, NAACP v. Town of Huntington*,[56] in which it declined to address (thereby leaving intact) the Second Circuit's discriminatory effect ruling against a municipal defendant for zoning restrictions.

Although discriminatory effect litigation under Title VIII shows promise as a preservation strategy, it is also a largely untested strategy.

Despite the lack of direction from the Supreme Court, all of the circuit courts, with the exception of the D.C. Court of Appeals,[57] have recognized some form of discriminatory effect under Title VIII.[58] This being said, the circuit courts differ among each other on such basic issues as what constitutes a discriminatory effect and what rules and standards of decision to apply in discriminatory effect cases.

The Two Forms of Discriminatory Effect: Disparate Impact and the Perpetuation of Segregation

The circuit courts have recognized two different forms of harm that may be the basis for discriminatory effect claims under Title VIII: (1) *disparate impact*, which involves a harmful effect disproportionately suffered by members of a protected class, and (2) *the perpetuation of segregation*, which involves harm suffered by all members of a community caused by the denial of opportunity for interracial association.[59] Of the two theories, disparate impact is more fully developed in the case law, largely because courts have imported much of the Title VII[60] employment discrimination disparate impact framework.[61]

Disparate Impact

The Second Circuit has summed up disparate impact, explaining that it involves "a facially-neutral policy or practice, such as a hiring test or zoning law, [that has a] differential impact or effect on a particular group."[62] In other words, disparate impact occurs where a defendant's policy or practice that makes no reference to race causes disproportionate harm to people of color.

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[54]*See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977) ("determining whether invidious discriminatory purpose was a motivating factor *demands* a sensitive inquiry into such circumstantial and direct evidence of intent as my be available" (emphasis added)). In fact, the disparate treatment effects test from the Title VII case law — under which a complainant need not prove discriminatory purpose, but only certain factual circumstances leading to an inference of such a purpose — has been applied to Title VIII disparate treatment defendants in several cases. *See McDonnell Douglas Corp. v. Green (McDonnell Douglas)*, 411 U.S. 792, 802 (1973) (setting out a four-part "effects" test in the Title VII discrimination-in-hiring context: "(i) that [the complainant] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications"); *Smith v. Anchor Building Corp. (Smith)*, 536 F.2d 231, 233 (8th Cir. 1976) (applying *McDonnell Douglas* test to disparate treatment in leasing claim under Title VIII); *Village of Bellwood v. Dwivedi (Dwivedi)*, 895 F.2d 1521, 1533–34 (7th Cir. 1990) (applying *McDonnell Douglas* test to racial steering claim under Title VIII).

[55]*See* Michael M. Daniel, *Factual Basis for the Liability and Remedial Involvement of the Federal Government In Public Housing Desegregation* (on file at NHLP).

[56]844 F.2d 926 (2nd Cir. 1988), *review denied in part and judgment aff'd in part*, 488 U.S. 15, 18 (1988) (*per curiam*).

[57]*See Brown v. Artery Organization ("Artery")*, 654 F. Supp. 1106, 1114 (D.C. Dist. Col. 1987) (refused to apply discriminatory effect liability to a project owner).

[58]*See, e.g., Langlois v. Abington Housing Authority ("Langlois")*, 207 F.3d 43, 51, n.4 (1st Cir. 2000) (residency preferences in provision of federal tenant-based Section 8 rental subsidies); *Huntington,* 844 F.2d 926 (2nd Cir. 1988); *Resident Advisory Board v. Rizzo ("Rizzo")*, 564 F.2d 126, 148 (3rd Cir. 1977) (refusal to permit construction of low-income housing development affecting families of color); *Betsey v. Turtle Creek Assocs. ("Betsey")*, 736 F.2d 983, 988, n.5 (4th Cir. 1984) (all-adult conversion policy affecting tenants of color); *Simms v. First Gibraltar Bank ("Simms")*, 83 F.3d 1546, 1555 (5th Cir. 1996) (refusal of loan application affecting minority-owned cooperative corporation; complainants were unsuccessful); *Arthur v. City of Toledo ("Arthur")*, 782 F.2d 565, 575 (6th Cir. 1986) (local referenda repealing sewer extensions necessary for construction of housing affecting families of color); *Metropolitan Housing. Dev. Corp. v. Village of Arlington Heights ("Arlington II")*, 558 F.2d 1283, 1289–90 (7th Cir. 1977) (zoning restrictions preventing construction of low-income housing affecting families of color); *U.S. v. City of Black Jack ("Black Jack")*, 508 F.2d 1179, 1184–85 (8th Cir. 1974) (zoning restrictions in all-white neighborhood in segregated region preventing construction of a Section 236 project affecting African Americans); *Keith v. Volpe ("Keith")*, 858 F.2d 467, 482–84 (9th Cir. 1988) (exclusion of low-income housing that was part of a highway displacement consent decree); *Mountain Side Mobile Estates Partnership v. Sec'y of HUD ("Mountain Side")*, 56 F.3d 1243, 1251 (10th Cir. 1995) (numerical occupancy restrictions in mobile home park affecting families with children); *Jackson v. Okaloosa County ("Jackson")*, 21 F.3d 1531, 1543 (11th Cir. 1994) (public housing siting decisions affecting African Americans).

[59]*See* Roisman and Tegeler at 317–18.

[60]Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e, *et seq*. (West 1999).

[61]*See, e.g., Rizzo*, 564 F.2d at 148; *Betsey*, 736 F.2d at 988; *Black Jack,* 508 F.2d at 1184–85 (early Title VIII disparate impact cases relying on *Griggs).*

[62]*Huntington*, 844 F.2d at 933 (1988) (citing *Sobel v. Yeshiva Univ*., 839 F.2d 18, 28 (2nd Cir. 1988)).

Disparity: Designation of Populations to Contrast

A disparate impact case requires the designation of two populations: the population affected by the defendant's allegedly discriminatory practice and some other population against which "disparity" is measured. In *Wards Cove Packing Co., Inc. v. Atonio,*[63] the Supreme Court held that in Title VII employment discrimination cases involving hiring or promotion practices:

> [t]he proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified ... population in the relevant labor market. It is such a comparison—between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs—that generally forms the proper basis for the initial inquiry in a disparate-impact case.

Wards Cove was partially "overruled" by the *Civil Rights Act of 1991*,[64] but is considered still to be good law in most respects, including the methods it described for establishing disparate impact.[65] The First,[66] Fourth,[67] and Tenth[68] Circuit Courts have invoked *Wards Cove* in their disparate impact analysis in Title VIII cases.

All of this being said, the designation of populations to contrast in a disparate impact claim involving the loss of federally assisted units will vary depending on the case and the situation of the plaintiffs.[69] While *Wards Cove* has imposed additional requirements, the Supreme Court has not provided comprehensive guidance on establishing the disparate impact of a particular practice, even in the employment discrimination context. There are a number of possibilities in a fair housing loss-of-units case. The population of affected families could be compared with the local population of program-eligible families, with the overall population of families participating in a PHA's programs or residing in other properties held by a project owner, or with some definable subset of these populations.[70]

[63]490 U.S. 642, 650–1 (1989) (internal quotations omitted).

[64]42 U.S.C.*A*. § 2000e-2(k)(1) (1994).

[65]*See* Mahoney at § II.A. (1998).

[66]*See Langlois v. Abington Housing Authority*, 207 F.3d 43, 49-50, n. 4 (1st Cir. 2000).

[67]*See Edwards v. Johnston County Health Dept.*, 885 F.2d 1215, 1223-4 (4th Cir. 1989).

[68]*Mountain Side Mobile Estates Partnership v. Sec'y of HUD*, 56 F.3d 1243, 1253 (10th Cir. 1995).

[69]It will also vary according to the jurisdiction. While a number of circuits have relied on *Wards Cove*, the Fourth Circuit and the Eastern District of Missouri have each treated the populations affected by a defendant's actions as a kind of comparison population, examining whether persons of color make up a majority of this population. *See Betsey*, 736 F.2d at 988 (4th Cir. 1984); *In re Malone*, 592 F. Supp. 1135 (E.D.Mo. 1984). Neither court makes the point explicitly, but there appears to be an assumption of disproportionality where people of color (i.e., "minorities") comprise the majority of an adversely affected group.

[70]This subject will receive further treatment in part two of this series.

Disparity: Criteria for Measuring

Three forms of disparate impact have been recognized by the circuit courts.[71] They differ from each other in the way that the severity of harm to members of a protected class is assessed. Some or all may apply in particular instances of demolitions and conversions depending on the demographic composition of the building's occupants, the demographic composition of the region, and, perhaps, the conditions of the local housing market.

The first and strongest type of disparate impact occurs when a greater number of people of color, rather than whites, will be adversely affected by a defendant's policy or practice.[72] A second and somewhat weaker type of disparate impact occurs where people of color make up a disproportionately higher percentage of the adversely affected group relative to the composition of the local population.[73] A third and not as widely acknowledged type of disparate impact occurs when a defendant's actions cause disproportionately greater harm to people of color, even if there is no numerically disproportionate effect.[74]

The Perpetuation of Segregation

The second theory of Title VIII discriminatory effect liability is based not on the harm experienced disproportionately by members of protected classes, but on the harm inflicted on all members of a community by the "perpetuation of segregation" in housing. Unlike the disparate impact under Title VIII,

[71]*See* Roisman and Tegeler at 317–18.

[72]*See, e.g., Resident Advisory Board v. Rizzo*, 425 F. Supp. 987, 1018 (E.D. Pa. 1976) (failure to build public housing where 95 percent of the individuals on the waiting list for public housing in Philadelphia were members of minority groups; cited as a strong example of disparate impact in *Arlington II*, 558 F.2d at 1291).

[73]*See Arlington II,* 558 F.2d at 1286, 1290 (zoning restrictions preventing the construction of a low-income housing project where African Americans made up 40 percent of the group eligible for occupancy but only 18 percent of the local population; described as a weakly disparate impact as compared to *Rizzo* because 60 percent of the group eligible for occupancy was white); *Betsey*, 736 F.2d at 988 (treating the residents in a building as the population for comparison, a revised occupancy policy imposed in an apartment building leading to eviction notices being sent to 74.9 percent of the building's non-white tenants, but only 24.6 percent of the building's white tenants). *Contra In re Malone*, 592 F. Supp. 1135 (E.D.Mo. 1984), *aff'd without opinion*, 794 F.2d 680 (8th Cir. 1986) (no showing of disparate impact where fewer numbers of African Americans than whites affected).

[74]*See Black Jack,* 508 F.2d at 1186 (overruling the district court's finding that a zoning ordinance restricting the construction of a low-income housing project had no disparate impact because the "ultimate effect of the ordinance was to foreclose 85 percent of the blacks living in the metropolitan area from obtaining housing in Black Jack, and to foreclose them at a time when 40 percent of them were living in substandard or overcrowded units"—even though fewer African-Americans that whites would be eligible for occupancy and the numbers of eligible African-Americans and whites were essentially proportional to the composition of the local population). *See also Huntington*, 844 F.2d at 929 (zoning restrictions preventing the construction of a subsidized project where 7 percent of all the town's families required subsidized housing, while 24 percent of African-American families needed such housing); *Pfaff v. HUD ("Pfaff")*, 88 F.3d 739, 745 (9th Cir. 1996) (explaining that disparate impact involves "a significantly *adverse **or** disproportionate* impact on persons of a particular [type] produced by the [defendant's] facially neutral acts or practices" (emphasis added)).

which was judicially inferred largely by analogy to Title VII, perpetuation of segregation is a legal theory based specifically on the particular legislative history of Title VIII.[75] As the Supreme Court held in *Trafficante v. Metropolitan Life Insurance Co.*, the nature of this harm stems from "the loss of important benefits from interracial associations."[76] The Court explained: "While members of minority groups were damaged the most from discrimination in housing practices, the proponents of [Title VIII] emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered."[77] There is some irony to discussing the benefits of interracial associations and the prohibitions on the perpetuation of segregation in the context of federal housing programs. The value placed on opportunities for interracial association in federally assisted housing varies.[78] And, federal housing policies have been blamed for creating or encouraging much of the patterns of residential segregation that exist today.[79]

The Second,[80] Sixth,[81] and Seventh[82] Circuit Courts have entertained discriminatory effect claims based on the perpetuation of segregation. The Fourth,[83] Fifth[84] and Eighth[85] Circuit Courts have remarked favorably on the theory in passing. The Ninth[86] and Tenth[87] Circuit Courts have made oblique reference to the theory. A recent dissent in the First Circuit has addressed unintentional or "subconscious" perpetuation of segregation in detail.[88]

A displacement of tenants in one complex may perpetuate segregation in the region as a whole, if, for example, these tenants are forced to relocate to racially segregated areas.

Discriminatory effect cases based on the perpetuation of segregation have typically involved zoning restrictions in white communities that have had the result of excluding people of color. To the extent that demolition and conversion cases do not fit the pattern, it is not completely clear how this theory of Title VIII will apply in these cases. Demolitions and conversions alter existing housing patterns, not perpetuate them. On the other hand, the Supreme Court has found that housing markets are regional, not municipal, and highly complex.[89] A displacement of tenants in one complex may perpetuate segregation in the region as a whole, if, for example, these tenants are forced to relocate to racially segregated areas. In other words, the alteration of specific neighborhood housing patterns may have the effect of perpetuating, or retrenching, a segregated status quo in a region.

Rules of Decision Applied in Title VIII Discriminatory Effect Cases

While nearly all of the circuit courts recognize at least one form of discriminatory effect, they are split on the rules of decision to apply in discriminatory effect cases. Three different frameworks have been employed: the "pure effects" test, the "four-factor" test, and the "three-factor" test.[90]

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[75]*See Arlington II*, 558 F.2d at 1289–90 (Citing *Trafficante*, 409 U.S. at 211, in turn citing 114 Cong. Rec. 3,422 (remarks of Sen. Walter Mondale): "Conduct that has the necessary and foreseeable consequence of perpetuating segregation can be as deleterious as purposefully discriminatory conduct in frustrating the national commitment to replace the ghettos by truly integrated and balanced living patterns." (internal quotations omitted)).

[76]409 U.S. 205, 210 (1972).

[77]*Id*.

[78]*See, e.g., Schmidt v. Boston Housing Auth.*, 505 F. Supp. 988 (D. Mass 1981) (White residents challenged, unsuccessfully, admissions plan that hindered them from finding housing in predominantly white projects in South Boston.).

[79]*See, e.g.,* Michael H. Schill and Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. Pa. L. Rev. 1285, 1308–11 (1995) (describing, among other things, discriminatory underwriting practices by the Federal Housing Administration). *And see* 114 Cong. Record 2,281 (1968) (Remarks of Senator Edward Brooke: "Today's Federal housing official commonly inveighs against the evils of ghetto life even as he pushes buttons that ratify their triumph—even as he ok's public housing sites in the heart of Negro slums, releases planning and urban renewal funds to cities dead-set against integration, and approves the financing of suburban subdivisions from which Negroes will be barred. ... In other words, our Government, unfortunately, has been sanctioning discrimination in housing throughout this Nation;" cited in *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1133–34 (2nd Cir. 1973)). *But see* Richard H. Muth, *The Causes of Housing Segregation*, in *U.S. Commission on Civil Rights, Issues in Housing Discrimination: A Consultation* at 372 (1985) ("Whatever impact [Federal Housing Administration] practices may have had was presumably eliminated by President Kennedy's famous stroke of the pen in 1962. Yet, it is difficult to discern any marked changes in the intensity or patterns of black segregation since that time.").

[80]*See Huntington*, 844 F.2d at 937.

[81]*See Arthur*, 782 F.2d at 575.

[82]*See Arlington II*, 558 F.2d at 1293.

[83]*See Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988, n.3 (4th Cir. 1984); *Edwards v. Johnston County Health Dept.*, 885 F.2d 1215, 1224 (4th Cir. 1989).

[84]*See U.S. v. Mitchell*, 580 F.2d 789, 791–92 (5th Cir. 1978).

[85]*See Black Jack*, 508 F.2d at 1186.

[86]*See Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1309, 1311 (9th Cir. 1982) (held white tenant had standing under Title VIII to challenge apartment occupancy policy alleged to have discriminatory effect on African American and Latino families, but the court did not resolve the issue of effect and the case is further complicated by the tenant's related Fourteenth Amendment claim).

[87]*See Mountain Side*, 56 F.3d at 1253 (making reference to *Arlington II).*

[88]*See Langlois*, 207 F.3d at 54 (Stahl, J., dissent: "Because 'subconscious discrimination' in housing tends to manifest itself in practices that, although not overtly racial, have the effect of freezing segregation, I address [the complaint] by asking whether defendants' use of local preferences within the jurisdictions they represent may have the effect of 'perpetuat[ing] segregation and thereby prevent[ing] interracial association.' *Arlington Heights*, 558 F.2d at 1290.").

[89]*See Hills v. Gautreaux ("Gautreaux")*, 425 U.S. 284, 299 (1976).

[90]For a recent overview of standards of decision that have been applied in Title VIII discriminatory effect cases, *see* Kristopher E. Ahrend ("Ahrend"), *Effect, Or No Effect: A Comparison Of Prima Facie Standards Applied in "Disparate Impact" Cases Brought Under The Fair Housing Act (Title VIII),* 2 Race & Ethnic Ancestry L. Dig. 64 (1996) (Ahrend uses the term "disparate impact" more broadly than Roisman and Tegeler to include non-purposeful perpetuation of segregation.).

The "Pure Effects" Test

The "pure effects"[91] test is the test most widely used in Title VIII discriminatory effect cases. The test has been adopted by the First,[92] Second,[93] Third,[94] Fifth,[95] Eighth,[96] and Ninth [97] Circuit Courts. The Fourth Circuit has also adopted it, but only in cases involving private defendants.[98] The "pure effects test," imported from Title VII disparate impact case law,[99] relies on a two-part framework of prima facie showing and rebuttal.

The Plaintiff's Prima Facie Showing

To make out a prima facie discriminatory effect case under Title VIII, the plaintiff must show: "(1) the occurrence of certain outwardly neutral [policies or] practices, and (2) a significantly adverse or disproportionate impact on persons of a particular [type] produced by the [defendant's] facially neutral acts or practices."[100]

Part (1) of the prima facie showing—"outward" or facial neutrality—has to do with whether the policies or practices make express reference to membership in a protected class. Those policies or practices that are facially discriminatory are analyzed according to a disparate treatment framework.[101]

Part (2) of the prima facie showing requires the plaintiff's special effort and attention. First, the plaintiff must prove actual discriminatory effect—that is, that people of color will be disparately impacted or segregation will be perpetuated in a community—usually with statistical comparisons.[102] Second, the discriminatory effect the plaintiff shows must be "significant."[103] No court has articulated a clear standard for what constitutes a "significant" discriminatory effect. But, it appears to be a threshold requirement. For example, the Eighth Circuit has suggested that a zoning restriction adversely affecting 32 percent of an area's African-American population and 29 percent of its white population does not, by itself, constitute a sufficiently strong or significant disparate impact.[104] However, in a disparate impact context, this probably need not mean that greater numbers of people of color than whites are affected; a disproportionate effect on people of color should be sufficient.[105] Finally, as described above, there are two forms of discriminatory effect. The Second Circuit has held that a showing that particular policies and practices that both have a disparate impact and perpetuate segregation is especially strong.[106]

A disparate impact defendant cannot undermine a prima facie showing of disparate impact with a "bottom line" argument that only a small number of people of color are affected by its conduct or that its actions have only a small effect on the total minority population of an area.

The Defendant's Challenge of the Sufficiency of the Prima Facie Showing

Prior to presenting its rebuttal to the plaintiff's prima facie showing, the discriminatory effect defendant may also respond by attacking the sufficiency of the plaintiff's showing.[107] This will usually be done by challenging the accuracy of the plaintiff's statistical analysis.[108] However, there is an important difference between prima facie showings based on disparate impact and those based on the perpetuation of segregation. A disparate impact defendant cannot undermine a prima facie showing of disparate impact with a "bottom line" argument that only a small number of people of color are affected by its conduct or that its actions have only a small effect on the total minority population of an area.[109] The disparate impact prohibitions of Title VIII protect individuals, not groups.[110] Therefore, disparate-impact plaintiffs are required only to prove "discriminatory impact on them as individuals. The plain language of the statute makes it unlawful '[t]o discriminate against any person.'"[111]

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[91]This term has been borrowed from Roisman and Tegeler. The test is also referred to as the "effect-only" test or the "effects" test. *See, e.g.,* Ahrend at 65 ("effect-only").

[92]*See Langlois*, 207 F.3d 43, 51, n.4.

[93]*See Huntington,* 844 F.2d at 934.

[94]*See Rizzo,* 564 F.2d at 148.

[95]*See Simms,* 83 F.3d at 1555.

[96]*See Black Jack,* 508 F.2d at 1184–85.

[97]*See Pfaff,* 88 F.3d at 745.

[98]*See Betsey,* 736 F.2d at 988.

[99]*See Griggs.*

[100]*Pfaff*, 88 F.3d at 745 (9th Cir. 1996) (citing *Palmer v. U.S.*, 794 F.2d 534, 538 (9th Cir. 1986) (ADEA)).

[101]*See Bangerter v. Orem City Corp.,* 46 F.3d 1491, 1501 (10th Cir. 1995) (discussing difference between disparate treatment and "disparate impact" (discriminatory effect)).

[102]*See Pfaff*, 88 F.3d at 746.

[103]*See, e.g., id.* at 745; *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386, 1388–89 (5th Cir. 1986). *See also Southend Neighborhood Imp. v. County of St. Clair ("Southend")*, 743 F.2d 1207, 1209–10 (7th Cir. 1984) ("significant ... discriminatory effects" and the "four-factor" test).

[104]*See Black Jack*, 508 F.2d at 1186 (going on to find sufficient disparate impact on the basis of disproportionate harm).

[105]*See* n. 73, *supra*.

[106]*See Hungtington*, 844 F.2d at 938 (contrasting the prima facie showing in *Rizzo).*

[107]In a related move, the defendant may also challenge the applicability of discriminatory effect theories under Title VIII in the first place. This will be addressed further in part two of the series.

[108]*See, e.g., Hanson v. Veterans Admin.*, 800 F.2d 1381, 1388–89 (5th Cir. 1986) (defendant successfully refuted the accuracy of plaintiff's statistical analysis, which purported to show that the defendant's appraisal policies disparately impacted African-American veterans by systematically underappraising home values).

[109]*See Connecticut v. Teal*, 457 U.S. 440, 453 (1982) (rejecting the appellee's "bottom line" argument: "The principal focus of [Title VII] is the protection of the individual employee, rather than the protection of the minority group as a whole.").

[110]*See id.*

[111]*Betsey,* 736 F.2d at 987 (citing 42 U.S.C.A. § 3604(b)).

A prima facie showing based on the perpetuation of segregation is more vulnerable to a "bottom line" challenge. In a perpetuation of segregation claim, the overall composition of a community is exactly what is at issue. Even though Title VIII protects "persons," a plaintiff shows injury under the perpetuation of segregation theory by showing that she has been denied opportunities for interracial association within her community because of the actions of the defendant that have affected the racial diversity of her community.[112]

A plaintiff shows injury under the perpetuation of segregation theory by showing that she has been denied opportunities for interracial association within her community because of the actions of the defendant that have affected the racial diversity of her community.

The Defendant's Rebuttal: The "Simple Justification" Test and Stricter Standards

If a plaintiff is successful in making a prima facie showing of discriminatory effect, the burden then shifts to the defendant to present a rebuttal. The circuit courts applying the pure effects test diverge on the substance of the rebuttal requirement. The Second[113] and Third[114] Circuit Courts apply a "simple justification"[115] test, requiring the defendant to prove: (1) that the outwardly neutral policy or practice causing the discriminatory effect furthers a "legitimate and bona fide interest"[116] and (2) that no alternative would serve this interest with "less discriminatory effect." The First Circuit[117] has pointed to a "simple justification test," but has left open the issue of a "less restrictive alternative." The Fifth[118] and Ninth[119] Circuit Courts have not addressed their rebuttal standards in detail, but appear also to be leaning towards the simple justification test. The Fourth[120] and Eighth[121] Circuit Courts, however, apply stricter standards, requiring the defendant to show that its policy or practice was "necessary" to further a "compelling interest."

The simple justification test and the stricter tests of the Fourth and Eighth Circuit Courts are more demanding than those applied to the Title VII disparate impact defendant. In Title VII disparate impact cases, the defendant merely has the burden of production to articulate a legitimate interest; the plaintiff must then challenge this rebuttal as a "pretext," by showing that there are less discriminatory alternatives available.[122] In a Title VIII discriminatory effect case, the defendant must show that no alternative would serve this interest with less discriminatory effect.[123]

None of seven circuit courts that have applied the pure effects test have clearly stated the nature of the Title VIII defendant's burden on rebuttal.[124] Under Title VII, while a burden of production may shift to the defendant on rebuttal, the plaintiff always has the ultimate burden of persuasion.[125] Citing Fed. R. Evid. 301 and Title VII disparate treatment case law,[126] the Supreme Court has held that this arrangement "conforms with the usual method for allocating persuasion and production burdens in the federal courts."[127] The matter has yet to be fully addressed.

The "Four-Factor" Test

A minority of the circuit courts apply multi-factor balancing tests in lieu of the pure effects test. The Fourth[128] and Seventh[129] Circuit Courts apply a "four-factor" test; the Sixth and Tenth Circuit Courts apply a "three-factor" test, discussed

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[112]*See id.* at 987, n.3 (indirectly suggesting a "bottom line" analysis in perpetuation of segregation cases).

[113]*See Huntington,* 844 F.2d at 939.

[114]*See Rizzo*, 564 F.2d at 148.

[115]This term is borrowed from *Langlois,* 207 F.3d at 51.

[116]The Second Circuit has provided more detail on these terms. To be legitimate, "the proffered justification" must at least be "of substantial concern such that it would justify a reasonable official in making [a] determination" on this basis. *Huntington,* 844 F.2d at 939. To be bona fide, the justification must have animated the decision at the time it was made: "[p]ost hoc rationalizations by administrative agencies should be afforded 'little deference' by the courts." *Id.*

[117]*See Langlois,* 207 F.3d at 51, n.6.

[118]*Simms,* 83 F.3d at 1555.

[119]*Pfaff*, 88 F.3d at 747.

[120]*Betsey,* 736 F.2d at 988 (requiring a private defendant to "prove a business necessity sufficiently compelling to justify the challenged practice" on rebuttal).

[121]*See Black Jack*, 508 F.2d at 1185 (requiring a "governmental defendant to demonstrate that its conduct was necessary to promote a compelling governmental interest").

[122]As this description suggests, "pretext" is something of a term of art: a Title VII disparate impact plaintiff can show that an employer's rebuttal justification is pretextual merely by demonstrating that the employer's business interests may be met by means that have less of a discriminatory effect; the plaintiff need not prove bad faith or discriminatory purpose. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Wards Cove*, 490 U.S. at 660. The plaintiff need not prove deception or discriminatory purpose on the part of the defendant.

[123]*See Huntington*, 844 F.2d at 939 (the inapplicability of the Title VII pretext test in Title VIII cases).

[124]*But see Langlois*, 207 F.3d at 50, n.4 (citing *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 658-61, (1989)).

[125]*See Wards Cove Packing Co. v. Atonio ("Wards Cove")*, 490 U.S. 642, 658-61, (1989) (Title VII); 42 U.S.C. § 2000e-2(k)(1) (1994) (codifying disparate impact standard in employment discrimination cases, overruling *Wards Cove* in part, but retaining a form of justification defense; cited in *Langlois,* 207 F.3d at 50, n.4.).

[126]*See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256–258 (1981).

[127]*Wards Cove*, 490 U.S. at 660–61.

[128]*Smith v. Town of Clarkton ("Clarkton"),* 682 F.2d 1055, 1065–66 (4th Cir. 1982).

[129]*Arlington II*, 558 F.2d at 1290.

in the following section. The elements of the "four-factor" test have been set out by the Seventh Circuit as follows:

> (1) how strong[130] is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis* [, 426 U.S. 229 (1976)]; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.[131]

The Fourth Circuit has held explicitly that the "four-factor" test applies only to government defendants;[132] the Seventh Circuit has applied the four-factor test to a private defendant.[133]

The actual functioning of the "four-factor" test in the Fourth and Seventh Circuit Courts is somewhat unclear, largely because of the limited amount of case law. Neither court has described any burden shifting mechanism and the Seventh Circuit has emphasized that "the ultimate burden of proof" lies with the complainant.[134]

Of the four factors, the Seventh Circuit has held that the second factor, evidence of discriminatory intent, is the least important and that a plaintiff need not provide evidence of intent to prevail.[135] In fact, the Seventh Circuit has ruled for plaintiffs where only two of the four factors, the first and fourth, favored them on the principle that Title VIII is to be "liberally construe[d]."[136] The Fourth Circuit has not specifically addressed how close cases are to be resolved.[137] The importance of the other factors with respect to each other has not been specifically addressed. However, if the pure effects cases are any indication, the strength of the plaintiff's showing of discriminatory effect and the interests of the defendant will always figure prominently in a "four-factor" analysis.

The "Three-Factor" Test

The Sixth [138] and Tenth [139] Circuit Courts have adopted a "three-factor" test. The "three-factor" test is the Seventh Circuit's "four-factor" test with the second factor, "evidence of discriminatory intent," omitted. [140] The Sixth and Tenth Circuit Courts refuse to provide "half credit" where a plaintiff does not "present sufficient evidence to allow the conclusion that the [defendant] racially discriminated in [its actions]."[141] The test is summarized, in the following manner, by the Tenth Circuit:

> (1) the strength of the plaintiff's showing of discriminatory effect; (2) the defendant's interest in taking the action complained of; and (3) whether the plaintiff seeks to compel the defendant affirmatively to provide housing for members of a protected class or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.[142]

The Sixth Circuit appears to apply its "three-factor" test as a balancing test, with each factor weighed together simultaneously.[143] The Tenth Circuit's test, however, operates in a way very similar to the "pure effects" test. The Tenth Circuit first requires a complainant to establish a "prima facie case," which the defendant is then required to rebut by "presenting valid non-pretextual reasons for the challenged practices" and "demonstrat[ing] that the discriminatory practice has a manifest relationship to the housing in question."[144]

The Tenth Circuit has not clearly specified the elements of the plaintiff's prima facie case. In introducing the "three-factor" test, it stated that all three factors would be employed in determining the sufficiency of the plaintiff's prima facie case.[145] But, this would make the defendant's *rebuttal* of the prima facie case—a showing related to its interests in taking the challenged action—part of the prima facie case itself. The relation of the third factor with respect to the plaintiff's prima facie showing is clearer. The Tenth Circuit states:

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[130]*See* n. 109-12, *supra*, for a discussion of "bottom line" attacks to the strength of a showing of discriminatory effect.

[131]*Arlington II*, 558 F.2d at 1290.

[132]*See Betsey*, 736 F.2d at 988 n. 5.

[133]*See Gomez v. Chody ("Gomez")*, 867 F.2d 395 (7th Cir. 1989) (challenge to displacement of Latino families as part of building purchaser's rehabilitation plan).

[134]*See Gomez*, 867 F.2d at 402.

[135]*See Arlington II*, 558 F.2d at 1292–93 (noting the difficulty of proving intent, but that partial evidence of intent undermines the defendant's equitable position).

[136]*See id.*, 1294.

[137]*See Clarkton* 682 F.2d at 1065–66 (granting relief on the strength of plaintiffs' showing on the first three factors without proceeding to the fourth).

[138]*See Arthur*, 782 F.2d at 575.

[139]*See Mountain Side*, 56 F.3d at 1251.

[140]*See Arlington II*, 558 F.2d at 1290. *And see Arthur*, 782 F.2d at 575 ("we adopt only the first, third, and fourth factors that the Seventh Circuit established in *Arlington II"); Mountain Side*, 56 F.3d at 1252 ("We adopt the Sixth Circuit's analysis of disparate impact. We also decline to adopt the second factor of discriminatory intent from the Seventh Circuit's analysis.").

[141]*Arthur*, 782 F.2d at 575.

[142]*Mountain Side*, 56 F.3d at 1252.

[143]*See Arthur*, 782 F.2d at 575–77.

[144]*Mountain Side*, 56 F.3d at 1253, 1254.

[145]*See id.* at 1252.

> Where plaintiff seeks a judgment which would require defendant to take affirmative action to correct a Title VIII violation, plaintiff must make a greater showing of discriminatory effect. On the other hand, if plaintiff seeks a judgment merely enjoining defendant from further interference with the exercise of plaintiff's Title VIII rights, a lesser showing of discriminatory effect would suffice.[146]

In other words, the more drastic the relief sought by the plaintiff, the stronger the plaintiff's prima facie case must be, at least with respect to the first factor.

The Practical Significance of the Different Tests

The practical difference between the three tests has been questioned, since plaintiffs have consistently prevailed where they have shown significant discriminatory effect in the face of weak justification by defendants.[147] For example, the Third and Ninth Circuit Courts have noted in prominent decisions that their conclusions would be the same under either the "pure effects" or "four-factor" tests.[148] The Seventh Circuit has gone as far as to state that the "four-factor" test it created is "in fact, though not in words, the 'disparate impact' analysis familiar from Title VII cases."[149] Some circuit courts have applied more than one decisional framework. The Second and Third Circuit Courts, while they have adopted the pure effects test, also employ the four-factor test to guide final decisions on the merits.[150] The First Circuit initially employed a similar approach, but appears more recently to have retreated from it.[151]

On the other hand, one instance where the choice of a test has led to substantive differences in outcomes has been pointed out.[152] In *Mountain Side Mobile Estates Partnership v. Sec'y of HUD*, the Tenth Circuit, applying the "three-factor" test, denied a disparate-impact claimant relief.[153] The dissent in this case, applying the "pure effects" test, would have granted relief.[154] The important difference between the approaches was that, under the majority's decisional framework, the plaintiff's prima facie showing of discriminatory effect is weighed against the nature of the relief sought—more drastic relief must be justified by a stronger showing of discriminatory effect.[155] The "pure effects" test does not involve this type of balancing.

Something similar happens in the application of the "four-factor" test. The Seventh Circuit weighs the second factor, partial evidence of discriminatory intent, against the third factor, the defendant's interests. In *Metropolitan Housing Development Corp. v. Village of Arlington Heights ("Arlington II")*, the Seventh Circuit has noted that evidence of discriminatory intent tends to "undermin[e] the equitable position of the defendant."[156] While the *Arlington II* court did not find any such evidence of intent in that case, presumably a finding of this kind would subject a defendant's "third factor" showing to a higher level of scrutiny, which would likely translate into a requirement of a stronger showing of interest. The "pure effects" test, on the other hand, does not involve analysis of partial evidence of discriminatory intent as directly.[157]

The more drastic the relief sought by the plaintiff, the stronger the plaintiff's prima facie case must be, at least with respect to the first factor.

All of this being said, the "pure effects" test, the most widely employed test, does appear to accommodate a certain amount of balancing analysis.[158] A plaintiff's prima facie showing must be sufficiently "significant."[159] A defendant must demonstrate a sufficiently "bona fide and legitimate" interest on rebuttal.[160] Other circuit courts have not been as explicit about their analysis as the Tenth Circuit, but "significant" and "legitimate" are open-textured terms that invite comparison, balancing, and the exercise of discretion.

Affirmative Fair Housing Duties and Title VIII Discriminatory Effect Claims

In addition to a duty to refrain from discrimination on the basis of race, HUD has special affirmative fair housing duties. Title VIII provides that "the Secretary of Housing and Urban Development shall [...] administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchap-

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[146] *Id.* at 1253 (citing *Casa Marie v. Superior Court of Puerto Rico for Dist. of Arecibo*, 988 F.2d 252, 269 n. 20, (1st Cir. 1993)).

[147] *See* Schwemm at § 10.4(2)(c).

[148] *See Rizzo*, 564 F.2d at 148, n. 32; *Volpe*, 858 F.2d at 482–84.

[149] *Dwivedi*, 895 F.2d at 1533.

[150] *See Huntington,* 844 F.2d at 936; *Rizzo,* 564 F.2d at 148 n. 32 (describing the four factor test as "a standard upon which ultimate Title VIII relief may be predicated").

[151] *See Casa Marie v. Superior Court of Puerto Rico for Dist. of Arecibo ("Casa Marie")*, 988 F.2d at 270, n.20 (1st Cir. 1993). *But see Langlois,* 207 F.3d at 51 (1st Cir. 2000) (rejecting *Arlington II* "balancing" analysis).

[152] *See* Ahrend, Race & Ethnic Ancestry L. Dig. at 76–77.

[153] *See Mountain Side*, 56 F.3d at 1255–57.

[154] *See id.*, 56 F.3d at 1257–59.

[155] *See* n. 144-6, *supra* (discussing also the confusing nature of the Tenth Circuit's description of its test).

[156] *Arlington II,* 558 F.2d at 1292.

[157] *But see* n. 116, *supra* (defendant must show a "bona fide" interest on rebuttal).

[158] *But see Langlois,* 207 F.3d at 51 (rejecting *Arlington II* "balancing" analysis).

[159] *See* n. 103, *supra*.

[160] *See* n. 116, *supra*.

ter."[161] The Second Circuit has interpreted Title VIII to extend this affirmative duty to PHAs.[162] The First Circuit, in a very recent decision, acknowledged the possibility, but left the issue for the district court on remand.[163] However, among the rest of the circuit courts, this analysis of the statute, imposing affirmative duties on defendants other than HUD, has not been widely adopted.[164]

Sources of Law Imposing Affirmative Fair Housing Duties on PHAs and Project Owners: Regulation and Contract

While Title VIII may not directly impose affirmative duties on PHAs and project owners, a number of other authorities do. HUD regulations regarding public housing admissions and occupancy state that a PHA "must affirmatively further fair housing in the administration of its public housing program."[165] In addition, the QHWRA requires PHAs to include a certification that they "will affirmatively further fair housing" in their annual PHA plans describing their program administration procedures.[166]

Most important is Executive Order (E.O.) 11063, issued by President John F. Kennedy in 1962. This order directs "all departments and agencies in the executive branch of the Federal Government, insofar as their functions relate to the provision, rehabilitation, or operation of housing and related facilities, to take all action necessary and appropriate to prevent discrimination because of race ..."[167] HUD's regulations implementing E.O. 11063 are very broad in their scope and apply to both PHAs and project owners as HUD housing program participants. Further, project owners' Section 8 Housing Assistance Payments (HAP) contracts with HUD[168] and the Regulatory Agreements attached to owners' federally insured mortgages[169] expressly require owners to comply with regulations issued pursuant to E.O. 11063.[170] The E.O. 11063 regulations provide that "no person receiving assistance from or participating in any program or activity of [HUD] involving housing and related facilities shall engage in a discriminatory practice."[171]

A "discriminatory practice" is defined as:

> Any discrimination on the basis of race ... or the existence or use of a policy or practice, or any arrangement, criterion or other method of administration which has the effect of denying equal housing opportunity or which substantially impairs the ability of persons to apply for or receive the benefits of assistance because of race ... in the sale, rental or other disposition of residential property or related facilities ... or in the use or occupancy thereof ...[172]

This prohibition of discriminatory practices, as they are defined, is essentially the same as the discrimination prohibitions of Title VIII — it encompasses both purposeful discrimination and policies and practices that have the "effect of denying equal housing opportunity."

The regulations do not stop there. Another subsection, entitled *Prevention of Discriminatory Practices*, commands HUD housing program participants "to take all action necessary and proper to prevent discrimination on the basis of race..."[173] In other words, E.O. 11063 regulations not only require PHAs and project owners to refrain from engaging in practices that have a discriminatory effect, the regulations require PHAs and project owners to prevent these effects in the first place.[174]

The Meaning of "Affirmatively Further Fair Housing"

The problem is that the duty of PHAs and project owners to affirmatively further fair housing or to prevent discrimination has not been fleshed out to any degree. HUD has provided a small amount of additional guidance with respect to the Community Development Block Grant (CDBG) Program. HUD regulations require grantees under the CDBG Program to submit a certification that they will affirmatively further fair housing. Under the CDBG program:

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[161] 42 U.S.C.A. § 3608(e) (West 1999). *See also Shannon v. United States Department of HUD*, 436 F.2d 809 (3rd Cir. 1970) (construing HUD's affirmative fair housing duties in the context of project siting decisions).

[162] *See Otero v. New York City Housing Authority ("Otero")*, 484 F.2d 1122, 1133 (2nd Cir. 1973). *See also U.S. v. Charlottesville Redevelopment and Housing Authority ("Charlottesville")*, 718 F. Supp. 461, 464–467 (W.D.Va. 1989).

[163] *See Langlois*, 207 F.3d at 51–52 (1st Cir. 2000).

[164] *See, e.g., Rizzo*, 564 F.2d at 130 (3rd Cir. 1977) (declining to affirm the district court's decision on the basis of a breach of the defendant PHA's duty to affirmatively further fair housing).

[165] 24 C.F.R. § 960.103 (as amended, 65 Fed. Reg. 16,691, 16,725 (Mar. 29, 2000)).

[166] *See* 42 U.S.C.A. § 1437c-1(d)(15) (West Supp.1999).

[167] E.O. 11063 at Part I, § 101 (issued pursuant to 42 U.S.C.A. § 1982).

[168] *See* HUD Form 52587, Exh. A, ¶ 1.b. (May 1993) (*Housing Assistance Payments (HAP) Contract: Section 8 Housing Assistance Payments Program).*

[169] *See* FHA Form 2466, ¶ 10 (Nov. 1969) (*Regulatory Agreement for Multifamily Housing Projects (Under 207, 220, 221(d)(4), 231 and 232, Except Nonprofits)*).

[170] *See* 24 C.F.R. § 107.25 (1999) (requiring E.O. 11063 compliance provisions to be included in HUD legal instruments).

[171] 24 C.F.R. § 107.20(a)(1999) (*Prohibition against discriminatory practices*). "Person" is defined to include "one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives or agents, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, fiduciaries and public entities." *Id.* at § 107.15(d). "Public entity" is defined as "a government or governmental subdivision or agency." *Id.* at § 107.15(e).

[172] *Id.* at § 107.15(f).

[173] *Id.* at § 107.21 (*Prevention of discriminatory practices*).

[174] Interestingly, these regulations prohibiting discriminatory effects provide for no "legitimate interest" rebuttal or defense. One reading would be that strict liability for discriminatory effects is imposed against HUD housing program participants.

> [this] require[s] the grantee to assume the responsibility of fair housing planning by conducting an analysis to identify impediments to fair housing choice within its jurisdiction, taking appropriate actions to overcome the effects of any impediments identified through that analysis, and maintaining records reflecting the analysis and actions in this regard.[175]

HUD has considered but declined to implement regulations that would further clarify these affirmative duties of CDBG program participants.[176]

This conception of the duty affirmatively to further fair housing as a planning and analysis requirement is basically in line with HUD's affirmative fair housing duties under Title VIII,[177] as they have been interpreted.[178] In order to satisfy its affirmative fair housing obligations, HUD must, at minimum, study the racial and socio-economic effects of its decisions before proceeding with a particular course of action.[179]

Offensive Use of Affirmative Duties

The affirmative fair housing duties of non-federal defendants have only been addressed in a limited fashion in the case law.[180] Typically, they have been invoked by defendants who sought to use them to justify acts of discrimination for the purposes of maintaining demographic balance in racial "tipping" cases.[181]

There is no reason why these affirmative fair housing duties cannot be used offensively by Title VIII plaintiffs. There are two ways to attempt this. The first way is to seek relief directly under the legal provision imposing the affirmative duty. This will be difficult under E.O. 11063 regulations, as these regulations allow only for an administrative grievance procedure through HUD,[182] and less difficult under the other authorities.[183]

The affirmative fair housing duties of non-federal defendants have only been addressed in a limited fashion in the case law.

A second and potentially promising way to bring these affirmative duties to bear against PHAs and project owners is to incorporate these duties into the decisional frameworks for discriminatory effect cases. Under the pure effects test, a defendant's affirmative duty should affect the burden the defendant must carry on rebuttal. A practice that has been shown to have a discriminatory effect is less likely to be "legitimate" when a defendant is required to prevent these effects in the first place. A defendant's failure to study the fair housing effects of its decision would also undermine the legitimacy of its position.

Similarly, affirmative duties ought to affect the application of the four-factor or three-factor tests. A PHA or project owner's interest in taking an action that has a discriminatory effect is limited since such defendants are required to act to prevent these effects, or at least to study them prior to acting. Further, the significance of the final factor, the nature of the relief sought by the plaintiff, ought to weigh in favor of granting relief where the plaintiff seeks to compel a defendant to act affirmatively to prevent a discriminatory effect, since again defendant PHAs and project owners are already required to act affirmatively to prevent discrimination.

Conclusion

Federal fair housing law offers a powerful means by which to mount a fundamental challenge to the loss of federally assisted housing developments. HUD, PHAs, and project owners are particularly vulnerable to such challenges because of the disproportionate adverse impact their actions impose on families of color and the segregative effects their actions can cause, and because of their special affirmative fair housing duties. Part two of this series will apply the legal frameworks described above to specific examples and attempt to anticipate potential objections and defenses to the imposition of discriminatory effect liability against PHAs and project owners. ■

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[175] 24 C.F.R. § 570.601(a)(2) (1999).

[176] 63 Fed. Reg. 57,882 (Oct. 28, 1998) (*Fair Housing Performance Standards for Acceptance of Consolidated Plan Certifications and Compliance With Community Development Block Grant Performance Review Criteria; Proposed Rule).*

[177] 42 U.S.C.A. § 3608(e)(5).

[178] *See, e.g., NAACP, Boston Chapter v. Secretary of HUD,* 817 F.2d 149, 154 (1st Cir. 1987); *Shannon v. HUD*, 436 F.2d 809, 816 (3rd Cir. 1970) (relying also on Exec. Ord. 11063 (1962)); *Anderson v. City of Alpharetta*, 737 F.2d 1530, 1538 (11th Cir. 1984).

[179] As HUD hardly ever does this in the loss of units context or in any other context, any claim against a PHA or project owner should also include HUD, provided that HUD made some kind of discretionary decision relating to the demolition, disposition, or conversion. *See HUD's Fair Housing Duties*, 20 HOUS. L. BULL. 1. (Jan. 1999).

[180] HUD's duties to affirmative further fair housing have received fuller treatment, typically in the context of challenges to funding decisions. *See Rizzo*, 564 F.2d at 139-40; *Acevedo v. Nassau County*, 500 F.2d 1078, 1082 (2d Cir. 1974); *Otero*, 484 F.2d at 1133–34; *Shannon*, 436 F.2d at 816; *Clients' Council v. Pierce*, 711 F.2d 1406, 1422–25 (8th Cir. 1983); *Alschuler v. HUD*, 686 F.2d 472, 475 (7th Cir. 1982); *Business Association v. Landrieu*, 660 F.2d 867, 870-71 (3d Cir. 1981); *King v. Harris*, 464 F. Supp. 827, 837 (E.D.N.Y.), *aff'd without opinion sub nom. King v. Faymor Development Corp*., 614 F.2d 1288 (2d Cir. 1979), *vacated on other grounds*, 446 U.S. 905 (1980); *Anderson v. City of Alpharetta*, 737 F.2d 1530, 1538 (11th Cir. 1984); *Gautreaux v. Romney*, 448 F.2d 731, 739 (7th Cir. 1971).

[181] *See Otero*, 484 F.2d at 1133; *Charlottseville*, 718 F. Supp. at 467. *See also U.S. v. Starrett City Assocs.*, 840 F.2d 1096 (2nd Cir. 1988). This strategy of disparate treatment on the basis of race in the name of integration has been consistently unsuccessful. Courts have held that affirmative duties to integrate are subordinate to the duty to refrain from engaging in discrimination on the basis of race. *See Charlottesville, id*.

[182] *See* 24 C.F.R. § 107.35 (1999) (Complaints).

[183] *See* Schwemm at § 21.3 (discussing enforcement of § 3608).

$27 Million Available for Tenant Participation Activities

Public Housing Authorities (PHAs) that receive operating subsidies for public housing units from the Department of Housing and Urban Development (HUD) are now required to use $25 per occupied unit per year for resident participation activities. The funds for these activities are being made available to PHAs by HUD as an add-on expense to the PHAs' operating subsidies. Nationwide, under this formula, approximately $27.7 million will be allocated to PHAs for resident participation.[1] This allocation will have a substantial impact on both large and small PHAs. For example, a PHA with 250 public units will receive $6,250 and one with 1,250 units will receive $31,250 for tenant participation.

Authorization for the resident participation funding is found in the recently published interim rule on the *Allocation of Operating Subsidies Under the Operating Fund Formula*.[2] This rule makes several significant changes to the public housing funding formula to provide funds to support both tenant participation and tenant services. There are, however, no dramatic changes from the proposed rule that was published last year.[3] Comments on the interim rule are due May 29, 2001.[4]

While the interim rule earmarks funding for tenant participation, a January 2001 HUD PIH Notice on resident participation activities and existing tenant participation regulations provide guidance on how the funds for tenant participation should be spent.[5] Moreover, HUD has announced its intention to revise the published tenant participation regulations.[6] Further, HUD has stated that, pending the revisions, the notice's provisions regarding distribution and the use of the resident participation funds are applicable to Fiscal Year (FY) 2001 funds.

[1]This figure is based upon the 1,107,732 occupied public housing units that are reported in the *Multifamily Tenant Characteristics System (MTCS) Resident Characteristics Report*, *at* www.hud.gov/mtcs/public/guest.cfm (click on *public housing* and *national*) (information as of Feb.2001) (Web site last visited Apr. 13, 2001) (1,107,732 x $25 = $27,693,300).

[2]66 Fed. Reg. 17,275 (Mar. 29, 2001).

[3]65 Fed. Reg. 42,487 (July 10, 2000).

[4]Advocates should review the interim regulations to determine if further comments should be submitted. Any comments submitted on the interim regulation will be considered in the development of the cost study currently being conducted by Harvard University. The study considers the cost incurred in operating well-run public housing and the results will be presented to the negotiated rulemaking committee and Congress. 66 Fed. Reg. 17,275, 17,277 (Mar. 29, 2001). For more information regarding the *Public Housing Operating Cost Study*, *see* www.gsd.harvard.edu/phocs/.

[5]*See* HUD Notice PIH 2001-3 (HA), *Interim Instructions on Distribution and Use of Operating Subsidy Funds Received for Resident Participation Activities*, (Jan. 18, 2001) (hereinafter HUD Notice PIH 2001-3); *see also* 24 C.F.R. §§ 964.100-150 (2000).

[6]24 C.F.R. §§ 964.1-964.150 (2000).

Resident Participation

The interim rule clearly states that resident participation activities are to be funded from the $25 per unit allocation and are distinct from resident services that are not to be funded from this allocation.[7] Resident services include activities such as day care programs, resident self-sufficiency programs, and resident safety and security programs. As discussed below, a PHA may have additional funds to pay for these services, if there is an increase in rental income.

Allocation of Funds

HUD is currently in the process of distributing some of the resident participation funds to individual PHAs. For PHAs with fiscal years beginning January 1 and April 1, HUD field offices have notified them of the additional funds. HUD sent these PHAs letters obligating, at this time, approximately 50 percent of what is due for the entire year. Assuming that these PHAs respond in a timely manner to the HUD letters, some of the tenant participation funds should be received by the PHAs with January 1 and April 1 fiscal years by May 2001. PHAs with fiscal years beginning July 1 will receive letters soon telling them that they can expect an add-on to their operating subsidy for FY 2001. Presumably, the PHAs with October 1 fiscal years will also receive timely notification of the additional funds.[8] Adjustments to the initial 50 percent allocation will be made when the precise amount of funds is determined.

At the local level, the system for allocating tenant participation funds varies depending on whether and how the tenants are organized. The unifying theme is that residents and their PHA must collaborate to determine how the funds are to be used.[9] If there is a recognized city-wide or jurisdiction-wide resident organization, the PHA is required to work

[7]66 Fed. Reg. 17,275, 17,282 (columns one and two) (Mar. 29, 2001).

[8]In general, the allocation of operating subsidies has been unusual this year, due to the change in administrations. NHLP understands that PHAs with fiscal years beginning January 1 and April 1 are currently operating with *Letters of Intent* at funding levels based on last fiscal year's operating subsidy amounts. Adjustments for operating subsidies have not been made based upon the PHA's budget for FY 2001. With respect to the funds for resident participation for PHAs with fiscal years beginning January 1 and April 1, HUD sent another *Letter of Intent* "in order not to unduly delay resident organizations from receiving and benefitting from these funds." *HUD Memorandum from Gloria J. Cousar, Acting General Deputy Assistant Secretary to All Directors of Public Housing and Troubled Agency Recovery Centers, Re: Subsidies for Low-Income Housing Projects-Resident Participation Fund,* (Apr. 9, 2001). The *Letter of Intent* obligates 50 percent of the amount that a PHA is eligible for based upon the occupied units reported on the latest approved form HUD 52723, *Calculation of Operating Subsidy. Id. Attachment II (Sample Letter of Intent)*. The funds will be distributed to the PHA after it submits to HUD a form for payment disbursement. Form HUD-52721, *Direct Disbursement Payment Schedule Data Operating Subsidies Public Housing Program* (June1991). For those PHAs with January 1 and April 1 fiscal years, advocates should be able to obtain from their local PHA or HUD a copy of the letter and the amount of funds that has been obligated to date.

[9]HUD Notice PIH 2001-3 at 2, 3 and 4.

in partnership with that organization to determine the activities and distribution of the resident participation funds.[10] HUD Notice PIH 2001-3 uses the term city-wide resident organization and the published regulations use the term jurisdiction-wide tenant organization. There is no explanation for the different terms and the terms are used interchangeably throughout this article. In other words, it is the jurisdiction-wide organization that provides the input to the PHA as to how the funds will be distributed to local development resident councils.

HUD has provided examples of the types of activities that are eligible for resident participation funding, including consultation and outreach that supports active interaction between the PHA and residents.

If there is no city-wide organization but there are "duly-elected" resident councils, the local development resident councils will negotiate on behalf of all the residents of the PHA.[11] The PHA and resident councils will work together to determine the activities and distribution of the resident funding. If there is no city-wide or development resident council, the PHA must work in partnership with the Resident Advisory Board (RAB) through the PHA Plan process to determine the resident participation activities and funding.[12] Ideally, in this latter situation the PHA Plan should reflect the agreements reached.

At a minimum, any agreement reached between the parties regarding activities, roles and responsibilities must be in writing and reviewed annually.[13] Presumably, in the case of city-wide organizations and development resident councils, the agreement would be part of or an attachment to the resident group's Memorandum of Understanding (MOU) with the PHA.[14]

Eligible Activities

HUD has provided examples of the types of activities that are eligible for resident participation funding. In general, these activities include "consultation and outreach for public housing residents that support active interaction between PHA and residents."[15] More specifically, the resident participation activities include:

- providing information to residents on the issues or elements of the PHA operation that effect them and their living environment;
- resident surveys to obtain tenant input;
- resident council annual membership events;
- development-based community promotions focused upon resident participation;
- resident outreach activities;
- promotion of resident participation activities;
- training of tenant commissioners, resident councils, resident households and RABs;
- resident council elections and organizing activities;
- leadership development for resident participation;
- orientation of new and existing tenants-to-resident participation activities; and
- orientation of new and existing tenants-to-resident participation in PHA planning activities including revitalization work, safety and security programs, property management and maintenance activities, and capital improvement issues.[16]

The HUD list is illustrative only and should also encompass:

- operational support (e.g., office supplies) for resident councils;
- child care costs to allow residents to attend meetings and training activities;
- stipends for resident council officers and other resident leaders;[17] and
- assistance with grant writing for resident councils.

Minimal costs for refreshment directly related to resident meetings are also eligible uses of resident participation activities.[18] In addition, per diem for meals related to travel performed in connection with official duties and responsibilities is also an allowable cost.

Ineligible Activities

Refreshment costs associated with entertainment are not an allowable cost.[19] Costs for rental of land, purchase of any

[10] *Id.* at 2; A PHA must recognize a duly elected tenant council and, if duly elected resident councils form a jurisdiction-wide tenant council, the PHA must recognize the jurisdiction-wide tenant organization. 24 C.F.R. §§ 964.18(a) and (b)(i) and § 964.105(a) (2000).

[11] HUD Notice PIH 2001-3 at 2. The election procedures for a tenant council are set forth at 24 C.F.R. §§ 964.115, 964.125 and 964.130 (2000).

[12] HUD Notice PIH 2001-3 at 2.

[13] *Id.* at 2; *see also Id.* at 4.

[14] 24 C.F.R. § 964.18(a)(10) (2000) (MOU); *see also Id*. at § 964.18(a)(6) (agreements on the use of space).

[15] HUD Notice PIH 2001-3 at 3.

[16] *Id.*

[17] 24 C.F.R. §§ 964.150(b) and 5.609(8)(iv) (2000) (stipends up to $200 are not included in income).

[18] HUD Notice PIH 2001-3 at 3.

[19] *Id.* and at 4.

vehicle and fees for lobbying are not allowable.[20] Also, voucher recipients are not eligible for resident participation funding from operating subsidies.[21] As previously noted, resident services should not be funded out of the resident participation funds.

Funding Amount

The funding level for resident participation activities is determined by multiplying $25 by the number of occupied units plus the number of units occupied by police officers and PHA employees.[22] PHAs are to use the "occupied units" number that they and HUD use to determine dwelling rental income in the operating subsidy calculations. Employee and police units are to be added to that base for the $25 calculation.[23] PHAs must include this calculation in their request for operating subsidies.[24] However, if the calculation is not included by the PHA, HUD will add it as part of the HUD completeness and accuracy review of a PHA's request for operating subsidies.

PHAs are required to expend the funds for tenant participation activities regardless of the PHA's financial status.[25] The only exception to this rule is if the amount of operating subsidies that a PHA receives is reduced. In that event, the reduction for tenant participation activities will be made on a pro-rata basis, i.e., an amount proportional to the reduction of the entire subsidy.[26]

Distribution of Funds

PHAs receive the resident participation funds as part of their operating subsidy allocation.[27] HUD Notice PIH 2001-03 states that PHAs may "allocate and redistribute" the funds to those city-wide or development resident councils or to the RAB "with the capacity to administer and account for funds."[28] The published tenant participation regulation is more direct. It stipulates that a PHA "shall provide funds it receives for [tenant participation] to the duly elected resident council at each development and/or jurisdiction-wide resident councils."[29] That regulation further provides that where there are both jurisdiction-wide and development councils, the distribution will be agreed upon by the PHA and the respective councils.[30] PHAs should, therefore, work with the tenant councils to ensure that the necessary financial safeguards are in place. Tenant participation funds should not be withheld from a tenant council or RAB unless the PHA has verifiable information that the tenant group would commit a grossly negligent or criminal act in the handling of the funds.

PHAs are required to expend the funds for tenant participation activities regardless of the PHA's financial status.

The resident participation regulations also state that the $25 is to be distributed in the following way: $15 to the resident councils and $10 to the PHA for the costs incurred in carrying out tenant participation activities such as the expense of elections, recalls and arbitration. These regulations cross-reference to the former operating subsidy regulation which also provided for the $15 and $10 split.[31] The interim operating subsidy regulation eliminates the split and refers only to the $25. The interim regulation should now control and tenant organizations and PHAs should no longer be subject to, or constrained by, the $15 and $10 split.

Resolution of Funding Disputes

The PIH Notice sets out a system for resolving funding disputes between PHAs and resident councils that is inequitable. It provides that any funding disputes between a resident organization and PHA regarding either the activities or disposition of funds must be resolved within 120 days of the start of the PHA's fiscal year. In the event that a resolution cannot be achieved, the notice provides that the funds shall be used "by the PHA for resident education activities

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[20]*Id.* at 4.

[21]*Id.* But PHAs may use their administrative fee reserves to fund family participation activities.

[22]*Id*. at 17,294, § 990.108(e)(1). On an interim basis, HUD is calculating the subsidy amount for PHAs with fiscal years beginning January 1 or April 1 based upon the number of occupied units reported on the latest approved form HUD 52,753 (Jan. 24, 2001).

[23]*See* HUD Form 52,723 (Jan. 24, 2001), Part D, lines 09-13. (This form has not yet been finalized, but it was used by HUD and distributed to tenants who attended HUD training in Dallas Texas, April 2001.)

[24]66 Fed. Reg. 17,275, 17,294 (Mar. 29, 2001) (§ 990.108(e)).

[25]HUD Notice PIH 2001-3 at 3.

[26]66 Fed. Reg. 17,275, 17,294 (Mar. 29, 2001) (§ 990.108(e)(1)); *see also Id*. at 17,282.

[27]Resident Management Corporations (RMCs) that receive operating subsidies directly will receive the resident participation funds directly. According to a HUD official, there are five such RMCs nationwide.

[28]HUD Notice PIH 2001-3 at 4. *See also* HUD Memorandum from Gloria J. Cousar, Acting General Deputy Assistant Secretary to All Directors of Public Housing and Troubled Agency Recovery Centers, *Re: Subsidies for Low-Income Housing Projects-Resident Participation Fund* (no date) (which references resident organizations receiving tenant participation funds).

[29]24 C.F.R. § 964.150(a) (1) (2000). *See also Id.* at § 964.150(a) (2)("the [P]HA must provide tenant services funding to the duly elected resident councils regardless of the [P]HAs financial status. The resident council funds shall not be impacted or restricted by the [P]HA financial status and all said funds must be used for the purpose set forth in subparts B [pertaining to resident participation] and C [pertaining to funds for technical assistance for resident councils and resident management corporations]").

[30]*Id.*

[31]24 C.F.R. § 990.108(e) (2000) as published in 59 Fed. Reg. 43,644, 43,644 (Aug. 24, 1994).

related to HUD policies and procedures."[32] The system described is unreasonable and at variance with the published regulations. This is because it provides no incentives for a PHA to resolve any issues with tenant councils or RABs. When disputes arise, the HUD Notice creates an incentive for a PHA to be deleterious or even obstructionist, because, after 120 days, it will have total control of the funds subject only to the restriction that the funds are used for resident education related to HUD policies and procedures and that such uses must be included in the PHA Plan or amendment to the plan. Such a system of dispute resolution is disadvantageous to tenant councils and should be substituted by a dispute resolution system that involves an independent third party.

The proposed system of dispute resolution is disadvantageous to tenant councils and should be substituted by a dispute resolution system that involves an independent third party.

The dispute resolution system set out in the HUD Notice is also inconsistent with the system provided for in the published regulation. It provides that:

> If disputes regarding funding decisions arise between the parties [the PHA and development or jurisdiction-wide tenant councils], the matter shall be referred to the Field Office for intervention. HUD Field Office shall require the parties to undertake further negotiations to resolve the dispute. If no resolution is achieved within 90 days from the date of the Field Office intervention, the Field Office shall refer the matter to HUD Headquarters for final resolution.[33]

To the extent that the PIH Notice is inconsistent with the published regulation, it is invalid. HUD and PHAs must comply with the procedure set forth in the published tenant participation regulation if the funding dispute is between a duly elected tenant council or recognized jurisdiction-wide tenant organization and the PHA.

Alternatively, the system for resolving disputes should involve an independent arbitrator. Resolution of disputes by arbitration is currently provided for in the published tenant participation regulation when there is an appeal of a dispute regarding the resident council election process.[34]

Another way that residents may want to resolve disputes is through the PHA Plan process. As stated above, the HUD Notice provides that if there is a dispute that cannot be resolved within the 120 days of the beginning of the PHA's fiscal year, the uses of the funds must be included in the PHA Plan or an amendment to the plan. For virtually all PHAs, a plan for the use of the funds when there is a dispute will always take the form of an amendment to the PHA Plan because PHA Plans must be submitted to HUD 75 days before the end of a PHA's fiscal year. Although HUD invokes the PHA Plan process to resolve disputes involving the use of the funds, the HUD Notice again provides PHAs with an advantageous position in relation to resident councils and RABs, absent an agreement to the contrary. The HUD Notice provides that an amendment to the PHA Plan for resident participation activities and funding "shall not be considered a 'significant amendment' to the PHA Plan." Despite this pronouncement, tenant councils and RABs should seek, as part of the annual and five-year PHA plan processes, to include amendments dealing with resident participation activities and funding in the definition of a significant amendment to the PHA Plan.[35] Such a definition is critical because for each significant amendment or modification to the plan, a PHA must consult with the RAB, determine if the action is consistent with the Consolidated Plan, and hold a public hearing.[36]

Monitoring and Funding Accountability

The HUD Notice states that each PHA shall develop a system for annual fiscal accountability and that tenant councils, city-wide resident organizations and RABs that fail to adequately report to the PHA will be ineligible for future resident participation funding.[37] This is another area in which disputes will inevitably arise. PHAs and tenant groups should work together to develop a reasonable system of annual fiscal accountability that is appropriately related to the amount of funds provided to the resident group. The accountability procedures should be agreed upon, in writing, by the parties before the funds are distributed. Such an agreement should obligate the PHA to notify the resident group of any determination that the resident group has failed to follow the agreed-upon reporting system. If the PHA and the tenant group agree that the tenant group failed to adequately report, funding may be suspended until the reporting is corrected or a system is adopted that will assure adequate reporting in the future. Any determination to suspend funding should be subject to a resolution of funding disputes outlined above (resolution by HUD or by arbitration). Moreover, present and future tenant groups should not be penalized for the actions of prior tenant groups.

[32] HUD Notice PIH 2001-3 at 4.

[33] 24 C.F.R. § 964.150(a)(3) (2000).

[34] 24 C.F.R. § 964.130(c) (2000).

[35] A PHA must include in its PHA Plan the basic criteria it will use to determine a significant amendment or modification to its Five-Year and Annual Plan. 24 C.F.R. § 903.(r)(2)(ii) (2000).

[36] *Id*. at § 903.21(b).

[37] HUD Notice PIH 2001-3 at 5.

The published resident participation regulations provide further guidance regarding the requirements of a written agreement for a resident organization funded by the PHA. These regulations provide that there must be a budget, certain assurances and an agreement that the PHA may inspect and audit the resident council's financial records relating to the agreement.[38]

The Relationship Between Resident Participation Funds Authorized by The Interim Operating Subsidy Rule and Resident Participation Funds Previously Allocated by a PHA

Prior to the interim operating subsidy rule, some PHAs allocated funds for resident participation. HUD previously encouraged, but did not require, PHAs to fund such activities because of the lack of appropriations.[39] If a PHA funded resident participation, the expenditure of these funds may have shown up on the PHA's operating budget on lines 220-250 as a part of tenant services.[40] If these funds were part of the operating subsidy calculation, they were part of the PHA's allowable expense level (AEL).[41] The interim regulations specify that the $25 is an add-on to the AEL. Advocates should urge PHAs to continue the old level of funding for tenant participation and add to it the $25 per unit authorized by the interim regulations. In the introductory comments to the interim operating subsidy regulation, HUD declines to change the regulation to require PHAs to spend at the old level and add the new funds. But, HUD does urge "PHAs not to reduce any support now being made for resident participation activities."[42]

Use of Vacant Rental Units

The interim operating subsidy regulation also provides that HUD may approve a request from a PHA to use one or more vacant rental units for resident participation and still receive operating subsidies for the unit(s).[43]

Resident-Related Improvements and Services

Another significant change to the operating subsidy formula permits PHAs to retain 50 percent of any increase in dwelling rental income, provided that the PHA uses the retained income for tenant-related improvements and services.[44] The uses of the retained income must be developed in consultation with residents and included in the PHA Plan. The interim regulations are explicit in that there must also be ongoing resident consultation on the uses of the tenant service funds. The interim regulations provide a list of eligible uses for the retained income. The list includes:

- resident self-sufficiency services;
- resident employment and training services;
- optional earned-income exclusions;
- physical and management improvements that benefit residents;
- maintenance operations; and
- resident safety and security improvement and services.[45]

As with the $25 per unit per year, the funds that the PHA retains are easily identifiable from the HUD form used to calculate operating subsidies.[46]

The Relationship Between Funding for Tenant Participation and Tenant Services and the PHA Plan Process

The use and distribution of resident participation funds and the use of the increases in rental income are linked to the PHA Plan process. With respect to resident participation funds, the HUD Notice provides that "resident participation activities are intended to supplement PHA Plan activities and training."[47] Further, it states that resident participation funds may be used for "planning functions for such items as the Public Housing Agency Plan, revitalization, safety and security, property management and maintenance, and capital improvements."[48] The uses of the retained increases in rental income must be determined with resident input and incorporated into the PHA Plan.[49]

On issues relating to the distribution of the resident participation funds, a PHA must negotiate with the RAB if there is no city-wide or development resident council. It is the responsibility of the RAB to "provide resident input in the annual decision making process for resident participation activities and funding."[50] And if there are disputes regarding the distribution or use of the resident participation funds that cannot be resolved, "the uses of resident participation funding must be included in the PHA Plan or an amendment to the PHA Plan."[51]

Residents should use the plan process to identify and resolve issues regarding the use and distribution of resident participation and tenant services funds. During the PHA Plan process, tenants should request to see the HUD 52723 form in order to determine the amount that the PHA is claiming for tenant participation and tenant services.[52]

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[38]24 C.F.R. § 964.150(b)(3) (2000).

[39]*Id*. at § 964.150 (2000).

[40]Form HUD-52564, Operating Budget (Mar. 1995).

[41]66 Fed. Reg. 17,275, 17,287, 17,289 (Mar. 29, 2001) (§§ 990.102 and 990.105).

[42]*Id*. 66 Fed. Reg. at 17,282.

[43]*Id*. 66 Fed. Reg. at 17,294, § 990.108(e)(2).

[44]*Id*. at §§ 990.109(b)(1)(iii) and 990.116(a).

[45]*Id*. at § 990.116(b).

[46]*See* HUD Form 52,723 (Jan. 24, 2001) Part B, line 07.

[47]HUD Notice PIH 2001-3 at 3.

[48]*Id*.

[49]66 Fed. Reg. 17,275, 17,294 (Mar. 29, 2001) (§ 990.116(b)).

[50]HUD Notice PIH 2001-3 at 2.

[51]*Id*. at 4.

[52]Most PHAs submit this form to HUD approximately three months prior to the beginning of their fiscal year. This year, the form, as amended to provide for the resident participation calculation and the retention of increased rents for tenant services, has not been used for PHAs with fiscal years beginning January 1 or April 1, 2001.

With respect to the funds for tenant services, advocates should negotiate with the PHA to determine how the funds will be used, the circumstances under which tenants will be consulted on an ongoing basis and how they will be involved in any decisions precipitated by changes in funding. Advocates should be as specific as possible regarding the uses and should consider requesting that the allocation of funds be separately tracked at the local level. It is important to obtain that level of accountability at the local level because HUD has stated that the operating subsidy rule does not "require the PHA to separately account for, monitor, track or report on the retained income beyond the requirement to identify the proposed uses of the estimated amount of retained income in the Annual Plan."[53] Thus if the accountability is not obtained at the local level, it will not happen.

Advocates should negotiate with the PHA to determine how the funds will be used, the circumstances under which tenants will be consulted and how they will be involved in any decisions precipitated by changes in funding

With respect to the resident participation money, there are many options for its use. For example, the residents could include, as an objective, the creation of a city-wide resident organization. If that is the objective, the Plan should also include a timetable and plan of action for achieving that objective. Another objective that could be included is PHA recognition of a specified number of development resident councils. Again a timetable and plan of action (elections, development of an MOU, bylaws, etc.) for achieving that objective should be part of the PHA Plan. Also, if a PHA has determined that a resident group does not have the "capacity to administer and account for funds," the Plan should include a goal of increasing the capacity of the resident group to administer and account for the funds. The plan of action to achieve this goal could include training in fiscal management for the residents or efforts to find a fiscal agent who would mentor the group.

Conclusion

The new operating subsidy formula regulation presents an opportunity to expand tenant participation and to build capacity for public housing resident organizations. It also promotes opportunities for tenants to become more meaningfully involved in the PHA Plan process and to influence the decisions that affect their homes, rents, the support they receive when moving to work, and their living environment. There will be challenges, but they should not be allowed to impede the immense opportunity that now exists. ■

[53]66 Fed. Reg. 17,275, 17,281 (Mar. 29, 2001).

HUD Budget Cuts Public Housing, Modestly Increases Vouchers and Leaves Most Other Programs at Current Funding Levels[1]

The Bush Administration released its official budget on Monday, April 9, 2001, just days after both houses of Congress passed budget resolutions setting spending limits for Fiscal Year (FY) 2002.[2] The budget contained few surprises, following closely the *Budget Blueprint* released by the Administration in late February.[3] Cuts are proposed for many programs, with no clear rationale. It appears that the Administration told agencies to stay within certain spending limits in order for the President's budget to accommodate its massive $1.6 trillion tax cut. The result is a HUD budget of $30.4 billion for FY 2002, which, while 7 percent over FY 2001 appropriations, fails to take inflation into account.

The biggest proposed cuts, as expected, are in public housing programs. More than $700 million is being cut from the Public Housing Capital Fund, reducing funding for this program from $3 billion in FY 2001 to $2.29 billion for FY 2002. The Administration asserts that this decrease will not result in a decrease in funds for public housing modernization because PHAs have over $6 billion in unspent capital funds.[4] PHAs and advocates counter that these "unspent" funds are already obligated and will be used for previous commitments. PHAs have four years within which to spend funds and plan accordingly. Any surplus is thus largely illusory and the large cuts could lead to devastating effects for PHAs in need of capital repairs.

In addition to the Capital Fund cuts, the Administration is seeking to terminate the Public Housing Drug Elimination Program, a program that provides funds for safety, security and drug prevention activities such as after-school and mentoring programs. The Administration argues that the program had "little impact" and is duplicative of the Public Housing Operating and Capital programs.[5] The Drug Elimination program was funded at $310 million in both FY 2000 and FY 2001. While the administration has requested an increase of $150 million in the Public Housing Operating

[1]This article and the accompanying chart are taken largely from an analysis of the HUD Budget published by the National Low Income Housing Coalition in its *Memo to Members*, which can be found *at* www.nlihc.org.

[2]The budget is available *at* www.whitehouse.gov/omb/budget/index.html. The Democrats' response is available *at* www.democraticleader.house.gov/bushbudget/index.html and the Republican analysis can be found *at* www.senate.gov/~budget/republican/analysis/2001/fy2002summary.PDF.

[3]*See HUD FY 2002 May Be Worse Than It Looks*, 31 HOUS. L. BULL. 59 (Mar. 2001).

[4]*The Budget for Fiscal Year 2002*, at 485.

[5]*Id.* at 487.

Fund to cover (purportedly) some of these activities, the budget also states that the $150 million increase is meant to cover increased utility costs, which are estimated to cost twice that amount.

The Section 8 also suffers a serious cut. The budget proposes to cut Section 8 reserves from two months to one month. HUD has estimated that at least 15 percent of all PHAs need at least two months of reserves in order to run their Section 8 programs. This reduction may lead to a reduction in the willingness of PHAs to increase payment standards or provide services. It even may lead to a reduction in the number of families served. Another change in the Section 8 program proposed by the budget is the elimination of the specially designated vouchers for non-elderly disabled persons who lack housing because of elderly-only designations for PHA or HUD-assisted housing. Last year, HUD was required to spend at least $40 million for this purpose.

The HOME and CDBG programs are also losers in the FY 2002 budget. While HOME is level-funded, at almost $1.8 billion, the administration has requested a set-aside from the HOME program of $200 million for a homeownership down payment assistance program.[6] This means that HOME formula grants to states and localities will be cut by more than 10 percent in order to fund this new initiative. While new initiatives to make housing affordable are positive developments, funding them by cutting other programs—as this set-aside would do—does not help the overall low-income housing picture. CDBG will also be cut by over $300 million.[7] Formula grants, however, will only be cut slightly. What will be reduced are special set-asides and projects. While the budget proposes to cut these special projects, it is not clear that Congress will follow suit. It is expected that in the appropriations process, Congress will add many of these special projects back into the HUD appropriation.

Most other programs are level-funded, receiving almost the same amount of funds as in FY 2001. The problem with funding programs at the same levels as last year is that there is no recognition of the need to keep pace with inflation. Programs funded at the same level as FY 2001 will not be able to serve the same number of people or provide the same level of services. According to the Office of Management and Budget, HUD would have to be funded at $35 billion in order to meet current services requirements; much higher than the Administration's request.

There are some positive notes in the budget. The budget will fully fund the renewal of expiring Section 8 contracts, and it requests almost 34,000 in additional vouchers.[8] However, this is less than one-third of the new vouchers requested in the budget for FY 2001.[9] What is new about the Administration's voucher request is that it is proposing that vouchers be allocated to those PHAs with high voucher utilization rates.[10] Section 202, Housing for the Elderly, will receive an increase of over $4 million under President Bush's budget request.[11] Section 811, Housing for Persons with Disabilities, will receive an increase of almost $1 million.[12] Housing for Persons with AIDS (HOPWA) will receive a substantial increase of almost $20 million.[13] However, this is to cover jurisdictions that are likely to be newly eligible to receive HOPWA funds, so jurisdictions already receiving HOPWA funds will probably not see an increase in funding. The Lead Based Hazard Reduction program will receive a $10 million increase, for a funding level of $110 million in FY 2002.[14] Shelter Plus Care is again funded from a separate budget line item at $100 million, ensuring that permanent housing will not have to compete for scarce federal homeless assistance funds.[15]

Also included in the budget submission are a number of new initiatives. These include an increase in the FHA multifamily loan limit of 25 percent to spur new multifamily housing production.[16] This is expected to increase the development of rental units affordable to people with income at the 80 percent of area median income range. The budget also suggests a $1.7 billion homeownership tax credit to support the construction or rehabilitation of 100,000 homes for low-income households over the next five years. This initiative is not funded from the HUD budget and will have to be proposed in separate legislation that will have to be approved by the tax committees.

The HUD budget, while not showcasing any comprehensive federal housing policy, does focus heavily on new programs designed to help more Americans own their own home. At the same time, the budget does not dedicate sufficient resources to the people most in need. Down payment programs and homeownership tax credits are not likely to assist extremely low-income households. In addition, the budget proposes cutting some housing programs, essentially in order to pay for others. This becomes a zero-sum game when inflation is accounted for and only harms the people HUD is supposed to be assisting. While the administration claims that all core programs are funded at least at FY 2001 levels, this does not take into account the need for increased resources for housing assistance, nor does it recognize public housing as a core program. Thus, the process moves to Congress, which, because it has already agreed to some tax cuts, will have a difficult time in providing funding for programs that the Administration proposes to cut. ■

[6]*Id*. at 495.

[7]*Id*. at 491.

[8]*Id*. at 483.

[9]*See HUD Submits Promising FY 2001 HUD Budget Request to Congress*, 30 HOUS. L. BULL. 24 (Feb. 2000).

[10]This proposal is likely to harm high-cost and tight-market areas where it is more difficult to use vouchers. A list of housing authorities whose utilization rate for 1999 exceeds the lease-up/budget authority threshold can be found *at* www.hud.gov/adm/grants/fundsavail.html (look for *List of PHAs Passing the Lease_up/Budget Authority Threshold Requirement*).

[11]*The Budget for Fiscal Year 2002*, at 503.

[12]*Id*.

[13]*Id*. at 491.

[14]*Id*. at 524.

[15]*Id*. at 496.

[16]*Id*. at 481 and 508.

HUD FY 2001 Budget Chart for Selected Programs

HUD Program (set-asides indented)	FY00 Enacted	FY01 Request	10/27/00 Conference Report passed House and Senate. President signed into law. 106-988[1]	FY02 Request from Bush Administration
Housing Certificate Fund	$11,376	$14,128	$13,941	$15,717
Contract Renewals	10,640	13,010[2]	12,972[3]	$15,108
New Section 8 Vouchers	346[4]	690	453[5]	197[6]
Voucher Success Fund	—	50[7]	0	0
Contract Administration	194	209	192	196
Housing Production Incentives	—	8[8]	0	0
Public Housing Capital Fund	2,900	2,955	3,000[9]	2,293
Resident Opportunity and Self Sufficiency	55[10]	55	55	55
HOPE VI	575	625	575	574
Public Housing Operating Fund	3,138	3,192	3,242	3,385[11]
Drug Elimination Grants	310	345	310[12]	0[13]
Indian Housing Block Grants	620	650[14]	650	649
Elderly Housing (Section 202)	710	779	779[15]	783[16]
Disabled Housing (Section 811)	201	210	217[17]	217.7[18]
HOME Investment Partnership Program	1,600	1,650	1,800	1,796[19]
Housing Counseling Assistance	15	24	20	20
Community Development Block Grants	4,800	4,900	5,057[20]	4,802[21]
Self Help Homeownership	20	18	20	22
Youthbuild	42.5	75	60	60
Economic Development Initiative	256	100	292	0[22]
Homeless Assistance Grants	1,020	1,200	1,025[23]	1,023[24]
Shelter Plus Care Renewals			100[25]	100[26]
Housing for Persons with AIDS	232	260	258	277[27]
Rural Housing and Economic Development	25	27	25	0[28]
Brownfields Redevelopment	25	50	25	25
America's Private Investment Prog. (APIC)	20	37	0[29]	0
Fair Housing Assistance Program	20	21	22	23
Fair Housing Initiative Program	24	29	24	23[30]
Lead-Based Paint Hazard Reduction	80	120	100	110

[1]Signed into law on October 27th, 2000.

[2]This amount fully funds contract renewals and funds amendment Section 8 subsidy contracts and enhanced vouchers. Like the FY00 budget, the FY01 budget request includes a $4.2 billion advance appropriation.

[3]Includes $4.2 billion in advance appropriations. The rest of the Housing Certificate funds are to be used for relocation and replacement of demolished/disposed housing; family reunification; renewals of ELIHP and LIPHRA; $11 million to the Working Capital Fund for information technology systems; and, $40 million for disabled families displaced because of housing designated as elderly-only.

[4]In FY00, 60,000 vouchers were authorized for "fair share" distribution, not targeted to any specific population.

[5]Funds 79,000 new fair share vouchers.

[6]Funds almost 34,000 fair share vouchers to be distributed to PHAs with high utilization rates.

[7]This program shares some attributes of the Regional Opportunity Counseling program, which was funded at $10 million in FY99 but not funded in FY00.

[8]For one-time incentive payments to developers who build units targeted at special needs (e.g., large families) under the vouchers/low income housing tax credit/FHA-insured housing production proposal in the FY01 budget request.

[9]Includes $43 million for the Working Capital Fund for information systems and up to $75 million for capital needs as a result of emergencies or natural disasters.

[10]In FY99, ROSS program was a set-aside within CDBG. ROSS is now a set-aside within the Public Housing Capital Fund.

[11]This reflects a request for $150 million more in operating funds to cover increased utility costs.

[12]Up to $10 million can be used for technical assistance.

[13]The administration is requesting that this program be terminated because it is ineffective and not part of HUD's core mission.

[14]The FY01 request changes the name of this program from Native American Housing Block Grants to Indian Housing Block Grants.

[15]Includes $50 million for service coordinators and $50 million for conversion to assisted living. $500,000 will be transferred to the Working Capital Fund for information technology systems.

[16]Includes almost $50 million to convert housing to assisted living and almost $50 million for service coordinators.

[17]$500,000 will be used for the Working Capital Fund for information technology systems.

[18]An additional $20 million is requested for an initiative to increase access to technology for people with disabilities.

[19]The administration has proposed a $200 million set-aside from the HOME program for the American Dream Downpayment Fund. This will reduce the amount of HOME funds available for formula grants.

[20]Of this amount, $4,410 is for actual CDBG formula block grants.

[21]Includes $4,399 billion in CDBG formula grants and $403 million in set-asides. This reflects a reduction in set-asides by $310 million.

[22]The administration requests that Economic Development Initiative funding be terminated.

[23]30% of funds must be used for permanent housing. Shelter Plus Care renewals are funded separately. $500,000 will be used to fund the Interagency Council on the Homeless.

[24]An additional $100 million is provided in a separate account for S+C renewals. Retains the requirement that 30% of funds be used for permanent housing.

[25]Advocates were successful in getting S+C renewals funded from a separate appropriation, as opposed to having S+C renewals compete for scarce federal homeless assistance funds.

[26]The administration requests that S+C renewals once again be funded out of a separate appropriation.

[27]The administration's request includes an additional $20 million in HOPWA funding to support an increase in the number of jurisdictions that will likely be eligible for HOPWA funding.

[28]The administration is requesting that this program be terminated because it is duplicative of USDA rural housing programs.

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

[30]FY01 funding for FHIP included $7.5 million for a study of housing discrimination. Because the study is no longer being funded, all FHIP funding is available to organizations to enforce the Fair Housing Act.

RHS Housing Programs to Stagnate Under Administration's FY 2002 Budget

Except for the single-family homeownership programs, which are facing significant reductions in funding, the Bush Administration's Rural Housing Service (RHS) budget for Fiscal Year (FY) 2002 keeps the RHS housing programs at their actual FY 01 levels, which is slightly less than the congressionally enacted FY 2001 budget.[1] Thus, if the budget is adopted as proposed, practically all the rural housing programs will be reduced in size since the budget does not take into account inflationary cost increases.

Ironically, the Administration's stated goal of increasing homeownership in America does not extend to rural areas, or at least not rural housing programs. The Section 502 direct and guaranteed loan programs, the primary source for single-family home loans, are both being cut under the administration's proposal. The direct loan program, which serves primarily low-income households through the use of interest subsidies, will be reduced in size from $1.1 billion to $1.065 billion, a $35 million reduction. The guaranteed loan program, which serves more moderate-income households, will be reduced from $3.7 billion to $3.138 billion, a reduction of $562 million. Moreover, the Rural Housing Assistance Grant Fund, which is used primarily for Section 504 home repair grants, compensation for construction defects and housing preservation grants, is being reduced from $44 million to $38.9 million, a $5.1 million reduction.

The only housing program to receive a budget increase is the Section 521 Rental Assistance Program, used to subsidize the rents of very low-income households residing in RHS Section 515 rental housing and Section 514/516 farm labor housing. The increased funding is primarily intended to continue funding for a large number of households currently assisted with five and 20-year Rental Assistance contracts that are expiring and is not likely to increase the number of households receiving rental assistance.

All the remaining RHS programs are slated to receive the same funding for FY 2002 as they received in FY 2001 after the across-the-board budget cut that was made in January of 2001. The following table shows the funding levels proposed by the Administration for the rural housing programs and compares those levels to the congressionally approved FY 2001 budget.[2] ■

[1] After enacting the FY 2001 Budget in October of 2000, Congress adopted an across-the-board .22 percent cut in federal spending.

[2] The numbers in this table are based on a similar table prepared by the Housing Assistance Council, Inc. in its April 13th issue of the *HAC News*.

RHS Program	2001 Appropriations	2002 Budget Proposal	Difference
Loan Programs			
§502 Single Family Direct Home Loans	1,100	1,065	-35
§502 Single Family Guaranteed Home Loans	3,700	3,138	-562
§504 Home Repair Loans	32.4	32.3	-.1
§514 Farm Labor Housing Loans	28.5	28.4	-.1
§515 Rural Rental Housing Loans	114.3	114.1	-.2
§538 Guaranteed Rental Housing Loans	100	99.8	-.2
§523 Self Help Site Development Loans	5	5	——
§524 Site Development Loans	5.2	5.1	-.1
Grant Programs			
§516 Farm Labor Housing Grants	15	15	——
§523 Self Help Technical Assistance Grants	34	33.9	-.1
Rural Housing Assistance Grants	44	38.9	-5.1
§521 Rental Assistance Subsidy	680	693.5	+13.5

Pennsylvania Appellate Court Again Rejects Strict "One-Strike" Eviction Policy

A Pennsylvania appellate court recently held that a housing authority may not evict a public housing tenant for the criminal acts of her adult child without demonstrating that the child was "under the control" of the tenant. *Housing Authority of Pittsburgh v. Fields*.[1] In so doing, the court rejected an invitation to overturn its earlier decision in *Delaware County Housing Authority v. Bishop*,[2] where it refused to hold public housing tenants strictly liable for criminal acts of household members.

The *Fields* case arose when the housing authority served Marcella Fields with a notice of termination two months after her adult son, listed as a household member on the lease, was arrested for being in possession of cocaine directly in front of their unit. At trial,[3] Mrs. Fields moved to dismiss the suit based on the PHA's failure to establish both that she had control over her adult son and that she had knowledge, actual or constructive, of her son's activity. The trial court granted the motion, stating that the fact that the adult son resided with his mother was insufficient to support the conclusion that Mrs. Fields had control over him.

On appeal to an eight-judge *en banc* panel, the housing authority contended that the PHA is not required to prove that a household member (as opposed to a guest) is "under the control" of the tenant. The housing authority further argued that even if such a requirement exists, the PHA's evidence was sufficient to allow an inference that Mrs. Fields' had control over her adult son, namely, that her adult son had no identifiable source of income.[4]

The court found in favor of Mrs. Fields,[5] relying heavily on its earlier decision in *Delaware County Housing Authority v. Bishop*.[6] In that case, the housing authority sought to evict a tenant whose two adult sons, residing in the unit, committed separate criminal acts. One son raped an elderly female tenant of the project, while the second son was arrested for possession of marijuana and cocaine that were found in the unit. Because the language "under the tenant's control" in her public housing lease originated in amendments to the *Housing Act of 1937*,[7] the *Bishop* panel looked to the legislative history to derive the congressional intent. The court found, in support of the plaintiff's argument, that the language required both guests and members of the tenant's household committing criminal activity to be under the tenant's control to constitute a breach of lease. The *Bishop* court refused to hold the tenant strictly liable for unforeseeable criminal acts committed "without the tenant's knowledge by family members who are not under the tenant's control."

The *Fields* court further supported its conclusion with respect to the control issue by relying on the 9th Circuit's recent decision in *Rucker v. Davis*.[8] Having so concluded, the court then rejected the PHA's claim that the evidence produced at trial was sufficient to allow a reasonable fact finder to draw an inference that Mrs. Fields had control over her son. According to the court, all that was shown at trial was that Mrs. Fields' son was on the lease, that he was her son, and, arguably, that he had no income. The court thus affirmed the trial court's decision that the PHA had failed to meet its burden of showing that Mrs. Fields had control over her son to withstand a motion for a non-suit.

A strong dissent admitted that to impose strict liability upon innocent tenants might have harsh results, yet to avoid imposing consequences on tenants would remove the teeth of such a policy. The dissenters sought to overrule *Bishop*, stating that the plain language of the statute was not ambiguous and that the requirement of "control" applies only to guests and not to tenants, who could be held responsible for all actions of household members.

Even if the statute were ambiguous, the dissent argued, deference would be due to HUD's published guidance. It cited a HUD interpretation of the statute that tenants "should not be excused from contractual responsibility by arguing that [they] did not know, could not foresee, or could not control behavior by other occupants."[9] While the *Rucker* court stated that no deference was due to HUD because it believed HUD's interpretation of the ambiguous statutory language to be contrary to Congress' intent, the dissent in *Fields* claimed that deference is due to an agency interpretation precisely when an ambiguity is present.[10]

The dissent further objected to the majority's use of legislative history to clarify any ambiguous statutory language. According to the dissent, the legislative history cited by the majority to show Congress' desire to protect tenants from strict liability emerged from debate of the 1990 amendments

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[1]__ A.2d __, 2001 WL 293241 (Pa. Commw. Ct., Mar. 28, 2001).

[2]749 A.2d 997 (Pa. Commw. Ct. 2000). For a fuller discussion of *Bishop, see Recent "One-Strike" Cases Continue to Split the Courts,* 30 HOUS. L.. BULL. 68 (May 2000).

[3]In initial proceedings, the tenant won a judgment from the district court, yet the housing authority was awarded possession by a board of arbitrators. Both parties appealed to the trial court.

[4]It is unclear whether the implication was that the son, having no income, was dependent upon Mrs. Fields and therefore under her control, or whether the fact that he lived without an identifiable source of income pointed toward illicit drug activity about which she should have known.

[5]The appeals panel contained an even number of commissioned judges who split evenly, resulting in a tie vote. The majority opinion was filed as circulated to the panel.

[6]749 A.2d 997 (Pa. Commw. Ct. 2000).

[7]42 U.S.C.A. §1437(d)(1)(6), amended by the *Anti-Drug Abuse Act of 1988* (formerly §1437(d)(1)(5)).

[8]237 F.3d 1113, 2001 WL 55,724 (2001). *See En Banc 9th Circuit Rules that "One-Strike" Law Does Not Permit Eviction of "Innocent Tenants,"* 31 HOUS. L. BULL. 29 (Feb. 2001).

[9]2001 WL 293241, quoting 56 Fed. Reg. 51,560, 51,567 (Oct. 11, 1991).

[10]*Id.*,citing *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

to the *Housing Act* by the *Cranston-Gonzalez National Affordable Housing Act*, signed into law two years after the statutory "control" language at issue in this case was added to the *Housing Act*. The dissenting judges also found that Congress had debated the issue of protecting tenants from strict liability yet had failed to provide for an "innocent tenant" provision when amending the statute.

The dissent also criticized the majority for expanding upon the holding of *Bishop* and *Rucker* by placing the entire burden on the housing authority to show the tenant's knowledge. It would have shifted the burden to the tenant to show a lack of knowledge once the authority had proven criminal activity. Finally, the dissent stated that Congress intended for public housing authorities to have the same rights as private landlords to evict tenants for the criminal activity of household members, regardless of their knowledge of the activity.[11] ■

[11]*Id.* at 27.

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.

Collins v. Cleme Manor Apartments, 37 S.W.3d 527 (Tex. App., 2001): In early February, the Court of Appeals of Texas in Texarkana reaffirmed the importance of the jury trial, in the context of a Section 8 tenant being subject to eviction proceedings. The tenant had requested a jury trial of her landlord's Forcible Detainer action against her three days before she got notice of the bench trial date. The bench trial was scheduled for one week after she received the notice. The tenant also moved to continue the bench trial and to shorten the time for her landlord to respond to an already-served discovery request, based on the fact that the trial was to take place before the ordinary deadline for discovery responses. Ruling that the jury demand was untimely filed, the trial court denied all of the tenant's motions, proceeded with the bench trial, and granted judgment for possession to the landlord. The Court of Appeals, finding the issue of what procedural rules applied to the tenant's jury demand to be a question of first impression in Texas, held that trial court abused its discretion in denying the request for jury trial. Stressing the importance of the jury trial in American justice, the court concluded that Tex.R.Civ.P. 216, rather than Tex.R.Civ.P. 744 applied to the tenant's jury demand. Rule 216 provides that jury demands must be filed 30 days prior to the scheduled trial. However, the Court of Appeals employed an exception to the rule. The Court found that, since the bench trial was set to take place only 22 days after it was docketed and only one week after the tenant received notice of it, the tenant did not have a reasonable opportunity to timely make her jury request under the Rules, especially in light of the fact that the trial court also denied a *Motion for Continuance* that, if granted, would have permitted the tenant's jury request to be timely filed. The Court of Appeals also held that denying tenant's *Motion to Shorten Time to Answer Discovery* was an abuse of discretion.

[1]www.westlaw.com

[2]www.lexis.com

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

Newell v. Rolling Hills Apartments, ___F.Supp.2d___, 2001 WL 263296 (N.D.Iowa, March 15, 2001): A United States District Court in Iowa ruled in March that a Section 8 tenant's federal discrimination suit against her landlord would be stayed, but not dismissed, pending the outcome of the landlord's action for possession against her in state court. Advancing theories pursuant to 42 U.S.C. §§ 1981 and 1983, and the *Fair Housing Act*, 42 U.S.C. § 3604, the tenant applied for a *Temporary Restraining Order and Preliminary Injunction*, as well as monetary damages in her suit in federal district court based on allegations that her landlord was illegally proceeding with an eviction action against her because her daughter is biracial. The landlord had filed its state claims based on notices of lease violations regarding the alleged improper disposal of garbage. The tenant argued that any violation was *de minimus* and that the landlord was selectively enforcing the lease provisions in a discriminatory manner to exclude her because she had black visitors and because her daughter was black. The state court had stayed the eviction proceeding pending the federal court's ruling on the *Temporary Restraining Order and Preliminary Injunction.*

The federal court addressed two doctrines indicating that it might not have jurisdiction over the tenant's claims. First, *Younger* abstention (*Younger v. Harris*, 401 U.S. 37 (1971)) provides that federal courts should refrain from interfering with pending state court decisions. Second, the *Rooker-Feldman* doctrine (*Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)) provides that, generally, lower federal courts lack subject-matter jurisdiction over challenges to state court judgments. The court found that both doctrines applied. *Younger* applied because, although the state proceeding had been stayed, the case was still ongoing, could provide an adequate opportunity for the tenant to present her federal claims, and was the best forum for deciding issues of Iowa law. The court concluded, however, that only a stay, rather than a dismissal, of the federal claims was appropriate, given the possibility that the state court could preclude the tenant from raising her federal discrimination claims or hear her claims for money

damages. Likewise, the District Court held that *Rooker-Feldman* applied because the ultimate result of issuing a temporary restraining order and/or preliminary injunction would be effectively to reverse any potential state court order to evict the tenant. The federal court, however, again ruled that a stay, not a dismissal, was appropriate because *Rooker-Feldman* also requires that the State forum must provide a reasonable opportunity for the tenant to raise her federal claims, and whether the state would provide that forum was still in doubt.

Stolz v. Brattleboro Housing Authority, ___B.R.___, 2001 WL 242143 (D. Vt. February 14, 2001): With the backdrop of a bankruptcy proceeding, a federal district judge in Vermont reinstated an automatic stay of eviction proceedings against a public housing tenant. The public housing authority (PHA) was granted possession of the tenant's apartment on December 23, 1997, due to failure to pay rent and the writ of possession was to be issued on December 31, 1997. On December 26, 1997, the tenant filed for bankruptcy, staying the writ. The tenant then made rent payments through September 1999, but missed her next four payments, leading the PHA to file for a lift of the stay on January 20, 2000. The tenant obtained a discharge of all of her debts prior to February 7, 2000 through her bankruptcy petition. However, the bankruptcy court concluded that public housing tenants are not protected by 11 U.S.C. § 525, providing that government agencies may not discriminate against "bankrupts," and granted the PHA's motion to lift the stay. The district court reversed, holding that the protections of recipients of government benefits in § 525 do apply to public housing tenants, trumping the provisions of 11 U.S.C. § 365, which allows landlords to go forward with eviction proceedings if the tenants fails to repay rent discharged in bankruptcy. In doing so, the court rejected the contention that its interpretation would permit public housing tenants to forego payment of their rent without serious consequences, noting that tenants may only file bankruptcy once every six years and do not have the time or capacity to work the system to their advantage in such a way.

Smith v. St. Louis Housing Authority, ___B.R.___, 2001 WL 282827 (B.A.P. 8th Cir. March 23, 2001): A federal court in Missouri held that 11 U.S.C. § 525 did not protect a public housing tenant from eviction where the eviction was based on the tenant's failure to report income, rather than solely on nonpayment of rent. The tenant had been required to pay zero rent for the duration of her tenancy, but the housing authority later discovered that she had not reported income from years past, thinking that temporary work did not count. The housing authority sent numerous notices to the tenant advising her that her benefits would be terminated if she did not make full payment of the rent arrearage assessed based on her unreported work. The housing authority would not have proceeded with eviction had the tenant paid her arrearage, and the debt itself was dischargeable through the bankruptcy. Regardless, the Court of Appeals upheld the bankruptcy court's "implicit" finding that the termination of the tenancy was based on factors other than failure to pay rent, and thus not in contradiction with § 525, which prevents governmental entities from discriminating against a recipient of government benefits "solely" because she has filed under the *Bankruptcy Act*. The court based its conclusion on its assertion that the tenant had breached her rental contract before filing for bankruptcy and had committed fraud by not reporting her income. Section 525, the court stated, does not require government entities to shield debtors from all the adverse consequences of filing a bankruptcy petition. ■

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD), and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued in March of 2001. 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 Regulations

Allocation of Operating Subsidies Under the Operating Fund Formula; Interim Rule
66 Fed. Reg. 17,275 (Mar. 29, 2001)

Summary: This interim rule implements an interim Operating Fund Formula for determining the payment of operating subsidies to public housing agencies (PHAs). The interim rule follows publication of a July 10, 2000 proposed rule, and takes into consideration the public comments received on the proposed rule. As required by statute, the July 10, 2000 proposed rule was developed through negotiated rulemaking procedures. The policies and procedures described in the interim rule will govern the determination of funding distributions to PHAs under the Operating Fund

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

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

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

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

until a final rule, reflecting the results of a congressionally requested public housing cost study, is developed and published.

Effective Date: April 30, 2001.

Comments Due Date: May 29, 2001.

HUD Federal Register Notices

Waiver of Regulations Issued by HUD; Clarification of Authority During Transition Period; 66 Fed. Reg. 13,944 (Mar. 8, 2001)

Summary: The purpose of this statement of policy is to clarify the scope of persons authorized to waive regulations under an earlier statement of policy published in the Federal Register on April 22, 1991.

Effective Date: March 8, 2001.

Announcement of Funding Award—Fiscal Year 2000, Office of Healthy Homes and Lead Hazard Control, National Center for Lead Safe Housing; 66 Fed. Reg. 15,880 (Mar. 21, 2001)

Summary: In accordance with section 102(a)(4)(C) of the *HUD Reform Act of 1989*, this announcement notifies the public of a funding decision made by HUD the National Center for Lead Safe Housing. This announcement contains the name and address of the awardee and the amount of the award.

Announcement of Funding Awards for Fiscal Year 2000 Jobs-Plus Community Revitalization Initiative for Public Housing Families; 66 Fed. Reg. 16,953 (Mar. 28, 2001)

Summary: In accordance with section 210 of the *VA-HUD Appropriations Act of 2000*, this document notifies the public of the funding provided to selected PHAs in the *Jobs-Plus Community Revitalization Initiative for Public Housing Families of the Moving to Work Demonstration*. The purpose of this document is to announce the names and addresses of the housing authorities and the amount of funds to be used to cover a portion of the cost of rent-based work incentives to families in selected public housing developments. Families in these selected developments shall be encouraged to go to work under work incentive plans approved by the Secretary and carefully tracked as part of the research and demonstration effort.

HUD Notices

Extensions to the Transition Assistance Period for HUD's Lead Safe Housing Regulation; OHHLHC 01-2 (Mar. 8, 2001)

Summary: This notice explains how jurisdictions which previously submitted a transition implementation plan may obtain an additional time period to build the capacity to comply with the new lead paint regulation. For those jurisdictions requesting more time, an updated transition implementation plan must be submitted to HUD no later than April 10, 2001. An automatic extension of the existing transition assistance period from March 15, 2001 to April 10, 2001 is in effect to ensure that jurisdictions have enough time to update their Transition Implementation Plans. No submittal is needed to cover the time period from March 15, 2001 to April 10, 2001. HUD is providing this additional time to promote coordination among state and local agencies. During this period, program participants must continue to comply with HUD's lead-based paint regulations that were effective before September 15, 2000. HUD will assume that a jurisdiction that does not submit an updated transition assistance plan has the capacity to comply with HUD's new lead-based paint regulation at 24 C.F.R., Part 35. HUD will issue a notice prior to August 10, 2001 to address any remaining capacity shortfalls.

Termination of Tenancy for Criminal Activity; PIH 2001-8 (HA) (Mar. 13, 2001)

Summary: This notice is to advise PHAs of the effect of *Rucker v. Davis* on their ability to evict households from public housing on the basis of criminal activity committed by certain persons other than the public housing leaseholder (i.e., the lease signatory). This decision by the United States Court of Appeals for the 9th Circuit interpreted Section 6(1)(6) of the *U.S. Housing Act of 1937*, as amended, in a way that is contrary to HUD's interpretation, which applied to all PHAs nationwide. In a seven-to-four decision, 237 F.3d 1113 (9th Cir. 2001), the 9th Circuit rejected that interpretation. The majority opinion concluded that Congress could not have intended that, when the criminal activity is committed by a household member or guest, a leasehold could be terminated without a showing of particularized leaseholder fault.

Funding of Dire Emergency Utility Costs in the Low Rent Public Housing Program; PIH 2001-9 (HA) (Mar. 19, 2001)

Summary: The purpose of this notice is to provide PHAs with FYs ending June 30, 2001 and September 30, 2001, with a limited opportunity to request a revision of their current year HUD-approved budgets and/or operating subsidy calculations to reflect increased utility rates. Recognition will be given to the impact that increased utility rates are having on both PHA-paid utilities and resident-paid utilities.

Adjusted Implementation Date of Revised Form HUD-50058, Family Report; PIH 2001-11 (HA) (Mar. 29, 2001)

Summary: This notice announces that the April 2, 2001-implementation date of the revised Form HUD-50058, established in Notice PIH 2000-53, is delayed. The Office of Public and Indian Housing (PIH) will now implement the revised Form HUD-50058 not before May 1, 2001, and no later than June 1, 2001.

Conversion of Regular Housing Choice Vouchers to Enhanced Vouchers for Families affected by Section 8 Project-based Housing Assistance Payment (HAP) Contract Terminations and Expirations (Including Moderate Rehabilitation Contracts) in Federal Fiscal Years (FYs) 1995, 1996, 1997, 1998, and 1999;
PIH 2001-10 (HA) (Mar. 28, 2001)

Summary: This notice provides instructions to PHAs on converting regular housing choice voucher assistance and rental certificate assistance to enhanced voucher assistance in accordance with recent statutory amendments to Section 8(t) of the *United States Housing Act of 1937*. Subject to the availability of funds, the conversion of regular tenant-based assistance to enhanced vouchers is required for eligible program participants that received regular (non-enhanced) tenant-based rental assistance as the result of certain Section 8 project-based contract expirations or terminations, including non-renewal at HAP contract expiration (as the result of an owner's decision to "opt-out" or HUD decision that the contract could not be renewed). In order to be eligible, the family must have received their voucher or certificate as the result of a covered Section 8 contract expiration or termination that occurred in FYs 1995, 1996, 1997, 1998, or 1999.

RHS Federal Register Notices

Announcement of Funding To Develop Essential Community Facilities in Rural Communities for Eligible Public Entities, Nonprofit Corporations, and Tribal Governments With Extreme High Unemployment and Severe Economic Depression;
66 Fed. Reg. 13,039 (Mar. 2, 2001)

Summary: The RHS announces the availability of $47.5 million in national competitive grant funds to be administered in accordance with this notice, 7 U.S.C. 1926(a)(20), and the Community Facilities grant program (7 C.F.R. part 3570, subpart B) to develop essential community facilities in rural communities with extreme high unemployment and severe economic depression. An additional $2.5 million is available for community planning and implementation related to these essential community facilities.

Housing Demonstration Program;
66 Fed. Reg. 15,215 (Mar. 16, 2001)

Summary: The RHS announces the availability of housing funds for FY 2001 for the Rural Housing Demonstration Program. For FY 2001, RHS has set aside $3 million for the Innovative Demonstration Initiatives and is soliciting proposals for a Housing Demonstration program under section 506(b) of title V of the *Housing Act of 1949*. Under section 506(b), RHS may provide loans for innovative housing units and systems which do not meet existing published standards, rules, regulations, or policies. The intended effect is to increase the availability of affordable Rural Housing (RH) for low-income families through innovative designs and systems.

Announcement of Funding To Develop Essential Community Facilities in Rural Communities for Eligible Public Entities, Nonprofit Organizations, and Tribal Governments;
66 Fed. Reg. 16,172 (Mar. 23, 2001)

Summary: The RHS announces the availability of $50 million for rural community facilities described in section 381E(d)(1) of the *Consolidated Farm and Rural Development Act* (7 U.S.C. 2009d). Under the Rural Community Advancement Program (RCAP) for FY 2001, Congress designated $50 million to the Community Facilities loan and grant programs of which $25 million is reserved for assistance to areas in North Carolina which have been declared a disaster area because of Hurricanes Floyd, Dennis, or Irene. The purpose of the funding is to provide assistance to areas in the state of North Carolina, subject to a declaration of a major disaster under the Presidential Declared Disasters as reported by the Federal Emergency Management Agency (FEMA). The RHS will provide the additional $25 million to other states with presidentially or secretarially declared disasters. We will refer to the funds set aside for disaster designated counties in North Carolina impacted by Hurricanes Floyd, Dennis, or Irene as the "North Carolina Emergency Supplemental Program." ■

Most of the U.S. government's housing subsidies do not benefit the poor.

The largest housing subsidies are the mortgage interest and local property tax deductions, which are expected to total $82.3 billion in 2001.

These subsidies overwhelmingly benefit the wealthiest 20% of households. In contrast, it is estimated that $22.6 billion will be spent in federal housing subsidies for the poor in 2001.

—National Low Income Housing Coalition, Advocates Guide to Housing and Community Development Policy, 2000

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