NATIONAL HOUSING LAW PROJECT
advancing housing justice

# Housing Law Bulletin

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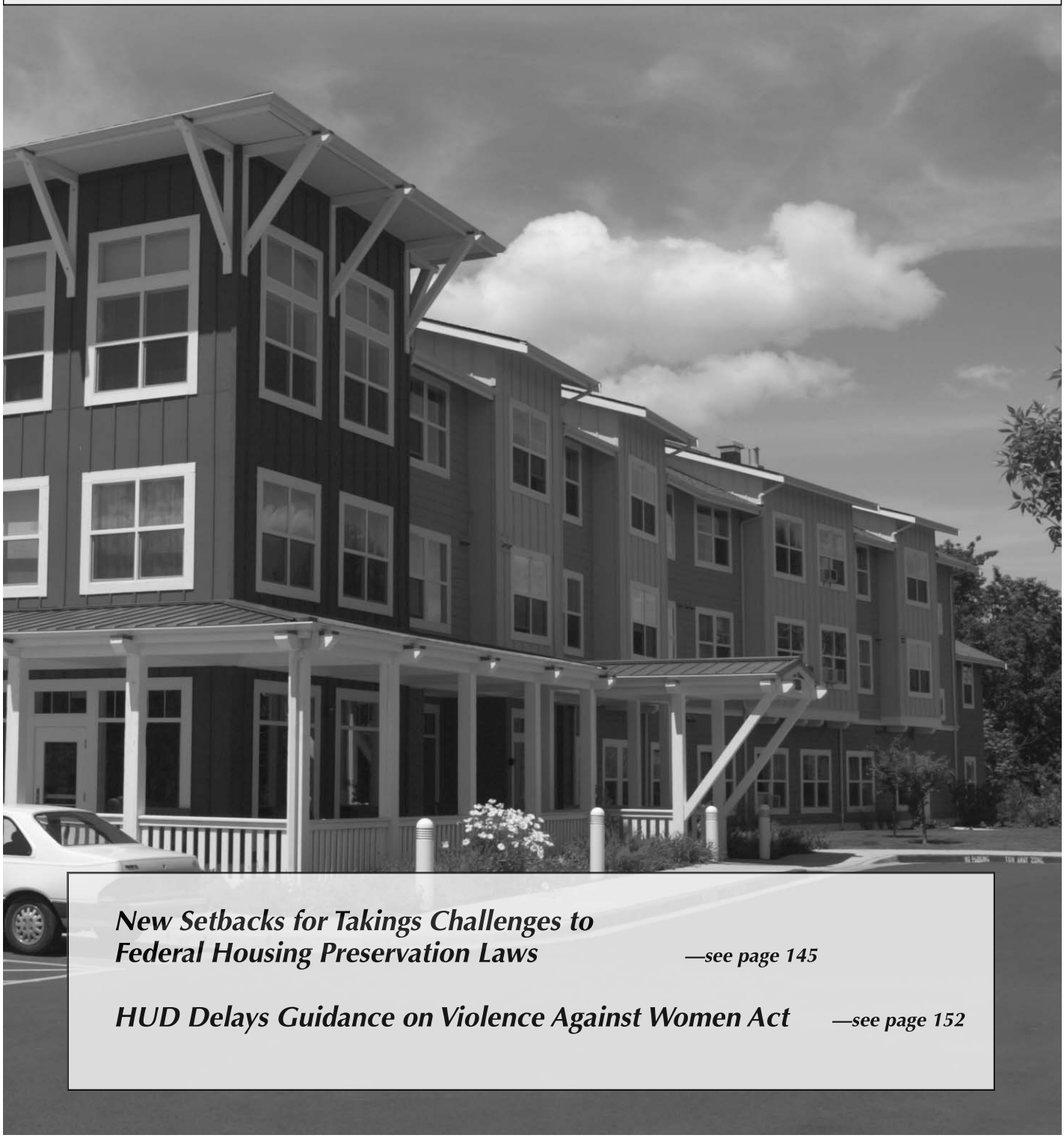

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See pages 166-167 for more information and a registration form.

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**614 Grand Avenue, Suite 320, Oakland CA 94610**
**Telephone (510) 251-9400 • Fax (510) 451-2300**

**727 Fifteenth Street, N.W., 6th Fl. • Washington, D.C. 20005**

**www.nhlp.org • nhlp@nhlp.org**

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**Cover:** Port Orchard Vista Senior Housing, a 42-unit subsidized Low-Income Housing Tax Credit Development in Port Orchard, Washington, that is operated by the Kitsap County Consolidated Housing Authority. It serves extremely low- and very low-income seniors. Financing by the Washington State Housing Trust Fund, Kitsap County CDBG and HOME funds and Westsound Bank.

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# Courts Deal New Setbacks to Takings Challenges of Federal Housing Preservation Laws

by Erin Ching*

Recently, two significant cases were issued by the United States Court of Federal Claims and the Federal Circuit regarding regulatory takings and the restrictions on prepayment of mortgages subsidized by the Department of Housing and Urban Development (HUD). Both cases closely examine the economic impact of the statutory restrictions on specific owners, and both decisions considerably limit the government's liability in future takings cases with similar fact patterns. In *City Line Joint Venture v. United States*, the claims court held that statutory restrictions on the right to prepayment did not constitute a regulatory taking because they simply diminished the owners' profits rather than denying the owner all economically viable use of the property.[1] In *Independence Park v. United States*, the Federal Circuit held that the impact of local rent control should be considered in assessing damages for claims involving prior restrictions on the prepayment of HUD-subsidized mortgages.[2]

## Background

These two cases share a similar factual background. Both involve owners who received HUD-subsidized mortgages under Section 221(d)(3)[3] and Section 236[4] of the National Housing Act. Through these programs, developers of affordable rental housing received HUD-subsidized financing for which they paid low mortgage rates for a term of forty years, with the option to prepay their loan balances and exit the program after twenty years.[5] While participating in the federal program and receiving the benefits of subsidized financing, owners had to follow rent restrictions set by HUD, but once they exited the program, owners could charge market rate for their units.

As many properties approached their twenty-year mark in the 1980s, Congress passed several housing preservation laws, including the Low-Income Housing Preservation and Resident Homeownership Act

*Erin Ching is a summer law clerk at the National Housing Law Project and a student at Duke University School of Law.

[1]City Line Joint Venture v. United States, 2006 WL 1494981, at *15 (Fed. Cl. May 26, 2006).

[2]Independence Park Apartments v. United States, 449 F.3d 1235, 1243 (Fed. Cir. 2006).

[3]Housing Act of 1954, Pub. L. No. 83-560, 68 Stat. 590, 597 (1954), amended by Housing Act of 1961, Pub. L. No. 97-70, 75 Stat. 149 (1961), *codified as amended at* 12 U.S.C. § 1715*l*(d)(3) (2003).

[4]Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 201(a), 82 Stat. 476, 498, 499 (1968), *codified at* 12 U.S.C. § 1715z-1 (2000).

[5]*See* NHLP, HUD Housing Programs: Tenants' Rights 1/29 (3d ed. 2004).

of 1990 (LIHPRHA).[6] LIHPRHA imposed restrictions on prepayment without HUD approval, and also provided financial incentives for owners to stay in the program or sell the property at market value to a preservation purchaser. Switching course for budgetary reasons in 1996, Congress reinstated owners' ability to prepay after twenty years.[7]

Some owners who had planned to prepay as soon as they became eligible filed lawsuits seeking restitution for lost profits during the years they were restricted from prepayment by the preservation laws. The primary line of cases in this category is *Cienega Gardens v. United States*, which has produced a number of reported decisions by the Federal Circuit and claims court on appeal and remand.[8] In *Cienega Gardens*, plaintiffs sought damages under claims of breach of contract and just compensation for taking under the Fifth Amendment. The breach of contract claims were eventually dismissed for lack of privity of contract because HUD was not a party to the deeds of trust (only the private lenders and the owners were named parties on the deeds of trust).[9]

The second major issue was whether the statutory restrictions on prepayment constituted a government action that rose to the level of regulatory taking. To establish a taking, the moving party must first prove that they have a protectable property interest.[10] The Federal Circuit previously held that the owners' ability to prepay constituted a property interest.[11] Next, the moving party must show that the government went too far in constraining their property interest, entitling them to just compensation.[12] In determining whether the government has gone "too far" in constraining a property interest, the court generally looks at three factors:[13] the character of the taking, the economic impact to the private party, and the reasonableness of the party's investment-backed expectations.[14] Based on these three considerations, the Federal Circuit determined that the regulatory restrictions constituted a taking and that the plaintiffs were entitled to compensation.[15]

Both of the cases discussed in this article, *City Line* and *Independence Park*, focus on the economic impact of the regulatory taking. *City Line* illustrates that courts may well diverge on whether the economic impact of the prepayment restrictions rises to the level of a regulatory taking or simply diminishes property value. The other case reviewed below, *Independence Park*, involving some of the *Cienega Garden* plaintiffs, evaluates the impact of local rent restrictions on the award of damages for a previously determined taking.

**City Line**

*City Line Joint Venture v. United States* involved the owners of a 283-unit project in Maryland who participated in the Section 221 program.[16] Like the owners in *Independence Park*, the owners in *City Line* wanted to prepay their mortgage after twenty years and were barred from doing so by the preservation laws. They filed a lawsuit claiming that the statutory restrictions on prepayment constituted a regulatory taking. Focusing on the economic impact, the court held that the restrictions were not a regulatory taking in this case.[17]

In determining whether the statutory restrictions constituted a regulatory taking, the claims court used the three-factor test set forth in *Penn Central Transportation Co. v. City of New York*.[18] The first factor involves the character of the government action. The court must look at the importance of the public interest at stake and weigh the burdens imposed on the owner as a result of the action against the burdens to the public as a whole.[19] Since the restrictions on prepayment limited the owners' right to exclude and to sell, and since it disproportionately placed the public burden on a few people, the court held that the restrictions had the character of a taking.[20]

Next, the court considered the reasonableness of the owners' investment-backed expectations. To prove reliance, the private party must show that they actually believed in a promised outcome, and they entered the program in reliance on that outcome. Here, the owners must prove that they actually believed that they would be able to prepay their mortgage after twenty years, and

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[6]Pub. L. No. 101-625, tit. VI, 104 Stat. 4249 (1990), *codified at* 12 U.S.C. §§ 4101 *et. seq*. (1990).

[7]Pub. L. No. 104-120, 110 Stat. 834 (1996). This deregulation of prepayment was re-enacted annually until 1998, when Congress passed a free-standing provision. Pub. L. No. 105-276, § 219, 112 Stat. 2461, 2487 (1998).

[8]The original case is *Cienega Gardens v. United States*, 33 Fed. Cl. 196 (9th Cir. 1995). For a full description of the procedural history, see NHLP, *Recent Takings Decisions on Preservation Laws Could Subject Feds to Big Liability*, 33 Hous. L. Bull. 339, 350 (2003).

[9]Cienega Gardens v. United States, 194 F.3d 1231 (Fed. Cir. 1998) (*Cienega IV*).

[10]Wyatt v. United States, 271 F.3d 1090, 1097 (Fed. Cir. 2001).

[11]Cienega Gardens v. United States, 331 F.3d 1319, 1328 (Fed. Cir. 2003) (*Cienega VII*).

[12]*Id*.

[13]Penn Central Transportation Co. v. New York City, 438 United States 104, 124 (1978).

[14]Until recently, the 9th Circuit considered an additional factor in its determination of regulatory takings, which was whether the government action substantially advanced legitimate state interests, based on *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). However, the United States Supreme Court rejected the "substantially advances" test in 2005. Lingle v. Chevron, 544 U.S. 528, 540 (2005).

[15]*Cienega VII,* 331 F.3d at 1337.

[16]2006 WL 1494981 (Fed. Cl. May 26, 2006).

[17]The government first argued that the owners' claim was not ripe for adjudication because the financial harm on the owners caused by the statutory restrictions is unclear. The owners did not attempt to prepay their mortgage and they did not attempt to sell the property during the years when the statutory restrictions were in place. The court recognized that attempts to sell or prepay would have been futile since HUD was not equipped to complete such transactions, and thus held that the takings claim was ripe for adjudication.

[18]438 U.S. 104 (1978).

[19]*City Line*, 2006 WL 1494981, at *6.

[20]*Id*. at *7.

that they entered the Section 221 program in reliance on that expectation.[21] The court held that investors were reasonable to rely on this promise and that it was likely that owners entered the program in reliance on the ability to prepay.[22] Therefore, two of the three prongs of the *Penn Central* were met.

*Despite the six-digit loss on a single property, the claims court held that the economic impact of the federal preservation statute was not substantial enough to rise to the level of a regulatory taking.*

The final factor that the court considered was whether the government action caused a serious financial loss to the owners.[23] The court examined three different formulas of valuation submitted by the parties (plaintiffs submitted two theories, defendants submitted one), which illustrates the difficulty in deciding on a standard method to value loss. These formulas analyzed factors such as the loss in rental income, the owner's actual return on equity versus potential return on an alternate investment, and value of the property before the restrictions versus value of the property after restrictions.[24] The court adjusted each of the three formulas to account for several additional factors such as the cost of renovations to bring the property up to market value and the increased taxes based on the property's new value.[25] The court did not adopt a set dollar amount of loss, but instead placed the number in a range somewhere between $640,000 and $700,000. Similarly, the court did not adopt an exact percentage of value lost, but said that it ranged between 10 and 33%. [26]

Significantly, despite the six-digit loss on a single property, the court held that the economic impact was not substantial enough to rise to the level of a regulatory taking.[27] A government action can only be considered a taking if it "denies an owner economically viable use of his land."[28] This is a high standard; "mere diminution in the value of the property, however serious, is insufficient to demonstrate a taking."[29] The statutory restriction on the owners' ability to prepay diminished the owners' profits, but it did not take away all economically viable use of the developments. Therefore, based on the economic impact prong of the *Penn Central* test, the court held that in this case the statutory restrictions did not constitute a taking.

**Independence Park**

*Independence Park Apartments v. United States*[30] came directly out of the *Cienega Gardens* line of cases discussed above. It involved the four model plaintiffs, which was a subset of the original group of plaintiffs, and the same set of facts. On remand, the *Independence Park* court considered whether the local rent control ordinance should be factored into the determination of damages for the regulatory taking based on the Federal Circuit's 2003 ruling.[31] The court held that the Los Angeles Rent Stabilization Ordinance (LARSO)[32] applied to landlords exiting the HUD mortgage program and should be included in the assessment of damages.[33]

Previously, the court of claims held that rent control should not be considered in assessing damages because it was expressly preempted by LIHPRHA, which says that no state shall establish any regulation that restricts the prepayment of the HUD mortgages.[34] Since LARSO restricted the amount of rent apartment owners could charge, the trial court held that LARSO was preempted by the federal statute.[35]

The Federal Circuit reversed, concluding that local rent control should be considered when determining damages. First, the court held that the mandate rule or law of case doctrine did not prevent the court from considering whether LARSO affected the calculation of

[21] *Id.* at *8.
[22] *Id.* at *9. Other courts might disagree with the conclusion that owners entered the program in reliance on the ability to prepay. *See, e.g.,* Blitzer v. United States, 684 F.2d 874, 877, n.1 (Fed. Cl. 1982). Many owners decided to join the program based on economic incentives such as federal income tax benefits and mortgage insurance rather than relying on the prepayment option.
[23] *City Line*, 2006 WL 1494981, at *9.
[24] *Id.* at *10.
[25] *Id.* at *11-14.
[26] *Id.* at *14.
[27] *Id.*
[28] *Id.* at *15 (quoting Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 United States 264, 295- 96 (1981) (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980))).
[29] *Id.* at *15 (quoting Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 645 (1993)).
[30] Independence Park Apartments v. United States, 449 F.3d 1235 (Fed. Cir. 2006).
[31] *Cienega VII,* 331 F.3d at 1337.
[32] Los Angeles Rent Stabilization Ordinance, Los Angeles, Cal. Mun. Code, ch. XV, §§ 151.00-151.20.
[33] The court also made the unrelated holding that "subsequent use agreements between government and owners mitigated, but did not terminate, damages that owners previously suffered from temporary regulatory taking." *Independence Park Apartments v. United States*, 449 F.3d at 1246 (Fed. Cir. 2006).
[34] Independence Park Apartments v. United States, 61 Fed. Cl. 692, 705 (Fed. Cl. 2004).
[35] The court of claims held for preemption on several grounds: first, because it was mandated by the Federal Circuit; second, because the court of claims had held for preemption in a previous hearing of the same case, and therefore was bound by the law of the case doctrine; and third, for the substantive reasons described above. (The third holding was redundant because it was based on the same reasoning as the first two holdings, but the court of claims included this holding in case the mandate and doctrine of law holdings were overturned by the court of appeals.) The Federal Court disagreed with all of them.

damages.[36] Although the court of claims had previously held that LARSO was preempted, the Federal Circuit subsequently made additional factual findings that, in its view, expressly left the issue of rent control open for future consideration.[37]

*The court held that LARSO affected the calculation of rent in determining the magnitude of loss suffered in the regulatory taking.*

Addressing the real substance of the issue, the Federal Circuit held that the preservation law did not preempt LARSO. First, the court found no express preemption of LARSO because LIHPRHA contains a clause that exempts rent control provisions from the scope of preemption.[38] Next, in response to the owners' claim of conflict preemption, where a state regulation is preempted because it creates a barrier that frustrates the purposes and objectives of Congress,[39] the Federal Circuit held that LARSO was not preempted by LIHPRA, citing *Topa Equities, Ltd. v. City of Los Angeles*.[40] There was no promise in the HUD regulations or the federal statute that the owners would be able to raise their rent to market level after twenty years, only an ability to prepay and exit the federal program and its restrictions.[41]

Based on the holding that LARSO was not preempted by LIHPRA, the court held that LARSO affected the calculation of rent in determining the magnitude of loss suffered in the regulatory taking.[42] The preservation laws prevented some owners from prepaying their mortgages for eight years, and the court had previously determined that these statutory restrictions constituted a regulatory taking. To determine damages, the court must figure out how much money the owners would have made without the restrictions and how much money they actually earned with the restrictions. The amount of damages the owners are awarded is the difference between these two sums. The owners argued that they would have made market rate profits without the restrictions, and so market rate is the figure that should be used in calculating damages. Conversely, the government argued that the owners would not have been eligible for market rate because their property would have been subject to rent control; therefore, the rent-controlled rate is the figure that should be used in calculating damages. Because LARSO would have restricted the rents owners could have charged, the court held that LARSO affected the calculation of damages.

### Conclusion

Together, *City Line* and *Independence Park* provide important support for limiting or entirely eliminating the government's liability in takings cases regarding federal low-income housing preservation statutes. ■

[36] *Independence Park*, 449 F.3d at 1239.
[37] The owners also argued that the government's failure to address the LARSO issue in prior appeal constituted a binding waiver of that issue for subsequent proceedings, but the court rejected that theory because the government, as appellee, was not obligated to name every possible theory of defense, but only to prove appellant's claims incorrect. *Id.* at 1240.
[38] *Id.* at 1241. *See also* 12 U.S.C. § 4122(a) (1990).
[39] Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000).
[40] 342 F.3d 1065 (9th Cir. 2003).
[41] *Id.* at 1071-1072.
[42] *Independence Park*, 449 F.3d at 1241.

# Court Orders FEMA to Allow Use of Federal Funds for Utility Costs

by Georgia Garthwaite*

On July 13, 2006, a federal court issued a preliminary injunction ordering the Federal Emergency Management Agency (FEMA) to allow hurricane evacuees to use certain housing assistance funds to pay for utility costs. The court denied FEMA's request to stay the order pending FEMA's appeal of the preliminary injunction on July 21. The class action lawsuit, *Watson v. FEMA*,[1] is one of several filed against FEMA in the wake of Hurricanes Katrina and Rita.

The lawsuit was filed in May 2006 to prevent FEMA from ending emergency housing assistance known as Section 403 and transferring up to 60,000 evacuee-households to the Section 408 temporary housing assistance program, which has more stringent eligibility requirements.[2] The plaintiffs sought a temporary restraining order to prevent FEMA from ending the Section 403 program and a preliminary injunction against the transfer.

Judge David Hittner denied the temporary restraining order and preliminary injunction. Following a decision

*Georgia Garthwaite is a 2006 summer law clerk at NHLP. She is a J.D. candidate at Washington University in St. Louis and received her A.B. degree from Princeton University.
[1] Watson v. Fed. Emergency Mgmt. Agency, Civ. Action No. H-06-1709 (S.D. Tex.).
[2] 42 U.S.C.A. §§ 5170b, 5174 (West, WESTLAW through P.L. 109-268 (excluding P.L. 109-248) approved 08-04-06).

in *McWaters v. FEMA*,[3] another class action against the agency, the *Watson* plaintiffs narrowed their request for injunctive relief to the single issue of requiring Section 408 rental assistance to include reasonable utility costs—and therefore allowing recipients to use Section 408 funds to pay for utilities. Under FEMA's then-existing policy, Section 408 recipients who used leftover housing funds to pay for utilities could be disqualified from the program, unless utilities were included within the rental charge itself. The plaintiffs sought to end this policy and allow all recipients to use Section 408 funds for utility costs, whether bundled with rental charges or billed separately. The plaintiffs did not seek additional funds through Section 408, merely seeking to include utility costs as a permissible use of program assistance.

### The Meaning of "Fair Market Rent"

In the statute authorizing the temporary housing assistance program, Congress ordered FEMA to pay Section 408 recipients "fair market rent."[4] The plaintiffs argued that this term includes utilities because of its accepted meaning in other housing assistance programs authorized by Congress and primarily administered by HUD. The plaintiffs also noted FEMA's own reliance on HUD-established "fair market rents" to determine the level of FEMA assistance. FEMA countered that Congress had not explicitly defined "fair market rent" to include utility costs, and that the agency's definition should receive deference.

The court held that "fair market rent," in the context of housing assistance programs, is a "term of art" whose established meaning should be adopted under Fifth Circuit and Supreme Court precedent.[5] Thus "Congress, in enacting § 5174, intended the term to have its established meaning, which takes into account a reasonable amount to cover utilities."[6] Moreover, the court held that the plaintiffs would suffer irreparable harm—eviction and possibly homelessness—without the injunction, and that this threatened injury to the plaintiffs outweighed any harm to FEMA. The court also found significant public interest in keeping Katrina evacuees from becoming homeless, ensuring a smooth transition to self-sufficiency, and encouraging efficient use of federal funds.[7] Finding the plaintiffs had satisfied every required element, the court issued the preliminary injunction. In the same ruling, the court also ordered FEMA to notify recipients that they can use Section 408 funds for utility costs, and forbade FEMA to disqualify recipients for doing so.

### FEMA Fails to Follow Order

The *Watson* plaintiffs filed an emergency motion for an order to show cause on July 21, alleging that FEMA had failed to comply with Judge Hittner's order. FEMA filed a motion to stay pending appeal the same day, which the court denied on July 27. The court has not ruled on the plaintiffs' show cause motion, and FEMA's appeal remains pending. The preliminary injunction remains in effect.

More information is available on the website www.femaanswers.org. ■

[3]McWaters v. Fed. Emergency Mgmt. Agency, No. 05-5488 (E.D. La. June 16, 2006). The class certification, issued June 30, 2006, confined this case to SBA loan and Short Term Lodging evacuees. McWaters v. Fed. Emergency Mgmt. Agency, No. 05-5488, slip op. (E.D. La. June 30, 2006).

[4]42 U.S.C.A. § 5174(c)(1)(A)(ii) (West, WESTLAW through P.L. 109-268 (excluding P.L. 109-248) approved 08-04-06).

[5]The court found the term "appropriately categorized as a term of art in the realm of housing assistance, albeit under a federal agency primarily tasked with emergency management." *Watson*, slip op. at 14.

[6]*Id.* at 14.

[7]*Id.* at 23. "[R]ewarding individuals, both now and in future disasters, who seek out less expensive rent in the hope that they would then have more money to put towards utilities encourages a more efficient use of federal and state resources." *Id.*

# Local Law Requires Owners to Continue to Rent to Voucher Holders

by Georgia Garthwaite*

The issue of whether owners may opt out of Section 8 Housing Choice Voucher contracts has divided New York courts. In *Ortiz v. Five Seven Naught Associates, et al.*, the Supreme Court for the County of New York echoed a growing line of case law that prevents landlords from "opting out" of the voucher program in violation of local and state tenant protection laws.[1] The court granted a preliminary injunction to protect voucher tenants from nonpayment proceedings, finding a likelihood of success on the merits.

Although the *Ortiz* ruling was not final, the court's praise of the "excellent and extensive analysis" in an earlier case, *Rosario v. Diagonal Realty, L.L.C.*,[2] indicates the potential effectiveness of this line of reasoning.[3] *Ortiz* and *Rosario* are consistent with a majority of trial-level

*Georgia Garthwaite is a 2006 summer law clerk at NHLP. She is a J.D. candidate at Washington University in St. Louis and received her A.B. degree from Princeton University.

[1]Ortiz v. Five Seven Naught Assoc., et al., No. 402804/2005 (N.Y. Sup. Ct. Apr. 18, 2006) (N.Y. State Unified Ct. Sys.). The Supreme Court, Appellate Division, did not reach the issue in *Licht v. Moses*, 813 N.Y.S.2d 849, 851 (N.Y. App. Div. 2006).

[2]Rosario v. Diagonal Realty, L.L.C., 803 N.Y.S.2d 343 (N.Y. Sup. Ct. 2005).

[3]*Ortiz*, No. 402804/2005, at 5.

decisions in New York City[4] and some rulings from high courts in other states.[5] Voucher tenants in other jurisdictions or programs with good cause eviction protections can develop a similar argument to maintain their voucher tenancy.

## Tenant Protection Under *Ortiz* and *Rosario*

In *Ortiz*, as in *Rosario*, landlords in New York City attempted to opt out of the voucher program, refusing to renew their voucher Housing Assistance Payments (HAP) contracts and suing tenants for nonpayment of the previously subsidized portion of their rent. Both sets of tenants[6] sought declaratory findings that the landlord or owner of a rent-stabilized apartment with a current voucher tenant must continue the HAP contract as a term and condition of the tenancy for as long as the tenant remains a rent-stabilized tenant.[7] The defendant owners countered that the 1998 congressional amendment ending the so-called "endless lease rule"[8] permits them to opt out of the voucher program as leases expire.[9]

The *Rosario* court held that the 1998 amendment did not preempt New York's rent stabilization laws, pointing out that: (1) no explicit language in the federal statute provides for such preemption, (2) the voucher program depends upon local and state participation, thus leaving room for state and federal regulation, and (3) compliance with both federal and state laws was not impossible because the federal provision "is devoid of any requirement that [owners' voucher] participation . . . be voluntary."[10] Having determined the threshold preemption issue, the court determined that an owner's acceptance of voucher subsidies "constitutes a material term and condition of the rent-stabilized lease" that must be renewed under New York's rent stabilization laws.[11]

Finding *Rosario* persuasive, the *Ortiz* court granted the plaintiffs' motion for preliminary injunction, finding a likelihood of success on the merits,[12] risk of irreparable injury without injunctive relief,[13] and greater hardship suffered by the plaintiffs than the defendant landlords without a stay.[14]

## Applicability in Other Jurisdictions

As noted in *Rosario*, the supreme courts of Connecticut, New Jersey and Massachusetts have also held that the federal voucher statute does not preempt state tenant protection provisions.[15] These holdings support the *Rosario* and *Ortiz* rulings, and form the basis for much of the court's rationale in *Rosario*. In *Franklin Tower One, L.L.C. v. N.M.*, the New Jersey Supreme Court held that the federal repeal of the "take one, take all" provision did not permit landlords to reject voucher tenants in violation of the state's law against source-of-income discrimination.[16] The *Rosario* court quoted from the holding at length and went on to apply its analysis to the "endless lease" provision at issue in *Rosario* and *Ortiz*.[17] *Rosario* also employed the same preemption analysis as the Connecticut Supreme Court in *Commission on Human Rights and Opportunities v. Sullivan Associates* (concluding that the federal voucher

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[4]*See, e.g.*, Ellwood Realty L.L.C. v. Polanco, No. 69979/04 (N.Y. Civ. Ct., N.Y. County Dec. 13, 2004); Mott v. New York State Div. of Hous. & Community Renewal, 628 N.Y.S.2d 712 (N.Y. App. Div. 1995), *appeal dismissed*, 86 N.Y.2d 836 (N.Y. 1995). Some courts outside the County of New York have disagreed. *See, e.g.*, 30 Eastchester L.L.C. v. Healy, SP-2002-77 No. 40066(U) (N.Y. City Ct. Mar. 28, 2002), 2002 WL 553709; Licht v. Moses, 799 N.Y.S.2d 161 (2004), *rev'd on other grounds*, 813 N.Y.S.2d 849 (N.Y. App. Div. 2006).

[5]*See* Comm'n on Human Rights & Opportunities v. Sullivan Assoc., 739 A.2d 238, 245-46 (Conn. 1999); Attorney Gen. v. Brown, 511 N.E.2d 1103, 1106 (Mass. 1987); Franklin Tower One, L.L.C. v. N.M., 725 A.2d 1104, 1111-13 (N.J. 1999).

[6]The plaintiffs are all rent-stabilized voucher tenants who are being sued in housing court for nonpayment of rent. *Ortiz*, No. 402804/2005, at 1. In granting the preliminary injunction, the *Ortiz* court also permitted four similarly situated plaintiffs to intervene. *Id. at* 7.

[7]*Ortiz*, No. 402804/2005, at 1; *Rosario*, 803 N.Y.S.2d at 346. The tenants also sought a similar finding applying to voucher tenants in buildings receiving J-51 tax abatement. The J-51 tax abatement program provides real estate tax incentives to owners who rehabilitate or convert buildings for residential use, and imposes rent stabilization requirements during the tax abatement period. N.Y., N.Y., ADMIN. CODE § 11-243 (formerly § J-51); *see Rosario*, 803 N.Y.S.2d at 350.

[8]Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, § 549 (a)(2)(A), 112 Stat. 2461, 2607 (1998) (codified at 42 U.S.C. § 1437f (d)(1)(B)(ii)). *See also* Pub. L. No. 104-134, § 203 (c)(2), 110 Stat. 1321, 1321-28 (1996) (temporary amendment that was made permanent in 1998).

[9]*Ortiz*, No. 402804/2005, at 3; *Rosario*, 803 N.Y.S.2d at 346, 348. Under the previous statute, federal law had prohibited owners from unilaterally terminating Section 8 tenancy without good cause. The amended statute currently in effect has a narrower application, only requiring good cause for terminations "during the term of the lease." 42 U.S.C. § 1437f (d)(1)(B)(ii) (2006). The lifting of the federal restriction, the defendants argued, trumps state and municipal tenant protection laws. *Ortiz*, No. 402804/05, at 5.

[10]*Rosario*, 803 N.Y.S.2d at 352. The court also ruled that owners receiving local property tax abatements must continue to accept Section 8 as required by local law, and that this protection was also not preempted. *Id.* This holding squares with other rulings—e.g., Cosmopolitan Assocs. v. Fuentes, 812 N.Y.S. 2d 738 (App. Term Jan. 2006).

[11]*Rosario*, 803 N.Y.S.2d at 357-58. The court also held that the federal provision did not preempt the tenant protection provisions in New York's J-51 tax abatement program, noting that "nothing in the [federal voucher] scheme is intended to preempt state and local laws prohibiting discrimination against [S]ection 8 tenants." *Id.* at 350.

[12]*Ortiz*, No. 402804/2005, at 5 (following *Rosario* on preemption issue and perceiving "strong argument that Section 8 assistance payments are a material term and condition which must be renewed with [a] rent stabilized renewal lease").

[13]*Ortiz*, No. 402804/2005, at 6. Rejecting Judge Ward's reasoning in *Deirdre Williams v. New York City Housing Authority*, 81 CIV 1801 (S.D.N.Y.), the court held that "[e]viction constitutes irreparable damage. It is the loss of one's home. Rather than place the risk of this injury on the tenant, as well as the burden to appeal a possibly negative outcome, it is reasonable to maintain the status quo pending the outcome of this proceeding." *Id.* at 6-7.

[14]*Ortiz*, No. 402804/2005, at 7. The court permitted the landlords to accept the plaintiffs' Section 8 subsidies without prejudice.

[15]*Rosario*, 803 N.Y.S.2d at 350.

[16]Franklin Tower One, L.L.C. v. N.M., 725 A.2d 1104, 1111-13 (N.J. 1999).

[17]*Rosario*, 803 N.Y.S.2d at 355.

statute did not preempt state antidiscrimination provisions)[18] and the Massachusetts Supreme Court in *Attorney General v. Brown* (same, and observing that owners' voluntary participation is not the "heart" of the federal voucher scheme).[19] Like the court in *Rosario*, all three state supreme court decisions are influenced by the common goal under federal and state statutory schemes of advancing affordable housing for low-income families.[20]

*The* Rosario *rationale is only relevant in jurisdictions with state or local rent stabilization provisions or laws prohibiting discrimination against voucher assistance as a source of income.*

In California, preemption issues have arisen between state laws and local ordinances designed to protect tenants. A California court of appeal held that state law preempted a Los Angeles city ordinance prohibiting landlords from opting out of voucher contracts and then charging tenants more than their contribution under the former voucher contracts.[21] Shortly after the city's petition for review was denied, the Los Angeles City Council amended the city's rent stabilization ordinance in May 2006 to clarify that rental units under the voucher program are subject to local rent stabilization provisions "to the fullest extent allowed by law."[22] That extent has yet to be determined, however, as the question of whether voucher assistance is a material term of a lease that an owner must accept is still open for disposition by the California courts.

As in California, other jurisdictions have yet to reach the issue. The District Court of Appeals for the District of Columbia did not decide the validity of a landlord's unilateral termination of a voucher contract in October 2005, holding that the tenant was collaterally estopped from challenging the legality of the landlord's action by a prior administrative decision.[23] Meanwhile New Hampshire's good cause eviction protection provision, in effect since 1983, has not faced a legal challenge.[24]

## Conclusion

The federal voucher statute does not itself prohibit owners from discriminating against voucher tenants on the basis of their subsidized status or source of income. As a result, the *Rosario* rationale, praised in *Ortiz*, is only relevant in jurisdictions with state or local rent stabilization provisions, such as New York City, or laws prohibiting discrimination against voucher assistance as a source of income, such as Chicago.[25] In those jurisdictions, however, the *Rosario* rationale provides a promising model for efforts to secure local and state tenant protections for voucher tenants alongside the federal legislative scheme. ■

[18]Comm'n on Human Rights & Opportunities v. Sullivan Assoc., 739 A.2d 238, 245-46 (Conn. 1999).

[19]Attorney Gen. v. Brown, 511 N.E.2d 1103, 1106 (Mass. 1987).

[20]*Rosario*, 803 N.Y.S.2d at 354; *Franklin Tower One*, 725 A.2d at 1111-12; *Sullivan*, 739 A.2d at 246; *Brown*, 511 N.E.2d at 1106.

[21]Apartment Ass'n of L.A. County v. City of Los Angeles, 38 Cal. Rptr. 3d 575 (Cal. Ct. App. 2006), *pet. & depub. request denied*, Case No. S141888 (Cal. May 10, 2006). The court held that because the Costa-Hawkins Rental Housing Act, Cal. Civ. Code § 1954.50, prevents landlords opting out of Section 8 contracts to maintain Section 8-level tenant rents for only ninety days, it cannot be reconciled with and therefore preempts Los Angeles' municipal ordinance imposing the same restriction without any time limit. *Apartment Ass'n*, 38 Cal. Rptr. 3d at 584.

[22]Los Angeles, Cal., Ordinance 177,587 (May 26, 2006) (amending L.A. Mun. Code ch. XV, art. I, § 151.02, effective July 5, 2006), *available at* http://clkrep.lacity.org/councilfiles/06-0825_ord_177587.pdf.

[23]Borger Mgmt. v. Sindram, 886 A.2d 52 (D.C. 2005).

[24]N.H. Rev. Stat. Ann. § 356-C:6 (1983).

[25]For jurisdictions with similar protections, see NHLP, *Protections Against Source of Income Discrimination for California Section 8 Participants, at* http://www.nhlp.org/html/sec8/protection_against_source_of_income.htm, and NHLP, *Section 8 Anti-Discrimination Statutes and Ordinances in Other States and Cities, at* http://www.nhlp.org/html/sec8/source_of_income_3.htm. Note that owners have challenged vouchers as a source of income under some antidiscrimination statutes that do not explicitly include vouchers within their purview. *See, e.g.*, Comm'n on Human Rights v. Sullivan Assoc., 22 Conn. L. Rptr. 463 (Conn. Super. Ct. 1998), *rev'd*, 739 A.2d 238 (Conn. 1999).

# HUD Delays Issuing Guidance to PHAs Regarding VAWA

by Erin Ching*

The new Violence Against Women Act of 2005 (VAWA), enacted on January 5, 2006, amends the statute for public housing, voucher and project-based Section 8 relating to issues of evictions, admissions and leases.[1] It also requires public housing agencies (PHAs) to address domestic violence issues in their Five Year Plan, their Annual Plan, and their Consolidated Plan.[2] Although the VAWA provisions became effective in January, HUD has not issued guidance to PHAs explaining how to implement the changes. Instead, HUD has issued two notices ordering PHAs to comply with the statute immediately, and stating that it will issue guidance and form regulations some time in the future.

## First HUD VAWA Notice

The first notice, issued more than six months after VAWA went into effect, briefly summarized the provisions of the new law and recommended that PHAs implement changes immediately.[3] It advised PHAs that VAWA prohibits removal of assistance or eviction when these actions are based on incidents of domestic violence, dating violence, or stalking. It further stated that VAWA applies to all PHAs administering public housing or Section 8 housing, and it applies to all owners participating in the Section 8 Housing Choice Voucher program. The notice informed PHAs that they must amend their Five-Year Plan and Annual Plan to include any goals, activities, objectives, policies or programs of the PHA that are intended to support victims of domestic violence, dating violence or stalking. The notice informed PHAs that HUD was developing regulations to provide guidance to PHAs about these new requirements, but until the regulations are released, PHAs are responsible for complying with the law. It also stated that HUD was developing a certification form (which is the subject of the second notice, discussed below) that owners and PHAs may require victims of domestic violence to use in order to certify that alleged incidents of abuse are bona fide. In the meantime, owners and PHAs were encouraged to accept alternative forms of proof from alleged victims.

## Second HUD VAWA Notice

The second notice, which was issued one month later, proposed language regarding the victim certification form and invited the public to submit comments.[4] The certification form discussed in the notice will be used by victims to prove incidents of violence and to qualify for the special VAWA protections against eviction and voucher termination. Although PHAs and owners may require victims to submit the certification form, they can alternatively accept the victim's statement or other corroborating evidence as sufficient proof of the violent incident.[5] Under the statute, victims are required to fill out a HUD certification form within fourteen business days of the incident.[6] If victims fail to fill out the form within two weeks, PHAs and owners are free to terminate the lease or stop assistance at any time; however, PHAs and owners also have the discretion to extend the fourteen-day deadline.[7] The certification form must include the name of the perpetrator (if known).[8] In addition, it must include a certification of the violence, which can either be a copy of the police or court order relating to the violence or a signed statement from a professional who is helping the victim deal with the violence.[9] Housing advocates and advocates working on domestic violence issues submitted comments regarding the proposed certification form prior to HUD's August 3 deadline, and now HUD must review and possibly incorporate these suggestions.

## Conclusion

HUD has essentially dropped the issue of VAWA implementation into the laps of PHAs. These two notices, issued more than six months after VAWA was enacted, provide inadequate guidance to PHAs and owners. VAWA provides important protections regarding evictions and termination of assistance for victims of domestic violence, dating violence, and stalking. HUD should act affirmatively and expeditiously to provide guidance. Failure to do so is inefficient and effectually requires 3,000 PHAs individually to take the time and effort to determine how to comply with the statute. Until HUD issues comprehensive guidance, PHAs likely will not fully implement the required changes or will collectively, unnecessarily duplicate efforts, and victims may be deprived of protections to which they are statutorily entitled. ■

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*Erin Ching is a summer law clerk at the National Housing Law Project and a student at Duke University School of Law.

[1]Pub. L. No. 109-162, 119 Stat. 2960 (2006).

[2]*Id.* (codified at 42 U.S.C. § 1437(c)-1(a)(2) (2006) and 42 U.S.C. § 1437(c)-1(d)(13) (2006)).

[3]Implementation of the Violence Against Women and Justice Department Reauthorization Act 2005, PIH 06-23 (June 23, 2006).

[4]Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request; Implementation of the Violence Against Women (VAWA) and Justice Department Reauthorization Act of 2005, 71 Fed. Reg. 41,039 (July 19, 2006).

[5]*See* 42 U.S.C. § 1437d(u)(1)(D) (2006).

[6]*See id.* § 1437d(u)(1)(A).

[7]*See id.* § 1437d(u)(1)(B).

[8]*See id.* § 1437d(u)(1)(A).

[9]*See id.* § 1437d(u)(1)(C).

# Sacramento Inclusionary Housing Ordinance Survives Legal Challenge

by Georgia Garthwaite*

The first inclusionary zoning ordinance in the nation to require developers to build or fund affordable housing for extremely low-income households survived statutory and constitutional challenges in *Building Industry Association of Superior California v. County of Sacramento*, No. 05AS00967 (Cal. App. Dep't Super. Ct. Sacramento County, Feb. 28, 2006). The Sacramento County regulation,[1] defended by housing advocates, affordable housing developers, low-income individuals, and the state of California, is now the subject of an appeal, *sub nom. North State Building Industry Association v. County of Sacramento*, No. C052814 (Cal. Ct. App. 3d Dist.).

## Case Background

States and municipalities have employed inclusionary zoning to increase their affordable housing stock since the early 1970s.[2] More than 34,000 affordable rental and for-sale units have been built through these policies in California alone.[3] Ordinances typically require developers to build a certain percentage of affordable units for low- to moderate-income households in conjunction with new market-rate developments.[4] In California and across the nation, inclusionary zoning ordinances most frequently require rental units for low-income households earning between 51% and 80% of area median income (AMI), and for-sale units for moderate-income households earning up to 120% of AMI.[5] Less than half of California's ordinances target very low-income households, earning between 30% and 50% of AMI, and virtually none target extremely low-income households earning below 30% of AMI.[6]

Sacramento County's inclusionary housing ordinance, passed in December 2004, was the first to require developers to build affordable housing for extremely low-income households.[7] In a few municipalities, local public agencies and other low-income housing providers have purchased units constructed under inclusionary zoning requirements and supplied additional subsidies to make them affordable to very low- and extremely low-income households.[8] Sacramento requires developers to meet these income-targeting requirements themselves. Under the Sacramento policy, 3% of new residential units must be affordable for extremely low-income families at or below 30% of AMI, with 6% affordable for very low-income families (earning up to 50% of AMI) and 6% for low-income families (earning up to 80% of AMI). In lieu of constructing affordable units, developers may be required to pay affordability fees and donate land for low-income housing.[9] The ordinance was the culmination of two years' effort by affordable housing advocates.[10]

In March 2005, the Building Industry Association (BIA) challenged the ordinance on nine statutory and constitutional grounds, suing the County of Sacramento, its Board of Supervisors, and the Sacramento Housing and Redevelopment Agency (collectively, Sacramento). BIA's first three causes of action claimed Sacramento's collection of fees and taxes violated various sections of the California Government Code and state constitution. The first disputed Sacramento's imposition of fees without finding a nexus between new market-rate construction and increased need for affordable housing, an alleged violation of the Mitigation Fee Act.[11] The second claimed that the ordinance had created a special tax in violation of the state constitution.[12] The third contended that Sacramento had failed to follow the required procedure to impose a levy under the California constitution.[13] The fourth through ninth causes of action asserted violations of the takings clauses of the state and federal constitutions, calling the ordinance invalid on its face.

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*Georgia Garthwaite is a 2006 summer law clerk at NHLP. She is a J.D. candidate at Washington University in St. Louis and received her A.B. degree from Princeton University.

[1]Sacramento, Cal., County Code ch. 22.35 (2005). The ordinance became effective in January 2005.

[2]Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. Rev. 971, 977-78 (2002). The nation's first inclusionary housing ordinances were enacted in Montgomery County, Maryland, and Fairfax County, Virginia. *Id.*

[3]Cal. Coalition for Rural Hous. & Non-Profit Hous. Ass'n of N. Cal., Inclusionary Housing in California: 30 Years of Innovation ii (2003).

[4]*See* Kautz, *supra* note 2, at 979-80.

[5]Cal. Coalition for Rural Hous. & Non-Profit Hous. Ass'n of N. Cal., Inclusionary Housing in California: 30 Years of Innovation iii, 10 (2003).

[6]*Id.*

[7]*See* Cosmo Garvin, *Crisis Management: Attorney General and Low-Income Advocates Join in on Inclusionary-Housing Lawsuit*, Sacramento News & Rev., May 12, 2005. *See also* Cal. Coalition for Rural Hous. & Non-Profit Hous. Ass'n of N. Cal., Inclusionary Housing in California: 30 Years of Innovation (2003); David Rusk, "Nine Lessons for Inclusionary Zoning," Keynote Remarks to the National Inclusionary Housing Conference (Oct. 5, 2005), *at* http://www.nhc.org/index/policy_action_hot_issues_IZ_Ruskkey.

[8]Cambridge, Massachusetts, and Montgomery and Fairfax counties employ such strategies. Policy Link, *Inclusionary Zoning—How to Use It*, at http://www.policylink.org/EDTK/IZ/How.html (content updated June 8, 2006).

[9]Sacramento, Cal., County Code § 22.35.050 (2005).

[10]Western Center on Law and Poverty, *Housing Groups, Residents and Attorney General Intervene in Sacramento County Inclusionary Zoning Challenge*, Hous. Task Force Update No. 51, July 2005, 27.

[11]Cal. Gov't Code § 66001.

[12]Cal. Const. art. XIIIA § 4.

[13]Cal. Const. art. XIIID § 6.

Several housing advocates, a nonprofit affordable housing developer, and three low-income Sacramento residents intervened on behalf of the defendants, and the state of California followed suit, requesting permission to intervene in April 2005.[14] Following the interventions, the Board of Supervisors made two significant changes to the ordinance, adding a waiver provision in July 2005 and a description of the purpose of the policy in September 2005.[15] To avoid permitting and construction delays, the defendant-intervenors moved for judgment on the pleadings in December 2005, arguing that BIA had failed to state any viable cause of action in its nine-point complaint.[16]

## The Court's Decision

The court took judicial notice of the changes to the ordinance and granted the defendants' motion for judgment on the pleadings, dismissing each of BIA's nine claims.[17] First, the court noted that the amended ordinance—containing the Board of Supervisors' express findings of a relationship between new development, affordable housing needs, and the imposition of affordability fees—complied with the Mitigation Fee Act.[18] Second, the court held that the affordability fees were optional—that is, a developer could choose to provide affordable housing units instead—and therefore not special taxes.[19] Similarly, the court found that fees under the ordinance did not constitute a levy as alleged in the third claim; because they were imposed for the use, not the ownership, of the property, such fees were not subject to constitutional tax requirements.[20]

Relying on *Home Builders Association v. City of Napa*,[21] another challenge to an inclusionary zoning ordinance with a similar waiver provision, the court also rejected BIA's takings claims, noting that the ordinance allows developers to apply for a "reduction, adjustment, or *complete waiver*" of the inclusionary zoning requirements and therefore "cannot and does not, on its face, result in a taking."[22] Instead, the waiver provision permits Sacramento to avoid unconstitutional application of the ordinance where the fees imposed "bear no reasonable relationship to housing loss . . . ."[23] In an authoritative coda, the court granted the defendants' motion in its entirety, dismissing BIA's facial challenge without leave to amend.[24]

## Conclusion

Sacramento County has tallied 171 planned projects subject to the ordinance comprising over 29,000 units to be built in coming years.[25] Of those planned units, 1,600 rental and 900 for-sale units will house low-income

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[14]Office of the Attorney General, *Attorney General Lockyer Defends Sacramento's Affordable Housing Ordinance*, Apr. 27, 2005, *available at* http://ag.ca.gov/newsalerts/2005/05_030.htm. California intervened to defend another inclusionary ordinance in 2001. Home Builders Ass'n v. City of Napa, 90 Cal. App. 4th 188 (Cal. Ct. App. 2001), *cert. denied*, 535 U.S. 954 (2002) (upholding Napa's inclusionary zoning ordinance against takings claims).

[15]Points and Authorities in Support of Intervenors' Motion for Judgment on the Pleadings at 1, Bldg. Indus. Ass'n of Super. California v. County of Sacramento, No. 05AS00967 (Cal. App. Dep't Super. Ct. Sacramento County, Feb. 28, 2006).

[16]Jocelyn Wiener, *Housing Lawsuit Dismissed by Judge: Builders to Appeal Ruling on County Policy Aiding Low-Income Families*, Sacramento Bee, Mar. 4, 2006, at B1. The State joined the motion the following month. The People's Joinder in Intervenors' Motion for Judgment on the Pleadings.

[17]Bldg. Indus. Ass'n of Super. California v. County of Sacramento, No. 05AS00967, slip op. at 1 (Cal. App. Dep't Super. Ct. Sacramento County, Feb. 28, 2006).

[18]*Id.* at 1-2.

[19]*Id.* at 2.

[20]The court cited Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles, 24 Cal. 4th 830, 841-42 (Cal. 2001) (upholding inspection fee imposed on parcel or person as incident of property ownership—landlords—because fee was not "levied solely by virtue of property ownership").

[21]90 Cal. App. 4th 188, 194 (Cal. Ct. App. 2001), *cert. denied*, 535 U.S. 954 (2002) (holding that for a facial challenge to succeed under the takings clause, "the mere enactment of the ordinance [must work] a taking of the plaintiff's property" (internal citations omitted) and that the plaintiff bears this burden when challenging generally applicable zoning regulations). *See also supra* text accompanying note 14.

[22]Bldg. Indus. Ass'n of Super. Cal. v. County of Sacramento, No. 05AS00967, slip op. at 3.

[23]*Id.* at 3 (citing San Remo Hotel v. City and County of San Francisco, 27 Cal. 4th 643, 673 (Cal. 2002)). In *San Remo*, the California Supreme Court held that housing replacement fees charged for conversion of residential hotels to tourist-only hotels bore a "reasonable relationship to loss of housing." *San Remo*, 27 Cal. 4th at 672-73. To find otherwise, the court held, the challenger would have had "to demonstrate from the face of the ordinance that the fees assessed under [it bore] no reasonable relationship to housing loss in the *generality* or *great majority* of cases . . . ." *San Remo*, 27 Cal. 4th at 672-73. In contrast, the Superior Court of San Diego County rejected an inclusionary zoning ordinance in the city of San Diego because its limited waiver provision would not permit the city to waive the ordinance requirements when they lacked a reasonable relationship with the impact of the development—that is, the city could not avoid an unconstitutional application of the ordinance. Bldg. Indus. Ass'n of San Diego County, Inc., v. City of San Diego, No. GIC817064 (May 24, 2006). San Diego ultimately reached a settlement with the building industry that instituted a waiver provision and reduced in-lieu fee payments charged to developers. Lori Weisberg, *City Amends Affordable-Housing Law: Compromise Would End Suit, Let S.D. Keep Fees*, San Diego Union-Trib., July 20, 2006. The court subsequently approved the settlement. Lori Weisberg, *City, Builders Settle Ordinance Fight: Affordable-Housing Waiver, Fees at Issue*, San Diego Union-Trib., July 26, 2006.

[24]Bldg. Indus. Ass'n of Super. Cal. v. County of Sacramento, No. 05AS00967, slip op. at 3. The posture of the case did not permit the court to address an as-applied challenge to the ordinance, so the ruling does not obviate future challenges from individual owners.

[25]Letter from Leighann Moffitt, Principal Planner, Sacramento County Planning Department, to Ethan J. Evans, Executive Director, Sacramento Housing Alliance (Mar. 3, 2006) (on file with NHLP). *See also* Jocelyn Wiener, *Housing Lawsuit Dismissed by Judge: Builders to Appeal Ruling on County Policy Aiding Low-Income Families*, Sacramento Bee, Mar. 4, 2006, at B1.

households. In addition, some 87 acres of land will be dedicated for affordable housing development under the ordinance. Sacramento County will also receive in-lieu fees of $2.65 million and $1.13 million in affordability fees from the 15 projects and 2,132 units already in the final approval stage under the ordinance.[26]

But the legal battle over the validity of the ordinance is not over. BIA filed an appeal on June 2, 2006, and the case is currently pending before the California Court of Appeal for the Third District.[27] A reversal of the superior court's ruling on BIA's takings claims would seem to contradict *City of Napa*'s rejection of facial challenges to waivable inclusionary zoning ordinances under the takings clause.[28] This holding appears to be settled law in California, having been denied review by the state supreme court and the U.S. Supreme Court.[29]

If the superior court's ruling stands, affordable housing advocates and builders alike will have an opportunity to test the innovative income-targeting provisions of Sacramento's inclusionary zoning policy in practice. Under the court's reasoning, Sacramento may protect its ordinance from as-applied takings challenges through judicious use of the waiver provision, a possible model for other municipalities seeking to enact constitutional inclusionary zoning laws. ■

***Additional Information:*** Valerie Feldman and Mona Tawatao of Legal Services of Northern California, Sacramento office, are lead counsel for the defendants-intervenors. For more information, contact Valerie Feldman at (916) 551-2150 or vfeldman@lsnc.net.

[26]Letter from Leighann Moffitt, *supra* note 25.
[27]Bldg. Indus. Ass'n of Super. Cal. v. County of Sacramento, No. 05AS00967, *sub nom.* N. State Bldg. Indus. Ass'n v. County of Sacramento, No. C052814.
[28]*See* Kautz, 36 U.S.F. L. Rev. at 972, 1004.
[29]Home Builders Ass'n v. City of Napa, 90 Cal. App. 4th 188 (Cal. Ct. App. 2001), *cert. denied*, 535 U.S. 954 (2002).

# New Public Housing Conversion Cost-comparison Methodology

In 1998, Congress passed the Quality Housing and Work Responsibility Act of 1998 (QHWRA).[1] The QHWRA amended the United States Housing Act by adding a new section, Section 33, which requires PHAs to convert to tenant-based assistance certain distressed public housing developments that fail to meet criteria specified by the Department of Housing and Urban Development (HUD).[2] Congress also amended Section 22 of the Housing Act to permit PHAs to voluntarily convert public housing.[3] Conversion refers to the removal of public housing units from the PHA's inventory.[4] The term is something of a misnomer. Not all units in the converted development are converted to tenant-based or project-based assistance, and conversion consequently can result in a loss of subsidized housing at the local level.[5]

When the QHWRA was enacted, HUD stated that Sections 22 and 33 were not self-implementing, and required the issuance of regulations to be effective.[6] In 1999, HUD published a proposed rule to implement the Sections,[7] and in 2001, HUD published a partial final rule on Section 22 for voluntary conversions.[8] However, this rule only addressed initial assessments and did not actually authorize any voluntary conversion of units.[9] Moreover, none of the proposed or partial rules set forth the standards or methodology necessary for a PHA to compare the costs of continuing to operate a development as public housing with the cost of providing the residents with tenant-based or project-based assistance. This was the situation again in September 2003, when HUD published a nearly complete rule, with an effective date of March 14, 2004.[10]

HUD also published a proposed rule for the cost comparison, and stated that it ultimately would be codified as an appendix to 24 C.F.R. part 972, which contains the regulations for required and voluntary conversions.[11] HUD elicited public comments to the proposed rule, and,

[1]*See* Pub. L. No. 105-276, tit. V, §§ 533, 537, 112 Stat. 2461, 2588-92, 2578-81 (1998).
[2]42 U.S.C.A. § 1437z-5 (West 2003).
[3]42 U.S.C.A. § 1437t (West 2003).
[4]24 C.F.R. §§ 972.103 and 972.203 (2004).
[5]For further discussion of the conversion process, see NHLP, HUD Housing Programs: Tenants Rights § 15.2.3 (3d ed. 2004).
[6]Quality Housing and Work Responsibility Act of 1998, Initial Guidance, 64 Fed. Reg. 8,192, 8,204, 8,207 (Feb. 18, 1999).
[7]Required Conversion of Developments From Public Housing Stock, Proposed Rule, 64 Fed. Reg. 40,232 (July 23, 1999).
[8]*See* Voluntary Conversion of Developments from Public Housing Stock, Required Initial Assessments, 66 Fed. Reg. 33,616 (June 22, 2001).
[9]*Id.*
[10]Required Conversion of Developments From Public Housing Stock, Final Rule, 68 Fed. Reg. 54,600-623 (Sept. 17, 2003).
[11]*See* Conversion of Developments from Public Housing Stock, Methodology for Comparing Costs of Public Housing and Tenant Assistance, 71 Fed. Reg. 14,328-14,339 (Mar. 21, 2006).

on March 21, 2006, published the appendix that establishes the methodology for comparing the cost of public housing with the cost of tenant-based assistance.[12] The rule became effective as of April 20, 2006. Along with the appendix, HUD has also created an Excel conversion calculator and sample spreadsheets.[13]

*HUD's on-line Excel conversion spreadsheet automates nearly all of the cost-comparison calculations..*

As HUD previously did not provide a standard methodology for PHAs to follow in making the cost comparisons between public housing and tenant-based assistance, the appendix represents the final link to full implementation of the conversion rules originally passed in 1998. This article will provide an overview of the conversion cost-comparison mechanics and a description of the key variables set forth in the appendix. Because the conversion process represents a potential loss of some public housing units and at least some conversion may be voluntary on the part of a PHA, and not mandated, it is critical that advocates are familiar with both the conversion requirements and the cost-comparison methodology.

PHAs are now required to conduct annual reviews of their public housing stock, in order to identify distressed developments that may be subject to required conversion. However only developments with 250 or more units on the same or contiguous sites with a vacancy rate of at least 15% for the past three years will face possible required conversion. If a development meets these criteria, the PHA uses the conversion calculator to determine whether it is more expensive to revitalize the development than to provide residents with tenant-based assistance. PHAs are not required to compare conversion costs for developments that do not meet the minimum size or vacancy thresholds.

PHAs must address developments identified for required conversion in their annual plans, and must develop a five-year plan for the removal of the units. PHAs will not be required to begin conducting the annual review of public housing stock until PHA fiscal years commencing six months after the effective date of the cost methodology.[14] Therefore PHAs with fiscal years starting April 1, 2007, will be the first who will have to identify developments for required conversion.[15]

PHAs may also seek HUD approval to voluntarily convert a development to tenant-based assistance. However, the PHA must prepare a conversion assessment, using the cost-conversion methodology, which demonstrates that conversion will not be more expensive than continuing to operate as public housing, will benefit the residents of the development, the PHA and the community, and will not adversely impact the availability of affordable housing in the community. The conversion assessment is submitted as part of the annual plan process. PHAs must also submit a conversion plan, as part of the annual plan, which must include a description of how the plan is consistent with the assessment, the impact of the plan on the community, and resident comments.[16]

## Cost-comparison Methodology Overview

The cost-comparison methodology weighs estimated public housing costs against estimated Housing Choice Voucher costs. To determine the net present value of the development, PHAs add together the projected operating costs, modernization costs, and costs to address accrual needs for the development. The costs are calculated on an annual basis over a period of twenty, thirty or forty years, depending on the level of revitalization. However, modernization costs and accrual costs are not assumed every year of the revitalization period. Modernization costs are assumed during the first four years of the revitalization period. Accrual costs (the costs to maintain the development) are assumed after the modernization is complete and run through the end of the twenty-, thirty- or forty-year revitalization period.

Voucher costs are determined by calculating the total unit weighted average of recent voucher holders in the local area, plus the administrative fee for providing the vouchers. These costs are added together to determine the total annual operating costs over the entire period of revitalization. In the first year of revitalization, the total cost of relocation is added to the total annual voucher operating costs.

### Discounting and Inflation

Recurring future costs related to public housing or tenant-based assistance are adjusted under the cost-comparison methodology. The type of adjustment depends on whether voluntary or required conversion is involved.

For required conversion, the costs in each future year are discounted back to the present year according to a

[12]Conversion of Developments From Public Housing Stock, Methodology for Comparing Costs of Public Housing and Tenant-Based Assistance, Final Rule, 71 Fed. Reg. 14,336 (Mar. 21, 2006).
[13]*See* HUD, *Conversion*, *at* http://www.hud.gov/offices/pih/centers/sac/conversion.cfm (updated Apr. 17, 2006).
[14]24 C.F.R. § 972.124 (2005).
[15]*See* HUD, *Required Conversion*, *at* http://www.hud.gov/offices/pih/centers/sac/rconv.cfm (updated Mar. 28, 2006).
[16]For additional discussion of voluntary conversion, see HUD Housing Programs: Tenants' Rights, *supra* note 5, at § 15.2.3.

**Summary of Cost-Comparison Variables**

| PUBLIC HOUSING | | TENANT-BASED ASSISTANCE |
|---|---|---|
| **Adjusted Future Operating Costs**<br>(overhead) + (utilities) + (utility allowances) | | **Adjusted Future Voucher Costs**<br>(voucher costs) + (admin fee) |
| **+ Modernization Costs**<br>(20-year, 30-year or 40-year) | | **+ Relocation Costs**<br>(usually $1000 per unit) |
| **+ Adjusted Future Accrual Costs**<br>(annual maintenance costs) | | |
| **+ Opportunity Cost** (*voluntary conversion only)*<br>(value of property) - (demolition costs)- (remediation costs) | | |
| **= Total Public Housing Cost** | ← compared → | **= Total Tenant-Based Assistance Cost** |

net present value calculation using the real discount rate specified by the Office of Management and Budget. Thus, for required conversion, recurring costs are assumed to shrink over time.[17]

For voluntary conversion, the process is reversed. Recurring costs are adjusted according to an inflation factor, which means that these costs are assumed to increase over time. The appendix does not explain the basis for this distinction between voluntary and required conversion, although it obviously alters the cost calculations.[18]

### HUD Cost-comparison Spreadsheet

HUD's on-line Excel conversion spreadsheet automates nearly all of the cost-comparison calculations. Because it is so comprehensive, it is likely to be the primary or the sole means used to perform cost-comparison calculations. Note that the calculator does not allow PHAs to factor any variables not already established in the spreadsheet, such as an anticipated non-recurring expense that may occur midway through the revitalization period.

## Public Housing Cost Variables

Public housing cost variables related to the cost-comparison methodology are described below.

### Operating Costs

PHAs proposing to modernize or revitalize a development are required to make a realistic projection of overall operating costs per occupied unit in the revitalized or modernized development, by relating those costs to the expected occupancy rate, tenant composition, and physical configuration of the development. Under the methodology, a development's operating costs are determined by taking the sum of all monthly overhead costs pro-rated to the development, monthly utility costs paid by the PHA, and any monthly utility allowances deducted from tenant rental payments to the PHA. The sum of these figures is divided by the number of occupied units in the development, in order to determine the monthly per-unit operating cost.[19]

Because future cost projections are only estimates, the rule recommends that PHAs compare the projections in the modernization plan with developments in viable conditions in similar neighborhoods to determine whether they have achieved the predicted income mix and occupancy rate proposed in the modernization plan, and how the costs of these similar developments compares with the PHA's projected operating costs.[20] Additionally, if the projected per-unit operating cost is lower than the current per-unit operating cost by more than 10%, the PHA must explain how the revitalized development will achieve the cost reduction.[21]

These estimates are subject to one of two reasonableness tests, based on either development-specific or PHA-wide historical operating cost data, as well as a bedroom adjustment factor.[22]

### Modernization Cost Estimates

PHAs are also required to prepare modernization or "capital repair" estimates, based on the specific needs of the properties proposed for conversion. Like the operation

[17]Conversion of Developments From Public Housing Stock, Methodology for Comparing Costs of Public Housing and Tenant-Based Assistance, Final Rule, 71 Fed. Reg. 14,336 (Mar. 21, 2006).
[18]*Id.*
[19]*Id.*
[20]*Id.*
[21]*Id.*
[22]*Id.* at 14,336-7.

costs, the costs of modernization will be considered in the final cost comparison with tenant-based assistance. The modernization estimates are prepared based on the level of revitalization necessary for the development to meet viability standards, and the projected viability, or remaining useful life, of the development after revitalization. If the modernization is equivalent to new construction or restores a development to "as-new" conditions, the PHA may consider the development to have forty remaining useful years. If the modernization, or revitalization, will ensure long-term viability, and will "address all accumulated backlog needs," the PHA will consider the development to have thirty remaining useful years. If the revitalization will be light, and will focus primarily on bringing the development into compliance with building codes, the PHA must use a twenty-year remaining useful life period to evaluate operating costs.[23]

However, PHAs are not required to assume the entire cost of modernization up front in the first year of modernization. Rather, they can assume that modernization costs will occur in year one, up to year four, of the remaining useful life period, consistent with the level of work to be completed, and the PHA's proposed revitalization schedule. In other words, the PHA can break down the modernization costs over a period of years, up to four, when preparing the cost comparisons for conversion.

**Accrual Costs**

Accrual costs represent the costs to continually maintain the development over the life of the applicable viability period: twenty, thirty or forty years, and are also considered in the final cost comparison to tenant-based assistance.[24] The procedure to determine accrual costs requires the PHA to use the index of housing construction costs, or HCC, which HUD publishes in the TDC index series.[25] From this index, the PHA can determine the HCC for units in the revitalized development, based upon the area of the development, type of unit and number of bedrooms. The total HCC is determined for the revitalized development and then divided by the number of units that will be in the development to determine a "unit weighted" HCC.

**Opportunity Cost: Voluntary Conversion Only**

For voluntary conversions, PHAs are required to prepare appraisals of the development based on "as-is" and revitalized conditions. The "as-is" appraisal will be considered a cost to the PHA as a forgone opportunity.[26] However, if the PHA assumes the cost of demolition and remediation upon the sale of the property, it must use the "residual value" as the forgone opportunity cost.[27] The residual value is determined by calculating the market value, based on the appraisal, less the costs for demolition and remediation.[28]

In determining the demolition costs, PHAs must consider average of the Total Development Cost (TDC) for the units. If the sum of the estimated per-unit demolition costs exceed 10% of the TDC, then the lower of either the PHA estimate or a figure based on 10% of the TDC must be used for calculating the cost of demolition.

## Tenant-Based Assistance Cost Variables

To estimate the cost of converting vouchers, the PHA first determines the unit-weighted monthly payment standard. This figure is derived by multiplying the PHA's monthly payment standard for voucher units occupied by recent movers by the corresponding number of occupied units in the development. The PHA then determines the monthly voucher administrative fee and adds this to the unit-weighted average monthly payment. PHAs must also include, in the first year of the remaining useful life period, $1000 per unit for relocation assistance costs.[29]

## Conclusion

While the conversion cost-comparison appendix will now allow PHAs to fully implement the conversion process, the overall impact on the availability of public housing remains to be seen. According to HUD, most PHAs will not be required to identify developments for required conversion until almost a year after the April 20, 2006, effective date. Additionally, PHAs will only have to consider larger developments that are distressed and have had a consistently high vacancy rate for the conversion process. Many developments may not be impacted by the required conversion process.

Nevertheless, the conversion process presents several areas for concern. First, the cost comparisons are not based upon unit-for-unit conversion from public housing to Tenant-Based assistance. The methodology also is not consistent. As noted, it uses a discount factor to determine cost comparisons for a required conversion, but an inflation factor for voluntary conversions. Additionally, although conversion does not necessarily mean the physical removal of a development, PHAs are only allowed to consider the value of the development in a voluntary cost conversion, and then must do so not as an asset, but as a "foregone opportunity" cost. Thus, the methodology appears to be slanted toward conversion.

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[23] *Id.* at 14,337.
[24] *Id.*
[25] *Id. See also* Public Housing Development Cost Limits, PIH 2006-22 (June 21, 2006).
[26] Conversion of Developments From Public Housing Stock, Methodology for Comparing Costs of Public Housing and Tenant-Based Assistance, Final Rule, 71 Fed. Reg. 14,336, 14,337, 14,338 (Mar. 21, 2006).
[27] *Id.* at 14,338.
[28] *Id.*
[29] *Id.*

HUD has posted a report on its website that identifies public housing units that may be potentially subject to a mandatory conversion.[30] The report identifies public housing developments with at least 250 dwelling units on one site or on contiguous sites. Although it is too early to determine the ultimate effect of conversion, advocates should consider reviewing this report, both for accuracy and as a starting point for evaluating the impact of conversion on local communities. ■

[30]The report is available at http://www.hud.gov/offices/pih/centers/sac/rconv.cfm.

# Long Beach Ordered to Designate Additional Projects as Subject to Section 3

Several years ago, the Legal Aid Foundation of Los Angeles (LAFLA) informed the City of Long Beach, California, that it intended to initiate litigation on behalf of several low-income individuals based on the failure of the city and its contractors to comply with Section 3 in the development of the Pike Project located in the Rainbow Harbor area of Long Beach.[1] The Pike Project controversy followed an earlier legal challenge to the city's violation of Section 3 requirements related to other aspects of the harbor development area.[2]

However, LAFLA and Legal Aid Society Employment Law Center agreed not to file litigation after negotiating the Pike Project Agreement with the City of Long Beach on March 13, 2003.[3] The purpose of the Pike Project Agreement was to increase economic opportunities for low-income residents and businesses in the City of Long Beach and in another neighboring community, Signal Hill. The agreement set forth a number of obligations for the city to comply with Section 3. The commitments included obligations relating to construction management, advertising, and outreach and expansion of construction training. The agreement provided for

- Staff support at the job site in a trailer to encourage the hiring of low- and very-low income individuals
- A commitment to use "best efforts" to obtain from the contractors and subcontractors workforce projections in order to determine jobs and other opportunities
- A commitment to enforce existing contract obligations of the contractors to use good faith efforts to hire low-income residents
- A commitment to use "best efforts" to encourage contractors to hire low-income residents of Long Beach and Signal Hill and to contract with Section 3 businesses
- A commitment to the "greatest extent feasible" to obtain information (income status, residence, date of hire, job classification and level) regarding the new hires and the hours worked by new hires
- An agreement to actively conduct outreach to low-income residents of Long Beach and Signal Hill and to take certain specified steps
- An expansion of the construction training and employment program by the Workforce Development Bureau[4]
- A commitment to work with WINTER (Women in Non Traditional Employment Roles)
- Creation of a monitoring committee composed of five members, two designated by the city and three by LAFLA
- Monthly reporting to LAFLA and to the monitoring committee regarding specific topics such as the new hiring reporting and information about the hiring of Section 3 businesses
- A narrative description of the outreach for hiring and contracting.

The agreement designated specific projects (an airport parking garage and two libraries), listing the dollar amounts (approximately $54 million in the aggregate) of the projects, which are subject to Section 3 and the

[1]The Pike Project gets its name from the Pike, which was the name of an amusement park on the ocean in Long Beach. The Pike was closed in 1968. The larger redevelopment area is known as Queensway Bay and it includes an aquarium, convention center, Shoreline Village and the ocean liner the Queen Mary.

[2]Letter from Dennis L. Rockway to Eva Plaza, Assistant Secretary for Fair Housing and Equal Opportunity, HUD, Re: Queensway Bay Project (June 8, 1998).

[3]Pike Project Agreement, No. 28171, at 1, *available at* http://www.nhlp.org/lalshac/hjn2004_conference_materials.htm.

[4]The goal of the Workforce Development Bureau, which is part of the City of Long Beach, is to build quality services that support the workforce needs of the community. The bureau sponsors a wide range of services for businesses and residents at one-stop career center locations throughout Long Beach. For more information, see http://www.longbeach.gov/cd/workforce/default.asp.

agreement.[5] However, the city also insisted upon stating up front that it was voluntarily agreeing to submit the Pike Project to Section 3, as it maintained that Section 3 did not apply to the Pike Project.[6] The agreement also designated a single individual to arbitrate and resolve any disputes. The relief that the arbitrator could provide was limited but included the authority to order the city to designate additional projects for compliance with Section 3.

## Arbitrator Orders Relief

The agreement was signed March 11, 2003, well after the Pike Project was underway. As a result, the obligations of the city and the monitoring committee "were compressed into a tight timeframe."[7] By December 2003, the monitoring committee issued a report which found that "in all categories reviewed, the city had not complied" with the agreement.[8] The monitoring committee therefore requested the arbitrator to require the city to provide two forms of relief:

- first, to designate additional projects equivalent in scope and dollar size to be subject to Section 3; and
- second, to obtain agreements with project contractors and local building and trade unions prior to construction to commit essential participants and effective targeting of community economic benefits to local low-income residents who are the beneficiaries of the agreement.

After an extensive review of the monitoring committee's findings and applying a standard of review that allowed an "appropriate deference" to the committee's findings and a review to determine if the evidence was sufficient, the arbitrator granted the first form of relief requested and denied the second.[9]

With respect to the first claim for relief, the arbitrator found that the "record shows that the City has gone to great efforts to comply in a very difficult and complex area. However, it appears that the City did not properly prioritize its work"[10] and did not act quickly enough. The examples cited repeatedly show that the city often recognized the problems but did not act to address them or failed to act to get "contractors, especially union contractors, on board early." Ultimately, the arbitrator concluded that the city could learn by its prior mistakes and could achieve the intended results—compliance with Section 3—with newly designated projects. As to the second claim for relief, the arbitrator did not disagree that requested relief would have "resulted in greater success in reaching the goal of the Agreement," but ultimately determined that the requested relief was beyond the scope of the agreement and thus declined to mandate the requested relief.[11]

*The Pike Project Agreement and the decision of the arbitrator may be helpful to other advocates because they construe terms that are key to the operation of Section 3.*

## Implications for Other Section 3 Advocacy

The Pike Project Agreement and the decision of the arbitrator may be helpful to other advocates because they construe two terms that are key to the operation of Section 3: "best efforts" and "to the greatest extent feasible." Section 3 obligates public housing agencies to use "best efforts" to give low- and very-low income persons training and employment opportunities and to award contracts to Section 3 businesses.[12] The agreement uses the term "best efforts" in the context of the city's obligation to obtain workforce projections and to encourage contractors to hire low-income residents and hire Section 3 businesses. The other key Section 3 term is "to the greatest extent feasible." The Section 3 statute requires all recipients of federal financial assistance for housing and community development programs to ensure that employment and other economic opportunities flowing from those funds are "to the greatest extent feasible directed to low and moderate income persons."[13] Again, the agreement incorporates the term "greatest extent feasible" and obligates the city to encourage its contractors to hire low- and very-low income residents of Long Beach and Signal Hill and to contract with Section 3 businesses "to the greatest extent feasible."[14]

These terms are discussed and applied in specific factual contexts which are common to other situations in which Section 3 applies. The arbitrator refers to case law to define "'best efforts' as diligence in the performance of contract terms and more exacting than the usual contractual duty of good faith . . . . 'Best efforts' also requires

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[5]The parties also agreed that "for purposes of the goals set forth in 24 CFR part 135.20 and for these projects only, the goal shall be for Section 3 residents to comprise at least 30 percent of the new hire hours worked on each project." Pike Project Agreement, *supra* note 3, at 5. In contrast, 24 CFR part 135.20 only requires that Section 3 residents comprise 30% of all new hires. Requiring that Section 3 residents comprise 30% of all the hours worked by new hires is beneficial because it helps to ensure that the work performed by Section 3 residents is for the length of the project, and it is easier to monitor and avoids abuses of hiring all Section 3 residents on the last days of the project.

[6]Pike Project Agreement, *supra* note 3, at 1.

[7]*Id.* at 2.

[8]*Id.* at 1.

[9]*Id.* at 4.

[10]*Id.* at 1.

[11]*Id.* at 3.

[12]12 U.S.C.A § 1701u(c) and (d) (West 2001).

[13]*Id.* at § 1701u(b).

[14]Pike Project Agreement, *supra* note 3, at 2.

using all reasonable methods and requires the party owing the duty to take all action and do all things necessary to consummate the transaction contemplated by the agreement."[15] The arbitrator relies upon *Ramirez, Leal & Co. v. City Demonstration Agency, et. al.*[16] to define the phrase "greatest extent feasible" to mean that "a municipality was 'obligated to take every affirmative action they could properly take . . . .'"[17]

Applying these definitions, the arbitrator reviewed the record and determined that there was evidence to support the committee's findings that the city failed to use "best efforts" to obtain workforce projections from the contractors. The committee concluded that, without these projections, the city was hampered in its "ability to plan, accurately advertise and properly tailor its training programs."[18] The city knew that it was not getting the information that it needed and was required to obtain, but waited nine months before it changed its reporting form and before meeting with the contractors for the purpose of obtaining the required information. The failure to follow through with the contractors also violated another provision of the agreement which required the city to encourage contractors to hire low-income residents to the "greatest extent feasible." The arbitrator concluded that the city's lack of follow-through with contractors and failure to take meaningful steps to ensure compliance provided substantial evidence to support the committee's findings that the city violated the agreement.[19] ■

[15]Pike Project Agreement, *supra* note 3, at 5 (citations omitted).
[16]549 F.2d 97, 105 (9th Cir. 1976).
[17]Pike Project Agreement, *supra* note 3, at 7.
[18]*Id.* at 5.
[19]*Id.* at 7. The arbitrator also upheld the committee's findings that the city's efforts to involve local, low-income businesses was insufficient as the city did not comply with the appendix to 24 C.F.R. part 135, which was incorporated by reference into the agreement. The city similarly did not connect these businesses with the Pike Project or use "best efforts" to facilitate their bidding on the project. *Id.* at 10-11.

# Recent Cases

The following are brief summaries of recently reported federal and state 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.

## Eviction — Late Payment of Rent; Project-Based Section 8

*Showe Mgmt. Corp. v. Hazelback*, 2006 WL 1976760 (Ohio App. July 17, 2006). The Ohio Court of Appeals affirmed a judgment for possession in favor of a landlord in an action for non-payment of rent. The tenant, apparently assisted under an unspecified Project-Based Section 8 program, tendered her rent plus late fee eight days after the end of the payment grace period—a total of $36.00. The court ruled, *inter alia*, that the landlord's refusal of the late payment was valid under the terms of lease. The court also rejected the tenant's due process and inequitable forfeiture arguments.

## Fair Housing — Affirmative Duties; Fair Housing — Exclusionary Zoning

*ACORN v. County of Nassau*, 2006 WL 2053732 (E.D.N.Y. July 21, 2006). The United States District Court for the Eastern District of New York denied a motion to dismiss for lack of standing and lack of subject matter jurisdiction an action challenging zoning practices alleged to exclude African-American and Latino residents, in particular practices that prevented the development of affordable housing. Plaintiffs asserted claims under the Fair Housing Act, 42 U.S.C. §§ 3601, 3608 *et seq*., the Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982, and 1983, the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*., and the Equal Protection Clause of the Fourteenth Amendment.

## Fair Housing — Generally; Insurance — Duty to Defend

*Washington v. Krahn*, 2006 WL 1938077 (E.D. Wis. July 1, 2006). The United States District Court for the Eastern District of Wisconsin found that an insurer had a duty to defend apartment building managers in a housing discrimination suit brought by housing testers and a fair

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

housing organization. The court followed *Hamlin, Inc. v. Hartford Accident & Indem. Co.*, 86 F.3d 93, 94 (7th Cir.1996) and various state court decisions to construe the complaint liberally in favor of the insured building managers.

### Landlord-Tenant Law — Successor Tenancy

*Maglies v. Estate of Guy*, 2006 WL 1932350 (N.J. Super. App. Div. July 14, 2006). The Appellate Division of the Superior Court of New Jersey ruled that the daughter of a deceased Housing Choice Voucher tenant had no right to succeed in her mother's tenancy where there had been no assignment of the leasehold. ■

# 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 July of 2006. For the most part, the summaries are taken directly from the summary of the regulation in the Federal Register or each notice's introductory paragraphs.

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

## HUD Federal Register Notices

**71 Fed. Reg. 38,214 (July 5, 2006)**
**Notice of Regulatory Waiver Request Granted for the First Quarter of Calendar Year 2006**

***Summary*:** Section 106 of the Department of Housing and Urban Development Reform Act of 1989 (the HUD Reform Act) requires HUD to publish quarterly *Federal Register* notices of all regulatory waivers that HUD has approved. Each notice covers the quarterly period since the previous *Federal Register* notice. The purpose of this notice is to comply with the requirements of Section 106 of the HUD Reform Act. This notice contains a list of regulatory waivers granted by HUD during the period beginning on January 1, 2006, and ending on March 31, 2006.

**71 Fed. Reg. 39,333 (July 12, 2006)**
**Announcement of Funding Award—FY 2002 Lead-Based Paint Hazard Control Grant Program**

***Summary*:** In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of a funding decision made by the department in a competition for funding under the Office of Healthy Homes and Lead Based Paint Hazard Control Grant Program Notice of Funding Availability. This announcement contains the name and address of the award recipients and the amounts of award.

**71 Fed. Reg. 40,532 (July 17, 2006)**
**Public Housing Operating Subsidy—Stop Loss and Appeals**

***Summary*:** HUD has submitted a proposed information collection to the Office of Management and Budget for review, as required by the Paperwork Reduction Act. HUD is soliciting public comments on the proposal, which relates to "stop loss" packages and appeals. To stop the phase-in of the reduction in the amount of subsidy a PHA receives under the new operating fund formula, PHAs submit a "stop loss" package to HUD demonstrating conversion to asset management. To appeal the amount of subsidy on any one of the permitted bases of appeal, PHAs submit an appeal request to HUD.

***Comments Due Date:*** August 16, 2006.

**71 Fed. Reg. 40,534 (July 17, 2006)**
**Public Housing Assessment System; Financial Condition Scoring Process**

***Summary*:** This final notice provides information to public housing agencies (PHAs) and members of the public about HUD's process for issuing scores under the Financial Condition Indicator of the Public Housing Assessment System (PHAS). This notice includes revised threshold values and associated points/scores for the expense management component of the Financial Condition Indicator based on available data for PHAs with fiscal years ending March 31, 2004, June 30, 2004, September 30, 2004, and December 31, 2004. The data analyzed is based on generally accepted accounting principles information submitted by PHAs as part of the financial data schedule submission.

**71 Fed. Reg. 40,634 (July 17, 2006)**
**Statutory Prohibition on Use of HUD Fiscal Year (FY) 2006 Funds for Eminent Domain-Related Activities**

***Summary:*** The statute appropriating FY 2006 funds for HUD and certain other executive departments and agencies includes an administrative provision that prohibits

[1] http://www.access.gpo.gov/su_docs.
[2] http://www.hudclips.org/cgi/index.cgi.
[3] To order notices and handbooks from HUD, call (800) 767-7468 or fax (202) 708-2313.
[4] http://www.rdinit.usda.gov/regs.

the use of FY 2006 funds to support any federal, state or local project that seeks to use the power of eminent domain, unless that power is sought for certain public uses. With the commencement of allocation of FY 2006 funds under HUD's formula-funded programs such as the Community Development Block Grant program and publication of HUD's FY 2006 Super Notice of Funding Availability on March 8, 2006, this notice advises that this provision may be applicable to certain activities funded by FY 2006 HUD appropriations.

**71 Fed. Reg. 40,732 (July 18, 2006)**
**Multifamily Housing Mortgage and Housing Assistance Restructuring Program (Mark to Market)**

***Summary*:** HUD has submitted a proposed information collection to the Office of Management and Budget for review. HUD is soliciting public comments on the subject proposal. Information to analyze and reduce rents to market and restructure mortgages on multifamily properties with FHA insurance and Section 8 project-based assistance whose Section 8 rents exceed market rents. The program reduces Section 8 rents to market and restructures debt as necessary.

***Comments Due Date:*** August 17, 2006.

**71 Fed. Reg. 41,039 (July 19, 2006)**
**Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request; Implementation of the Violence Against Women (VAWA) and Justice Department Reauthorization Act of 2005**

***Summary:*** HUD has submitted a proposed information collection to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. HUD is soliciting public comments on the proposal, which relates to a new certification that will be used by PHAs to request that an individual certify via a HUD-approved certification form that the individual is a victim of domestic violence, dating violence, or stalking, and that the incident or incidents in questions are bona fide incidents of actual or threatened abuse. The certification must include the name of the perpetrator and the individual must provide the certification within fourteen business days after the PHA requests the certification. If the individual does not provide the certification within fourteen business days after the PHA has requested the certification in writing, nothing prohibits any PHA from evicting any tenant or terminating a lease. A PHA may, at its discretion, extend the fourteen-day deadline. A HUD-approved certification is required by VAWA and signed by President Bush on January 5, 2006, and effective upon enactment.

***Comments Due Date:*** August 2, 2006.

**71 Fed. Reg. 41,040 (July 19, 2006)**
**"Logic Model" Grant Performance Report Standard**

***Summary:*** The proposed information collection requirement described in the proposal has been submitted to the Office of Management and Budget for review, as required by the Paperwork Reduction Act. The department is soliciting public comments on the subject proposal. Applicants of HUD Federal Financial Assistance are required to indicate intended results and impacts. Grant recipients report against their baseline performance standards. This process standardizes grants progress reporting requirements and promotes greater emphasis on performance and results in grant programs.

***Comments Due Date:*** August 18, 2006.

**71 Fed. Reg. 42,111 (July 25, 2006)**
**Announcement of Funding Awards for the Indian Community Development Block Grant Program for Fiscal Year 2005**

***Summary:*** This announcement notifies the public of funding decisions made by HUD in a competition for funding under the Fiscal Year 2005 Notice of Funding Availability for the Indian Community Development Block Grant (ICDBG) Program. This announcement contains the consolidated names and addresses of this year's award recipients under the ICDBG.

**71 Fed. Reg. 42,996 (July 28, 2006)**
**Implementation Guidance for Section 901 of the Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006**

***Summary*:** This notice provides guidance to HUD field offices and PHAs located within the most heavily impacted areas of Louisiana and Mississippi that are subject to a declaration by the President of a major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act in connection with Hurricanes Katrina or Rita on how to implement Section 901 of the Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Section 901). This supplemental appropriations act authorizes public housing agencies to combine assistance provided under sections 9(d) and (e) of the United States Housing Act of 1937 (Act) and assistance provided under Section 8(o) of the Act, for the purpose of facilitating the prompt, flexible, and efficient use of funds provided under these sections of the Act to assist families who were receiving housing assistance under the Act immediately prior to Hurricane Katrina or Rita and were displaced from their housing by the hurricanes.

***Effective Date:*** July 28, 2006.

**71 Fed. Reg. 43,002 (July 28, 2006)**
**List of HUD Programs Subject to Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973**

***Summary*:** This notice announces a list of HUD programs that are subject to the nondiscrimination provisions in Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973, as amended.

**71 Fed. Reg. 43,205 (July 31, 2006)**
**Notice of Proposed Information Collection: Comment Request; Affirmative Fair Housing Marketing (AFHM) Plan**

***Summary*:** HUD has submitted a proposed information collection to the Office of Management and Budget for review, as required by the Paperwork Reduction Act. HUD is soliciting public comments on the proposal, which relates to the revision of Form HUD-935.2, Affirmative Fair Housing Plan.

***Comments Due Date:*** September 29, 2006.

## HUD PIH Notices

**Notice PIH 2006-25 (HA) (July 3, 2006)**
**Extension—Housing Choice Voucher Portability Procedures and Corrective Actions Revision of Family Portability Information, Form HUD-52665**

***Summary*:** This notice extends Notice PIH 2005-28, same subject, which will expire on July 31, 2006, for another year until July 31, 2007. Notice PIH 2005-28 extended Notice PIH 2004-12. Notice PIH 2004-12 provides guidance on public housing agency administrative responsibilities related to portability moves.

***Expires*:** July 31, 2007.

**Notice PIH 2006-27 (July 7, 2006)**
**Reinstatement—Homeless Initiative in Public Housing and Housing Choice Voucher Programs**

***Summary*:** This notice reinstates Notice PIH 2003-25 (HA), which expired October 3, 2004.

***Expires*:** July 31, 2007.

**Notice PIH 2006-29 (HA) (July 28, 2006)**
**Disaster Voucher Program (DVP) Supplemental Guidance: Voucher Program Fungibility Issues Associated with Combining Voucher and Public Housing Funding During Calendar Year 2006**

***Summary*:** This DVP supplemental guidance document provides additional guidance on fungibility issues specific to the voucher program.

***Expires*:** July 31, 2007.

## RHS Federal Register Notices

**71 Fed. Reg. 38,358 (July 21, 2006)**
**Notice of Funding for the Rural Housing Demonstration Program**

***Summary*:** The Rural Housing Service announces the availability of housing funds for Fiscal Year (FY) 2006 for the Rural Housing Demonstration Program. For FY 2006, USDA Rural Development has set aside $1 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), USDA Rural Development may provide loans to low-income borrowers to purchase innovative housing units and systems that do not meet existing published standards, rules, regulations or policies. The intended effect is to increase the availability of affordable rural housing for low-income families through innovative designs and systems.

***Effective Date:*** July 6, 2006.

**71 Fed. Reg. 39,283 (July 21, 2006)**
**Rural Housing Service Notice of Funds Availability (NOFA) Inviting Applications for the Rural Community Development Initiative (RCDI)**

***Summary*:** This notice announces the availability of approximately $6 million of grant funds for the RCDI program through the Rural Housing Service. Applicants must provide matching funds in an amount at least equal to the federal grant. These grants will be made to qualified intermediary organizations that will provide financial and technical assistance to recipients to develop their capacity and ability to undertake projects related to housing, community facilities, or community and economic development. This notice lists the information needed to submit an application for these funds.

***Dates*:** October 10, 2006.

## RD Administrative Notices

**RD AN No. 4199 (1980-D) (July 21, 2006)**
**Single Family Housing Guaranteed Loan Program Section 8 Homeownership Vouchers**

***Summary:*** This Administrative Notice (AN) clarifies how Section 8 Homeownership Vouchers may be used for qualifying applicants under the Single Family Housing Guaranteed Loan Program. It explains how the Section 8 voucher assistance can used to maximize the applicant's capacity to repay the mortgage loan.

***Expiration Date:*** July 31, 2007

**RD AN No. 4200 (1980-D) (July 26, 2006)**
**Eligibility of Non-U.S. Citizens for Single Family Housing Guaranteed Loan Program Assistance and the Systematic Alien Verification for Entitlements Program**

***Summary:*** This AN furnishes guidance concerning access to the Systematic Alien Verification for Entitlements (SAVE) Program database maintained by the Department of Homeland Security Citizenship and Immigration Services. SAVE may assist in determining whether non-U.S. citizens are qualified to receive federal assistance. This AN also describes what documentation non-U.S. citizens must supply when SAVE does not achieve a determination, in order to be considered for a loan note guarantee under the Single Family Housing Guaranteed Loan Program. It also established the categories of non-citizens that are eligible to participate in the guaranteed loan program, including Native Americans crossing the border from Canada under the Jay Treaty. (The AN does not discuss or provide for any mechanism for appealing adverse eligibility decisions).

***Expiration Date:*** July 31, 2007

## RD Administrative Unnumbered Letter

**Compliance with the Improper Payments Information Act Section 521 — Rental Assistance Program (July 11, 2006)**

***Summary:*** The Section 521 Rental Assistance (RA) Program continues to be listed as a high risk assessable program under the Improper Payments Information Act (IPIA) due to the size of its outlays and error rate. Compliance with IPIA will be on-going, and an audit will be required annually until the Agency achieves an error rate of less than 2.5% of the program outlays. The results from the last year's audit showed the error rate of gross dollars improperly calculated against the Fiscal Year 2005 program outlay to be 3.19%. Therefore, another audit is required this year. Due to delays in conducting this year's audit, we will be reviewing all payments made between October 2005 and May 2006. The attachments for this year's audit includes a random list of RA payments made in each state with information for each payment provided from the Multi-Family Information System to assist in completing the review. Due to the tight timeline, your staff should request that the tenant files be sent to your office for review. Agency employees must conduct this review. There will be no substitution of the selected payment. If the borrower/management agent is unable to submit the file, then the payment will be considered as being unauthorized.

***Expiration Date:*** July 31, 2007 ■

**HOUSING JUSTICE NETWORK NATIONAL MEETING**

# Advancing Housing Justice: Event Basics

## Fees

Fees include materials, lunch each day, and refreshments.

| | BY 09/20 | AFTER 09/20 | SPONSORED CLIENT* |
|---|---|---|---|
| Training only: Oct 21 | $ 185 | $ 235 | $ 185 |
| Meeting only: Oct 22-23 | $ 395 | $ 495 | $ 295 |
| Meeting + Training | $ 525 | $ 670 | $ 455 |

*This rate applies to clients whose registrations are paid for by a legal services organization.

CANCELLATION/REFUND POLICY

To qualify for a refund less a $50 handling fee, a written cancellation must be received by NHLP no later than October 6, 2006. No refunds will be given after that date.

## Registration

Space is limited, so register early! The deadline for early registration is September 20, 2006. Mailed forms must be postmarked by that date; faxed forms must be received by that date. Forward registration with payment to:

FAX (CREDIT CARD ONLY)
510.451.2300

MAIL
NHLP
Attn: Registration
614 Grand Avenue, Suite 320
Oakland, CA 94610

## Site Information

Washington Court Hotel
525 New Jersey Avenue, NW, Washington, D.C. 20001
800.321.3010 or 202.268.2100

*Washington Court Hotel, located in the Capitol Hill neighborhood, is a five-minute walk to the U.S. Capitol Building and the National Mall and is just two blocks away from an array of shopping, dining and entertainment options. Washington Court Hotel is a union hotel.*

Washington Court Hotel is the site for the training, meeting and guest accommodations. Please call the hotel directly to make reservations. Mention that you are attending the Housing Justice Network conference to receive a conference room rate of $155. Rate is single/double occupancy plus tax. **To qualify for this rate, reservations must be made by September 20, 2006.**

## Questions

Contact Amy Siemens at 510.251.9400 x111 or asiemens@nhlp.org.

**HOUSING JUSTICE NETWORK NATIONAL MEETING**

# Advancing Housing Justice: Registration

**PLEASE PRINT CLEARLY**

## 1 PERSONAL INFORMATION

NAME _____ NAME ON BADGE (IF DIFFERENT) _____

ORGANIZATION _____

MAILING ADDRESS _____

CITY _____ STATE _____ ZIP _____

PHONE _____ FAX _____

EMAIL _____ ORGANIZATION'S WEB SITE _____

Housing Experience: [ ] years. What issues have you worked on? _____

_____

○ I am an HJN member. ○ I would like to become an HJN member.
Please send me an application form via ○ email ○ fax

Do you require special arrangements? (Please attach a description)
○ access ○ visual ○ audio ○ vegetarian ○ other dietary

## 2 FEES

| | BEFORE 09/20 | AFTER 09/20 | CLIENT |
|---|---|---|---|
| ○ Federal Housing Program: One Day Training | $ 185 | $ 235 | $ 185 |
| ○ Housing Justice Network Meeting only | $ 395 | $ 495 | $ 295 |
| ○ One Day Training + Meeting | $ 525 | $ 670 | $ 455 |

## 3 PAYMENT

**Payment must be included at the time of registration. Registrations will not be processed or confirmed until full payment has been received.**

○ This payment covers more than one registration. I have attached a registration form for each paid attendee.

○ I've enclosed a check for [$ ] made payable to National Housing Law Project

○ Please bill my ○ Mastercard ○ Visa for [$ ]

CARD NUMBER _____ EXP. DATE (MONTH/YEAR) _____

NAME OF CARDHOLDER _____ AUTHORIZED SIGNATURE _____

BILLING ADDRESS (REQUIRED FOR CREDIT CARD ORDERS) _____

CITY _____ STATE _____ ZIP _____

# NATIONAL HOUSING LAW PROJECT | **PUBLICATION ORDER FORM**

On Sale to Oct. 31

| PUBLICATION | UNIT PRICE | QTY. | TOTAL PRICE |
|---|---|---|---|
| **Combined Set: HUD Housing Programs: Tenants' Rights** (3d ed. 2004) and new 2006-2007 Supplement | $ 410 | | |
| **Housing Law Bulletin** (annual subscription, 10 issues) | $ 175 | | |
| **Welfare and Housing—How Can the Housing Assistance Programs Help Welfare Recipients?** (2000) | $ 5 | | |
| **Housing for All: Keeping the Promise** (1995) | $ 5 | | |
| **The Family Self-Sufficiency Program: An Advocate's Guide** (1994) | $ 10 | | |
| **A Passage from Poverty: Self-Sufficiency Policies and the Housing Programs** (1991) | $ 10 | | |

SUBTOTAL (All prices include shipping)

CALIFORNIA SALES TAX (Excludes Bulletin | 8.75% in Alameda County | 8.25% in rest of CA)

**TOTAL**

BILLING INFORMATION

All orders must be prepaid. Please do not send cash.

☐ I've enclosed a check or money order made payable to **National Housing Law Project**

☐ Please bill my ☐ **MasterCard** ☐ **Visa**

card number / exp date

name on card

organization

street address

city / state / zip

signature

SHIPPING INFORMATION

name

organization

street address

city / state / zip

telephone / fax

email

MAIL TO

National Housing Law Project
Publications Clerk
614 Grand Avenue, Suite 320
Oakland, CA 94510

QUESTIONS

For information on first-class mailing and large quantity discounts, call 510.251.9400 x108


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

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