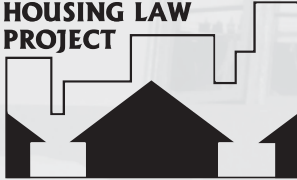


NATIONAL
HOUSING LAW
PROJECT



advancing housing justice

Housing Law Bulletin

Volume 38 • March 2008

Published by the National Housing Law Project



HUD Intends to Eviscerate PHA Planning Process

—see page 68

Congress Considers Preservation Agenda

—see page 72

Job Announcement: NHLP EXECUTIVE DIRECTOR

The National Housing Law Project, renowned for its landmark legal advocacy on behalf of low-income tenants and homeowners, especially those under the federally assisted housing programs, seeks an Executive Director to lead our organization and sustain our national leadership in employing the power of the law to address critical housing problems of low-income persons.

National Housing Law Project—Established in 1968, NHLP’s mission is to advance housing justice for low-income individuals. Primarily focusing upon the federally assisted housing programs, its core activities include legal and technical assistance, policy advocacy and education, litigation, and research. NHLP authors an array of publications, including the authoritative legal manual *HUD Housing Programs: Tenants’ Rights*. NHLP is headquartered in Oakland, California, with a branch office in the District of Columbia. NHLP’s nine-person staff includes six attorneys. In 2007, NHLP was recognized for its distinguished accomplishments by the John D. and Catherine T. MacArthur Foundation when it was selected as one of eight organizations worldwide for the MacArthur Foundation’s “Creative and Effective Institutions Award.”

The Position—NHLP seeks an experienced leader who has demonstrated management and fundraising experience and a commitment to promoting access to justice for low-income people. The Executive Director will work closely with NHLP’s Board of Directors, a highly skilled and committed staff, as well as a broader community of advocates, funders, and individual donors. The Executive Director is the primary spokesperson for the organization, oversees its staff, and is responsible for strategic planning, fundraising, and daily operations. The Executive Director also has a limited opportunity to engage in substantive advocacy.

The ideal candidate will have:

- an established track record with foundation and private donor fundraising;
- financial and personnel management experience;
- experience working collaboratively with a board, staff, and allied organizations;
- strategic planning abilities;
- a demonstrated commitment to social justice and the mission of NHLP;
- excellent oral and written communications skills;
- a willingness and capacity to travel;
- been admitted to the bar in at least one state.

Salary—Salary will be competitive and commensurate with experience. Generous benefits package.

Application Process—Applications will be accepted and considered until the position is filled. Applicants are urged to submit their applications promptly. Candidates should submit:

- a cover letter expressing in detail why they are interested in the position, what they can contribute to the future of the organization, and salary requirements;
- a current resume that includes salary history;
- two writing samples: preferably a legal memorandum and either a fundraising proposal or a memo addressing an important management challenge;
- the names and contact information for three references.

Applications may be submitted electronically to edsearch@nhlp.org or by mail to NHLP Search Committee at 614 Grand Ave., Suite 320, Oakland, CA 94610. Receipt of applications will be acknowledged. We would appreciate no phone calls.

NHLP is an equal opportunity and affirmative action employer that does not discriminate on the basis of race, color, national origin, ethnic background, religion, gender, sexual orientation or disability. Applications are particularly encouraged from people of color, women and others whose backgrounds may contribute to more effective representation of low-income persons.

Housing Law Bulletin

Volume 38 • March 2008

Published by the National Housing Law Project
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

Table of Contents

	Page
Rule Exempting HUD from Eviction Procedures "Patently Unconstitutional"	65
HUD Is Poised to Drastically Alter the PHA Plan Process.....	68
HUD Finally Recognizes Right to Remain for Over-Housed Enhanced Voucher Holders.....	71
Congress Considers Overdue Preservation Agenda	72
Recent Cases	75
Recent Housing-Related Regulations and Notices...	78
Announcements	
Economic Stimulus Payments Should Be Excludable as Income for Federal Housing Tenants.....	67
Publication List/Order Form	81



Cover: Mural on the side of Ping Yuen, a 194-unit public housing development owned and operated by the San Francisco Housing Authority.

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

A one-year subscription to the *Bulletin* is \$175.

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

Rule Exempting HUD from Eviction Procedures "Patently Unconstitutional"

A federal district court has ruled that a regulation allowing the Department of Housing and Urban Development (HUD) to evict tenants in buildings designated for rehabilitation without providing a reason for the eviction or an opportunity to challenge the action is unconstitutional. In *Linares v. Jackson*,¹ the court held that if HUD decides that a property it owns is in need of substantial rehabilitation, HUD must inform tenants of this decision and afford them a meaningful opportunity to be heard before proceeding with evictions.

Background

The plaintiffs, represented by South Brooklyn Legal Services, were tenants in HUD-owned multifamily buildings in New York City.² HUD acquired the buildings after the mortgage loans that HUD had guaranteed under Section 203(k) of the National Housing Act were foreclosed.³ HUD had entered into a memorandum of understanding (MOU) with New York City's Department of Housing Preservation and Development (HPD) that governed the disposition of more than 500 Section 203(k) properties in New York City, which HUD had either acquired or anticipated acquiring as a result of failed mortgage loans.⁴ The MOU, dated January 31, 2002, stated that the circumstances surrounding HUD's acquisition of the properties were "unique," many of the properties were "deteriorated," and that the rehabilitation of the properties would assist the City of New York with its economic recovery.⁵

The MOU provided that HPD would recommend nonprofit and for-profit developers to HUD, and that HUD would then sell the properties to these developers and provide up-front grants for their rehabilitation.⁶ The properties would become one of three types of housing: (1) affordable rental housing; (2) housing for owner-occupants, without income limitations, with profits above a predesignated amount to be split between the developer and HUD or HPD; and (3) housing for owner-occupants whose incomes do not exceed 165% of the area's median income.⁷

HUD served three tenants in these properties with notices to vacate that did not cite any reason why the

¹531 F. Supp. 2d 460 (E.D.N.Y. 2008).

²*Id.* at 461.

³*Id.*

⁴*Id.* at 462.

⁵*Id.*

⁶*Id.*

⁷*Id.*

tenancies were being terminated.⁸ In fact, two of the tenants received notices simply stating that “the Landlord elect[ed] to terminate [their] tenancy.”⁹ The tenants filed a complaint and motion for preliminary injunction to prevent HUD from proceeding with the “no cause” evictions.¹⁰ HUD’s opposition brief stated that it had issued the termination notices because it had determined that the properties needed to be rehabilitated so that they would be more attractive for sale to developers.¹¹

The district court found it “difficult to fathom” why HUD took the position that “it can take poor peoples’ homes without telling them why and without affording them a meaningful opportunity to be heard.”

Applicable Law

Subpart A of 24 C.F.R. § 247 sets forth the procedures required for terminating tenancies in multifamily projects. The procedures require that the termination notice “state the reasons for the landlord’s action with enough specificity so as to enable the tenant to prepare a defense.”¹² Subpart B, by incorporation, makes these procedures generally applicable to HUD-owned projects.¹³ However, 24 C.F.R. § 247.10 provides that these eviction procedures do not apply where “HUD terminates the occupancy of a tenant as a direct result of a determination by HUD to substantially rehabilitate or demolish the project.”¹⁴ The regulation further provides that nothing in § 247 should be construed to “affect in any way the right of HUD to exercise its full statutory authority and discretion to dispose of property acquired pursuant to the National Housing Act.”¹⁵

Regulation Ruled Unconstitutional

HUD moved to dismiss the tenants’ complaint, claiming that the dispute was not cognizable because HUD was acting within its unfettered discretion in issuing the notices to vacate.¹⁶ Specifically, HUD argued that under 24 C.F.R. § 247.10, it does not have to provide notice of its reasons for terminating a tenancy where the termination is the result of a decision to substantially rehabilitate a

property.¹⁷ HUD also argued that in state court eviction proceedings, tenants could not challenge HUD’s decision that their homes needed substantial rehabilitation because Congress had committed that decision to the agency’s discretion.¹⁸

At the close of oral argument, the parties agreed that HUD’s motion to dismiss should be converted into a motion for summary judgment because the constitutionality of 24 C.F.R. § 247.10 was a pure question of law.¹⁹ The court framed the issue as whether HUD had violated due process by refusing to provide notice and an opportunity to be heard before initiating eviction proceedings against tenants living in buildings that HUD had determined needed substantial rehabilitation.

The court emphasized that HUD had enacted the notice provisions of 24 C.F.R. § 247²⁰ to comply with the increasing number of judicial opinions finding that occupancy in subsidized housing is in the nature of a welfare entitlement, and tenants in these units are entitled to basic substantive and procedural protections.²¹ The court then cited numerous decisions establishing that the due process clause applies to termination of tenancies in subsidized housing projects.²² Citing the Second Circuit’s 1974 decision in *Caramico v. HUD*,²³ the district court noted that tenants in FHA-insured properties have a due process right to participate in FHA decisions as to whether buildings must be delivered unoccupied before mortgagees can recover on their mortgage insurance.²⁴ The *Caramico* court concluded that the tenants had a right to be heard on whether their housing was fit for continued habitation and whether rehabilitation would require the property to be vacated.²⁵

Given this line of authority, the district court found it “difficult to fathom” why HUD took the position that “by determining that premises it owns are in need of substantial rehabilitation, it can take poor peoples’ homes without telling them why and without affording them a meaningful opportunity to be heard.”²⁶ The court therefore granted the tenants partial summary judgment, concluding that 24 C.F.R. § 247.10 is “patently unconstitutional.”²⁷

¹⁷*Id.*

¹⁸*Id.* (HUD cited its general powers under the National Housing Act, 12 U.S.C. § 1710(g)).

¹⁹*Id.*

²⁰The regulations were originally enacted in 1976 as Part 450, which was similar in all respects except that it did not provide for criminal activity and abuse of alcohol as grounds for eviction.

²¹*Id.* at 468 (citing *Evictions from Certain Subsidized and HUD-Owned Projects*, 41 Fed. Reg. 43,330, 43,332 (Sept. 30, 1976)).

²²*Id.* at 469 (citing *Caulder v. Durham Hous. Auth.*, 433 F.2d 998, 1003 (4th Cir. 1970); *Escalera v. N.Y. City Hous. Auth.*, 425 F.2d 853, 861 (2d Cir. 1970); *Lopez v. Henry Phipps Plaza S., Inc.*, 498 F.2d 937, 943 (2d Cir. 1974); *Caramico v. HUD*, 509 F.2d 694, 701 (2d Cir. 1974)).

²³509 F.2d 694 (2d Cir. 1974).

²⁴*Linares*, 531 F. Supp. 2d at 470.

²⁵*Id.* (citing *Caramico*, 509 F.2d at 701).

²⁶*Id.*

²⁷*Id.*

⁸*Id.* at 461. One of the tenants was given twenty-three days to move out; the other two were given thirty-three days.

⁹*Id.*

¹⁰*Id.* at 462.

¹¹*Id.* at 463.

¹²24 C.F.R. § 247.4 (2007).

¹³*Id.* § 247.9.

¹⁴*Id.* § 247.10.

¹⁵*Id.*

¹⁶*Linares*, 531 F. Supp. 2d at 464.

What Process Is Due?

The court found that it was premature to determine the type of notice and hearing that must be extended to the tenants, because the parties had not yet had an opportunity to develop the record on this issue.²⁸ Setting a hearing on this issue for April 8, 2008, the court noted several factors that it would consider in determining what process is due. First, the district court observed that “it seems obvious” that the opportunity to be heard must precede the initiation of eviction proceedings.²⁹ The court reasoned that there was no immediate threat to health or safety warranting summary removal, and that HUD had opined that a tenant would not be permitted to challenge a “substantial rehabilitation” determination during New York’s summary eviction proceedings.³⁰

Second, the court stated that the notice “should make it clear why the tenancy is being terminated, as well as the right and process to challenge that decision.”³¹ The court noted that an evidentiary hearing may not be warranted, but that there must be a process to ensure that substantial rehabilitation is not used “as a pretext to evict a tenant from a perfectly decent home in order to sell it to a private developer.”³²

Finally, the court noted that assurances from HUD that the tenants would not become homeless, either because the tenants would not be displaced during rehabilitation or because HUD would arrange substitute housing, would bear on the court’s analysis in terms of the consequences of the deprivations and the private interest at stake.³³

Conclusion

The court’s ruling is significant given the number of Section 203(k) properties in New York City, as well as nationwide, that HUD has either acquired or is in the process of acquiring through foreclosure, as well as the number of tenants in these properties who have received “no cause” termination notices.³⁴ The decision ensures that these tenants can no longer be removed from their homes simply because HUD “elect[ed] to terminate [their] tenancy,”³⁵ and that some form of process will be available for challenging HUD’s substantial rehabilitation determinations. HUD’s motion for reconsideration of the decision is currently pending before the court. ■

²⁸*Id.* at 471.

²⁹*Id.*

³⁰*Id.*

³¹*Id.*

³²*Id.*

³³*Id.* at 472.

³⁴*See id.*

³⁵*Id.* at 461.

Economic Stimulus Payments Should Be Excludable as Income for Federal Housing Tenants

Starting in early May, the Treasury Department will begin sending economic stimulus payments (“tax rebates”) to more than 130 million households. To receive a payment, taxpayers must have a valid Social Security number, \$3,000 of income, and have filed a 2007 federal tax return. No other application is necessary. Those eligible will receive up to \$600 (\$1,200 for married couples), and parents will receive an additional \$300 for each eligible child younger than 17. However, millions of retirees, disabled veterans and low-wage workers who usually are exempt from filing a tax return must do so this year in order to receive a stimulus payment.

Although HUD had not yet issued any formal guidance on the topic as of April 1, 2008, public housing authorities, owners and tenants should be aware that the statute itself (The Economic Stimulus Act of 2008), Pub. L. No. 110-185, sec. 101(d) contains an income disregard for other federal programs. Any credit or refund made to an individual as a result of the stimulus cannot be considered as a resource during the month of receipt and for the following two months for purposes of determining the eligibility for, or amount of, benefits or assistance, under any federal program, or any state or local program financed in part with federal funds. This includes all of the rental housing programs funded and regulated by the Department of Housing and Urban Development or the Rural Development agency of the Department of Agriculture. (On February 20, HUD’s Office of Multifamily Housing did issue an announcement of the rebates’ exclusion from tenants’ income on its Rental Housing Integrity Improvement Project (RHIIP) Listserv, Posting #88.)

The IRS FAQs (www.irs.gov/newsroom/article/0,,id=179181,00.html) also state that eligibility is not affected.

HUD Is Poised to Drastically Alter the PHA Plan Process

The Department of Housing and Urban Development (HUD) has taken action on several fronts to streamline the public housing authorities (PHA) plan process by revising and eviscerating the HUD required Template for the five-year and annual plans. As early as 2006, HUD announced that it wanted to streamline the regulations relating to annual plans.¹ More recently, in the context of asset management, HUD sought to streamline the PHA Plan process in the context of the Public Housing Administrative Reform Initiative. This article will review the steps that HUD is taking to modify the PHA plan process.

Background on the 5-year and Annual Plans

In 1998, Congress created the PHA five-year and annual plans in response to proposals to devolve the regulation of key elements of the public housing and voucher programs to local PHAs. Currently, any PHA that receives funds under the United States Housing Act must submit to HUD a five-year plan setting out both the agency's mission in serving low-income and very low-income families and the goals and objectives it will employ to meet those needs.² Any agency that receives money from HUD to manage a voucher program³ or operate PHA-owned public housing units⁴ must also submit, annually, a detailed description of its operations, programs, services and fiscal status.⁵

The purpose of the plan is to provide a framework for local accountability and a means by which public housing residents, participants in the tenant-based assistance program, and other members of the public may locate basic PHA policies, rules and requirements concerning the PHA's operations, programs and services.⁶

Local accountability is accomplished, in part, by the requirement that each PHA "establish one or more resident advisory boards" (RABs),⁷ which "shall assist and make recommendations regarding the development of the [plan.]"⁸

In addition, PHA "shall consider the recommendations of the resident advisory boards in preparing the final . . . plan, and shall include, in the . . . plan submitted to the Secretary . . . , a copy of the recommendations and a description of the manner in which the recommendations were addressed."⁹ Local accountability is further supported by the requirement that any significant amendment or modification of a plan may only be made at a public meeting of the PHA board or equivalent body, with subsequent approval by the Secretary of HUD.¹⁰

To implement the statute, the Secretary promulgated a template for the five-year and annual plans.¹¹ Later the Secretary issued a streamlined template for use by high-performing PHAs,¹² small PHAs¹³ and PHAs that only administer the voucher program.¹⁴ All other PHAs are required to fill out the standard template for the five-year and annual plans.¹⁵ A PHA's annual plan submission to HUD includes the completed applicable template together with several specified attachments. Additionally, the PHA must identify and/or create and make available a number of supporting documents. The current standard template contains specific sections in which the agency must address seventeen of the nineteen statutorily required plan elements.¹⁶ The template presents numerous prompts, options, and suggestions for possible policies and programs among which a PHA can choose and to which it can add. It also includes requirements for individualized descriptions, addenda and supplements. These suggested options and opportunities are designed to assist PHA staff in thinking creatively and thoroughly about the scope of, and potential for, their program and to address those policy determinations that Congress devolved to the PHAs. It is also intended to facilitate resident and community understanding of, and constructive involvement in, the plan creation and implementation process.

⁹*Id.*

¹⁰*Id.* § 1437c-1 (g).

¹¹The Templates are issued in accordance with the authority to "establish . . . requirements for [the] form of submission, and for the contents of such plans." 42 U.S.C.A. § 1437c-1(c)(1); *See also* PHA Plans Streamlined Annual Version (Form HUD-500750SA) (4/30/2003) at <http://www.hud.gov/offices/pih/pha/templates/pdf/50075-sa.pdf>.

¹²42 U.S.C. § 1437c-1(k)(A) (West Supp. 2007).

¹³*Id.* § 1437c-1(k)(B), PHAs with less than 250 public housing units that have not been designated as troubled.

¹⁴*Id.* § 1437c-1(k)(C).

¹⁵PHA Plans: 5 Year Plan for Fiscal Years 2005-2009: Annual Plan for Fiscal Year 20__ (Form HUD 50075) (03/2006) at <http://www.hud.gov/offices/pih/pha/templates/pdf/phaplans.pdf>.

¹⁶The original statute contained seventeen elements and an "other" category. Pub. L. No. 109-162, Tit. VI, § 603, 119 Stat. 3040 (2006) added a requirement that the five-year plan (codified at 42 U.S.C.A. § 1437c-1(a)(2)) and annual plans (codified at 42 U.S.C.A. § 1437c-1(d)(13)) include statements and descriptions of how the authority plans to and has addressed issues of domestic violence, making the total nineteen. *See* <http://www.hud.gov/offices/pih/pha/templates/pdf/phaplans.pdf>. HUD has issued notices for PHAs explaining what must be done to comply with the Violence Against Woman Act obligations and the requirement to provide information regarding pets, the two items not addressed in the current template.

¹*See e.g.*, Semi Annual Regulatory Agenda, 71 Fed. Reg. 22,734, 22,738 (April 24, 2006); Semi Annual Regulatory Agenda, 71 Fed. Reg. 73,386, 73,388 (Dec. 11, 2006); Semi Annual Regulatory Agenda, 72 Fed. Reg. 22,676 (April 30, 2007).

²42 U.S.C.A. § 1437c-1(a) (West Supp. 2007).

³*Id.* § 1437f(o) (West 2003 and West Supp. 2007).

⁴*Id.* § 1437g.

⁵*Id.* § 1437c-1(b).

⁶72 Fed. Reg. 70,878 (Dec. 13, 2007).

⁷42 U.S.C.A. § 1437c-1 (e)(1) (West Supp. 2007).

⁸*Id.* § 1437c-1 (e)(2).

While the templates are, at first glance, mostly check-off-the-box forms, they are actually detailed road-maps to a myriad of fascinating destinations which illuminate both the broad boulevards and the back alleys of the PHA's fiefdom. The standard template will, for instance, disclose both the total number of units of housing managed by the PHA,¹⁷ whether the PHA seeks criminal history information from local, state or federal sources, and whether it shares any of that information with landlords.¹⁸ In addition, the attachments to both the streamlined and standard template contain detailed information about points of interest along the way. The "Required Attachments" list contains such things as the "Capital Fund Program Annual Statement,"¹⁹ while the "List of Supporting Documents . . ." includes the Administrative Plan for the voucher program and the Admission and Continued Occupancy Plan (ACOP). Both the Administrative plan and the ACOP contain many details for the administration of public housing and the voucher programs.²⁰ The standard template annual plan is a treasure trove of information which rightly belongs in the public domain, not in the castle keep.

Community activists and tenant advocates have counseled RABs, other participant groups, individuals and local stake-holders in the use of the plan process to influence both the creation of PHA policy and its implementation and enforcement.²¹

Dramatic Changes Proposed by HUD

HUD is poised to revise the PHA five-year and annual plan templates to drastically reduce their scope and to inhibit access to required and relevant information.

On August 22, 2006, HUD published a notice in the Federal Register announcing that it intended to eliminate the existing template forms (HUD 50075 SA and HUD 50075 SF) and have only a revised form HUD 50075 that would be used by all PHAs. That form would only have been ten pages rather than the existing forty-two pages.²² The notice provided a sixty-day comment period.²³

¹⁷PHA Plans 5 Year Plan for Fiscal Years 2005-2009 Annual Plan for Fiscal Year 20__ at 2 (Form HUD 50075) (03/2006) at <http://www.hud.gov/offices/pih/pha/templates/pdf/phaplans.pdf>.

¹⁸*Id.* at 23.

¹⁹*Id.* at 8.

²⁰*Id.* at 9.

²¹The Center for Community Change published a widely circulated *Resident's Guide to the New Public Housing Authority Plans*, June 1999. Copies are still available electronically at NHLP (Contact Andretta Harris at (510) 251-9400 Ext. 3108).

²²Notice of Proposed Information Collection for Public Comment: Public Housing Agency Plans, 71 Fed. Reg. 48,934, 48,935 (August 22, 2006).

²³The Paperwork Reduction Act (44 U.S.C.A. § 3501 et seq.) and OMB rules create a two-step process in which the agency proposing a new, revised, or renewed information collection publishes a notice which allows the public sixty days to comment to the agency. After taking comments into account, the agency submits the proposed collection to OMB and publishes a second Federal Register notice inviting comment to OMB for a thirty-day period.

On May 7, 2007, another notice in the Federal Register announced that a proposed new plan template had been submitted to the Office of Management and Budget (OMB) "for emergency review and approval" and that comments to the new template could be submitted to HUD by May 14, 2007.²⁴ The newly proposed annual template was one and one-half pages long with three pages of instructions.²⁵ Effectively, the proposed template constituted little more than a notice of which sections of the PHA plan the authority had changed from the previous year. The National Housing Law Project (NHLP) submitted comments, pointing out, in part, that there was no emergency warranting expedited review and that the quality, utility and clarity of the information would suffer to the point of being virtually useless.

On May 16, 2007, OMB issued an action notice approving HUD's May 7, 2007, request without change "due to Agency discretion."²⁶ OMB stated therein that the previous time burden for completing the PHA plan template was 64,466 hours and that the burden under the proposed form would be 52,698 hours²⁷ (a reduction of 18.25%).

On August 15, 2007, another Federal Register notice announced that a proposed "revision" of HUD forms 50075 and 50077²⁸ would be submitted to OMB and that comments on the revision were due by October 15, 2007. The proposed revised template²⁹ evidenced small changes from the May 2007 proposal, several of which responded to specific comments from NHLP.³⁰ There was, however, no recognition in this revision of the need to withdraw the proposed one-and-a-half-page template.

NHLP, the National Low Income Housing Coalition and the Housing Task Force of the Consortium for Citizens with Disabilities (CCD) all submitted comments stressing that the evisceration of the standard annual template would thwart congressional intent and statutory directive and make it much more difficult for resi-

²⁴Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request; Public Housing Agency Plan, 72 Fed. Reg. 25,770 (May 7, 2007), see NHLP, *Recent Housing-Related Regulations and Notices*, 37 Hous. L. BULL. 122, 123 (June/July 2007).

²⁵HUD, 5-Year and Annual Plan at http://www.reginfo.gov/public/do/PRAICList?ref_nbr=200711-2577-001.

²⁶GSA, OMB, *View ICR - OIRA Conclusion*, http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=200705-2577-001#.

²⁷GSA, OMB, *View ICR - OIRA Conclusion*, http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=200705-2577-001#.

²⁸Notice of Proposed Information Collection for Public Comment: PHA Plans Standard Template, 72 Fed. Reg. 45,823 (August 15, 2007), see NHLP, *Recent Housing-Related Regulations and Notices*, 37 Hous. L. BULL. 163, 165 (Sept. 2007).

²⁹GSA, OMB at http://www.reginfo.gov/public/do/PRAICList?ref_nbr=200711-2577-001.

³⁰*Id.* Including the inclusion of extremely low-income families (Section 5.2), identification of "all" PHA Plan elements rather than just the "required" elements (Section 6.0(a)), identification of the location of the entire plans rather than simply the "required PHA Plan elements not subject to HUD review" (Section 6.0(b)), and specific references to Section 3 and Family Self Sufficiency programs under the "Community Service and Self-Sufficiency" element (Section 6.0-7).

dents, participants and the public to know what is in the five-year and annual plans, understand the nuances of the inventory and fiscal status of the authority, anticipate demolition and disposition plans, identify and, thereafter, access supporting documents, exercise their responsibility and right to engage in the crafting of the plan and finally, to hold PHA officials responsible for its execution. The CCD focused on the impact of the proposed revisions on persons with disabilities. All three emphasized how the detailed template benefits local authorities by providing numerous prompts and options for possible PHA policy and programs and requiring individualized descriptions, addenda and supplements suggesting options and opportunities which assist PHA staff in thinking creatively and thoroughly about the scope of, and potential for, their program.

There are no reports that residents, their representatives or advocacy groups representing residents were involved in these discussions.

On November 20, 2007, a third Federal Register notice appeared,³¹ announcing that the proposed revised template had been submitted to OMB and that comments could be again submitted by December 20, 2007. Questions arose when the OMB and Information Collection Budget websites did not contain copies of the proposed template. Responding to protestations from CCD counsel, OMB issued a fourth notice, on December 13, 2007.³² This notice extended the comment period to December 31, 2007.³³ HUD continued to propose adoption of the truncated template. NHLP and CCD again submitted comments. Both argued that HUD lacked statutory or regulatory authority to change the template and that public housing program participants and the public, who were among the intended beneficiaries of the transparency and accountability promoted by the plan structure, would, in effect, be disenfranchised by the changes.

HUD has not posted the final template. Most recently it has reiterated that "the Department believes that the revised template significantly reduces the administrative burden associated with preparing Annual Plans (within statutory limits), while balancing the need for public

access." However, it appears committed to issuing a new template in the early part of 2008, which PHAs could begin to use for the July 2008 fiscal years.³⁴

Other Actions to Streamline the PHA Plan Process

HUD acknowledges that it began a process in late 2006 to discuss with PHAs and industry representatives areas for administrative streamlining.³⁵ There are no reports that residents, their representatives or advocacy groups representing residents were involved in these discussions. In the summer of 2007, HUD posted an announcement on its website to all PHAs that it was seeking volunteers for ten study areas identified by HUD for streamlining. Word of the announcement spread to resident groups and their advocates, and they signed up for the study groups, one of which was on the PHA plan process and the Capital fund. The PHA plan working group, unlike others, produced no minutes of its meetings or draft reports for posting on the HUD website.³⁶ However, it appears that the working group did discuss the PHA plan template and made recommendations regarding streamlining the capital fund.

Subsequent to the working group meetings, advocates have been informed that HUD has drafted new public housing rules that would amend the published rules regarding the PHA plan. Some of the critical changes include changes necessary to implement the revised template such as simplifying the information provided to residents and the public regarding available financial resources and eliminating significant guidance regarding the role and composition of the RABs. In addition, changes apparently may be proposed regarding the statement of housing needs and site-based waiting lists.

Conclusion

If HUD proceeds to adopt a new template and revised regulations, as it appears ready to do, resident and public participation in the PHA Plan process will be hampered severely. Information that has been heretofore available will no longer be easily accessible and it will be more difficult to influence the PHA plan process. Advocates are urged to monitor HUD's proposed actions and, when afforded an opportunity, should oppose the proposed changes. ■

³¹Notice of Submission of Proposed Information Collection to OMB; Public Housing 5-Year and Annual PHA Plan, 72 Fed. Reg. 65,344 (November 20, 2007); see NHLP, *Recent Housing-Related Regulations and Notices*, 37 Hous. L. Bull. 212, 214 (Nov./Dec. 2007).

³²Notice of Submission of Proposed Information Collection to OMB; Public Housing 5-Year and Annual PHA Plan; Correction, 72 Fed. Reg. 70,878 (December 13, 2007).

³³*Id.*

³⁴HUD, REAL ESTATE ASSESSMENT CENTER, PUBLIC HOUSING ADMINISTRATIVE REFORM INITIATIVE: INTERIM REPORT ON RECOMMENDATIONS (Nov. 30, 2007).

³⁵*Id.* at 1.

³⁶The HUD website for information about the Public housing Administrative Reform Initiative is <http://www.hud.gov/offices/pih/programs/ph/phari.cfm>.

HUD Finally Recognizes Right to Remain for Over-Housed Enhanced Voucher Holders

In 1999 Congress passed unified authority requiring the Department of Housing and Urban Development (HUD) to provide “enhanced vouchers” for all tenants facing housing conversion actions in many privately owned, federally supported properties, including owner opt-outs and prepayments.¹ Unfortunately, the law as passed and implemented by HUD failed to clearly protect tenants. Despite Congress’ attempt to clarify its intent that enhanced voucher holders be allowed to remain in their homes after conversion,² HUD had never issued regulations and its sole notice on the topic,³ issued in 2001, failed to implement that intent.

Under HUD’s 2001 policy, enhanced voucher holders faced three major threats to their housing security:

- the owner’s obligation to accept the voucher and terminate the tenancy only for tenant misconduct;
- the PHA’s authority to screen these previously assisted tenants and deny assistance; and
- family/unit size mismatches, which can result in tenant displacement.

At long last, after hundreds of thousands of units have been converted during the decade since Congress enacted the protection, HUD has issued a new Notice, PIH 2008-12 (Feb. 15, 2008), which provides real protection to those families that are “overhoused” at the time of conversion.⁴

¹Pub.L. No. 106-74, § 538, establishing a new Section 8(t) of the United States Housing Act, 42 U.S.C. § 1437f(t). According to HUD, “Enhanced vouchers are primarily provided in the case of preservation prepayments and Section 8 project-based contract opt-outs. Preservation prepayments are cases where the owner of a preservation eligible property (generally section 236 and section 221(d)(3) projects) is prepaying the mortgage or voluntarily terminating the mortgage insurance. Section 8 project-based opt-outs are situations where an owner chooses to end participation in certain programs by either opting-out of or not renewing certain expiring Section 8 project-based contracts.” HUD, Notice PIH 2008-12 (Feb. 15, 2008).

²Pub. L. No. 106-246, § 2801 (July 13, 2000) (H.R. 4425, FY 2001 Military Construction and FY 2000 Emergency Supplemental Appropriations) (amending Section 8(t) to state that “the assisted family may elect to remain in the same project in which the family was residing on the date of the eligibility event...”). The Conference Report states that this is a clarification of law: “inserts language as proposed by the House and the Senate clarifying the intent of title V, subtitle C, section 538 of Public Law 106-74.” H. Rep 106-710 (June 29, 2000).

³HUD, Notice PIH 2001-41 (Nov. 14, 2001) (now long past scheduled expiration date).

⁴The Notice does not address the “under-housed” side of this problem. Tenants residing in units that are too small for their family size under the local PHA’s occupancy guidelines must apparently move in order to receive any voucher assistance at all. *Id.*, pp. 36-37.

Tenants facing housing conversion, especially elderly tenants remaining after other household members have moved or died, sometimes reside in units that are too large for their current family size under normal voucher program occupancy requirements. Years ago, in Notice PIH 2001-41, HUD adopted a policy that enhanced voucher recipients living in inappropriately sized units must, if an appropriate unit is unavailable at the property, search for a unit elsewhere (with only a regular local payment standard).⁵ Only if an appropriate unit could not be found could a tenant remain in her home. But even in that case, two limitations imposed by HUD forced tenants to move or pay more than they should. HUD required the tenant to pay the full amount of the rent accruing during the search period (with no subsidy), and limited any higher subsidy payments for the “oversized” unit to one year, after which the subsidy was reduced and the tenant was forced to pay the difference or move.⁶ HUD’s new Notice (PIH 2008-12) repeals these harmful policies for overhoused families who want to remain in their homes.⁷

Under the new notice, if the family chooses to remain in the converted project, the PHA must determine whether a family is over-housed, and notify the family and the owner of that fact, as well as the appropriate unit size.⁸ The owner must then identify all appropriately sized units available in the project,⁹ and the family must move if one is available. If not, the family may remain in the over-sized unit and the assistance payment will be based on the reasonable rent for that unit.¹⁰ If an appropriate size unit later becomes available in the project, the family must move to that unit and must execute a new lease, and the assistance payment will be reduced to the reasonable rent for the smaller unit.¹¹ Families refusing to move to an appropriately sized unit on the premises when one becomes available will experience a reduction to the lower payment standard, and must pay any rent not covered by the assistance.¹² If an enhanced voucher family is appropriately housed at the time of the conversion, but later becomes over-housed, then the same process applies.¹³ It remains unclear whether HUD’s new policy will protect residents still living at the property with enhanced vouchers more than a year after conversion, but

⁵*Id.*, pp. 28-30.

⁶*Id.* at pp. 27-29.

⁷If an over-housed family chooses to move from the converted project, that family receives a normal housing choice voucher and will be subsidized based upon the payment standard for the number of bedrooms appropriate for the family. HUD, Notice PIH 2008-12; 24 C.F.R. § 982.402(c) and (d) (2007).

⁸HUD, Notice PIH 2008-12.

⁹To be “available,” a unit must be vacant and ready for occupancy, must meet applicable housing quality standards, must be rent reasonable and must meet any other voucher program requirements.

¹⁰*Id.* at p. 3.

¹¹*Id.*

¹²*Id.*

¹³*Id.*

who experienced a reduced payment standard under the old policy and thus pay substantially higher rents.

The PHA must establish a process for choosing which families will be required to move if there are more over-housed enhanced voucher families than available appropriately sized units. Suggested criteria include a lottery process, length of time the family has been living in the oversized unit, and age or frailty of the family.¹⁴

Notice PIH 2008-12 is a welcome new policy to protect over-housed tenants' right to remain. However, unless HUD acts to implement similar protections for tenants being denied continued assistance because of PHA re-screening or because owners fail to honor the enhanced voucher's good cause eviction feature, Congress must act soon to further clarify that tenants must receive continued assistance to remain in their homes when they have done nothing wrong.¹⁵ ■

Congress Considers Overdue Preservation Agenda

In order to address the increasing shortage of affordable housing, Congress must enact stronger legislative policies to preserve hundreds of thousands of units of existing privately owned federally assisted affordable housing. Because the current policy framework allows many owners to convert to market-rate and the costs of acquisition and rehabilitation are substantial, major changes to existing budget and policy decisions are needed. The National Preservation Working Group (NPWG), a network of national, state and local public and nonprofit organizations working on the housing preservation problem over the past two decades, has developed a package of legislative proposals that would address many of the obstacles to preserving affordable housing. These proposals are being considered by both the House and the Senate as their housing leadership drafts a comprehensive preservation bill to be introduced in Congress later this year. This article briefly reviews the major components of the NPWG preservation proposals.

Maintain Housing at Risk of Market-Rate Conversion

A number of different strategies can help prevent affordable housing from being converted to market rents. While Congress should affirm that HUD has a duty to maximize preservation when making discretionary decisions, there are many specific steps that can be taken to maintain the current housing stock. First, Congress should appropriate the amount of funds necessary each year to renew existing Section 8 contracts, rather than cutting them below needed levels as the current Administration proposes. This will enable retention of many units covered by current contracts, as well as retention of those expiring contracts with below-market rents that require higher rents in order to encourage owners to remain in the program.

Another vital change is reforming the mark-to-market program by making a broader range of properties eligible for mark-to-market debt restructuring, increasing the cap on HUD's authority to approve rents in excess of 120% of Fair Market Rent (FMR), and expanding the base of previously restructured properties that could benefit from not-for-profit purchase incentives. Specifically, both Section 8 properties in presidentially declared disaster areas and otherwise-eligible properties with rents at or below market eligible (not just those with rents exceeding market) should be eligible for debt restructuring. Marking up to market should also be allowed to enable preservation of Section 8 Moderate Rehabilitation properties, which are currently prohibited from doing so. Regarding approving rents above 120%, HUD's current authority is exhausted because it is capped at 5% of the restructured portfolio. The cap should be increased to 9%.

¹⁴*Id.* at pp. 3-4. Tenants and advocates could decide to negotiate this process with the PHA in the Annual Plan.

¹⁵The lack of clear policies has required tenants to litigate some of these issues. See, e.g., *Jeanty v. Shore Terrace Realty*, No. 03-Cv. 8669 (BSJ), 2004 WL 1794496 (S.D.N.Y. Aug. 10, 2004) (enjoining owner from refusing to accept enhanced voucher); *Estevez v. Cosmopolitan Assocs. LLC*, 2005 WL 3164146 (E.D.N.Y. Nov. 28, 2005) (enjoining evictions for nonpayment of rent based on owner's refusal to renew voucher assistance); *Feemster v. BSA Ltd. P'ship*, 471 F.Supp.2d 87 (D.D.C. 2007) (requiring acceptance of enhanced vouchers); *Barrientos v. 1801-1825 Morton, LLC*, No. CV 06-6437-ABC (FMOx) (C.D.Cal., orders Sept. 10 and Oct. 24, 2007) (enjoining owner's attempt to terminate all enhanced voucher tenancies at the property).

A looming threat to the current affordable housing stock is the maturing of HUD-subsidized mortgages. Between 2003 and 2013, the HUD-subsidized mortgages and rent restrictions on about 200,000 units will expire. At expiration, neither the units nor the tenants have any protection against market-rate rents. House Financial Services Committee Chairman Frank's 2004 bill, H.R. 4679, proposed rehabilitation, acquisition, or rent subsidy assistance to owners (nonprofit and for-profit) and purchasers in exchange for extending affordability restrictions. In addition, NPWG recommends that any new legislation should: (1) cover all properties owned by both for-profit and nonprofit owners, with HUD-insured or HUD-held mortgages that contain budget-based rent restrictions; (2) provide rehabilitation funds as either loans or grants; (3) ensure adequate acquisition, rehabilitation and rental assistance resources for nonprofit purchasers and owners; and (4) allow deferment of prior Flexible Subsidy loans. At the same time, tenants should be involved in preservation planning and endorsement, and Congress should require protections such as extended and specific affordability restrictions and timely provision of enhanced vouchers where the housing is not preserved.

Because incentives are often insufficient to guarantee preservation, Congress should also establish a federal first right of purchase to provide opportunities for tenants and communities to preserve properties facing market-rate conversion. To take full advantage of the federal investment in these properties, Congress should establish a federal first right of purchase, as it has for Rural Development (RD) properties facing prepayment. This first right of purchase would allow a preservation purchaser to buy the property at fair market value within a specified period after the owner gives a notice of proposed conversion or expiration of rent restrictions, similar to that established for RD properties and several state and local laws.

Although many state and local laws aim to preserve affordable housing by establishing notice or purchase requirements,¹ advocates often have to fight to protect these local laws from preemption challenges on a state-by-state basis. Parties challenging these preservation laws often point to an express preemption provision contained in the Low-Income Housing Preservation and Resident Homeownership Act (LIHPRHA) that has been dormant for years.² In order to avoid excessive litigation and uncertainty on this issue, Congress should clarify that LIHPRHA preemption only applies to properties with an executed LIHPRHA plan of action and that state and local preservation laws are not otherwise preempted by general conflict preemption principles.

¹See, e.g., *A Brief Review of State and Local Preservation Purchase Laws*, 36 HOUS. L. BULL. 217 (Nov./Dec. 2006).

²Pub. L. No. 101-625, tit. VI, 104 Stat. 4249, 4273 (1990) (establishing § 232 of LIHPRHA), codified at 12 U.S.C. § 4122 (1990).

In addition to these major changes to preserve housing at risk of conversion, Congress should enact other modest revisions to various programs. For example, it should authorize conversion of Rent Supplement and Rental Assistance Payment contracts to project-based Section 8, thereby permitting subsidy renewal, including mark-ups, and rehabilitation.

Finally, Congress should address a number of issues regarding the use of project-based vouchers for preservation purposes. Congress should allow owners and public housing agencies (PHAs) to utilize project-based vouchers, instead of enhanced vouchers, after conversions, while exempting these units from the ordinary project-based voucher cap, which limits the number of project-based vouchers to 25% of total number of units in a development, and the PHA's overall inventory limits for voucher based units. It is also important that Congress clarify that expiring project-based certificates can be converted to project-based vouchers, the successor program. Congress should also specifically allow project-based voucher rents to be established at market rents that are higher than the Low Income Housing Tax Credit (LIHTC) limits in order to support additional financing and, thereby, prevent HUD from imposing a lower cap in regulations.³

Restoring Deteriorating Properties

Many affordable housing properties are at risk of loss not because of market-rate conversion, but rather because of the lack of capital available for rehabilitation, together with subsidies to maintain affordable rents. Section 8 properties in poor condition are at risk of subsidy abatement and termination, and default on any underlying HUD-insured mortgage. After default and assignment of the mortgage to HUD, current law provides HUD with "flexible authority"⁴ on what to do with the property, whether selling the property to a third party at foreclosure, bidding its debt and purchasing the property, or accepting a deed-in-lieu of foreclosure. However, in order to preserve the affordability of HUD multifamily properties facing foreclosure or other disposition sale, Congress recently has required HUD to generally maintain in place the project-based Section 8 contracts.⁵ Because HUD has avoided this requirement by terminating contracts prior to foreclosing, Congress needs to tighten this mandate. Congress should also enact specific portions of H.R. 44, introduced in the 110th Congress, which would repeal HUD's "flexible authority," require HUD to maintain rental assistance to buildings undergoing rehabilitation

³Initially, HUD's rule (70 Fed. Reg. 59,892 (Oct. 13, 2005) imposed a cap at the LIHTC rent level, but HUD recently reversed its position so that higher rents are permissible in these circumstances. 72 Fed. Reg. 65,206 (Nov. 19, 2007).

⁴12 U.S.C.A. § 1715z-11(a) (West 2001).

⁵Pub. L. No. 109-115, Tit. III, § 311, 119 Stat. 2462 (2005); Pub. L. No. 110-161, Div. K, Tit. II, § 220 (Dec. 27, 2007).

as part of a preservation transfer, and extend HUD's non-judicial foreclosure authority to local government units acquiring HUD-held mortgages.

When HUD disposes of distressed HUD-owned properties or the HUD-held mortgages themselves, additional reforms are needed to ensure that local governments can purchase these properties and loans at prices that permit preservation of affordable housing. Ostensibly because of the Deficit Reduction Act of 2005, HUD adopted a policy that excludes repair or rehabilitation costs in determining an appropriate sales price for HUD-owned buildings and HUD-held loans. This policy makes it unreasonable for a local government to purchase the buildings or the loans, since it also has to fund the repair costs. H.R. 44 would revise the law to require HUD to use industry standard appraisal practices (which include the costs of repairs) when determining the market value of all multifamily real property and HUD-held loans.

A related issue, also arising from the Deficit Reduction Act of 2005, concerns restrictions on HUD's authority to provide grants and loans from the insurance fund for the necessary cost of rehabilitation of these properties, without further appropriations. H.R. 44 includes a provision that would reauthorize up-front grants, thus permitting these properties to be improved as affordable housing.

When HUD-supported properties are being sold, buyers should be required to demonstrate capacity by showing a track record of compliance with state and local housing and health codes. While Section 219 of the 2004 HUD/VA appropriations act⁶ required HUD to promulgate regulations to this effect, at least for foreclosure and disposition sales, HUD has never finalized such rules. Congress should therefore enact those provisions of H.R. 44 to ensure that buyers of both troubled and non-troubled properties are in compliance with housing and health codes.

In those situations where a project is not restorable, HUD should have authority to transfer project-based assistance to a new development, with appropriate protections to prevent abuse. Two statutes address this: 42 U.S.C. § 1437f(bb) and provisions in the FY 06 and FY 08 HUD Appropriations Acts.⁷ Section 215, the most recent provision, severely restricts the ability of assisted property owners and preservation purchasers to complete transactions. Congress should increase the authority to transfer the project-based Section 8 by broadening the definition of eligible properties, allowing partial transfers, strengthening tenant endorsement provisions, and affirming applicability of existing fair housing laws, among other things.

Finally, HUD has access to already appropriated but unused funds resulting from prepaid or terminated

Section 236 interest reduction subsidies. Section 531 of the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRAA)⁸ directed these funds to be used for rehabilitation of multifamily properties, but accumulated funds have often been rescinded. Congress should make an appropriation redirecting these funds and mandating that HUD implement a rehabilitation program.

Tenant Protections

As buildings lose their use restrictions or subsidies, or need to be rehabilitated, tenants facing displacement must be protected. Congress began addressing this issue in the mid-1990s, culminating in 1999, when it passed authority requiring HUD to provide enhanced vouchers for tenants facing certain conversion actions, such as opt-outs and prepayments.⁹ However, HUD has failed to implement this effectively; some owners refuse to accept the voucher, or if they do, often fail to set forth the good cause for eviction requirement. At other times, HUD policies permit PHAs administering the vouchers to deny assistance to previously assisted tenants or to force displacement of tenants whose family size has shrunk or grown and thus are mismatched to their current unit. In order to address these problems, Congress should clarify the owners' obligation to accept the enhanced voucher and ensure that new leases contain a good cause eviction provision. Legislation should also prohibit PHA re-screening of tenants and allow tenants to remain in their homes with enhanced vouchers regardless of unit size until the family can be transferred to a proper size unit.

In many situations where federally supported housing is lost (e.g., conversions of privately owned properties or public housing demolitions), Congress has provided tenant protection vouchers in order to maintain the community's overall affordable housing supply. However, in 2006, HUD issued Notice PIH 2006-5, providing that tenant protection vouchers would only be issued for the number of units that are occupied at the time the PHA applies for the replacement vouchers. This can lead to a significant loss in overall units, as some PHAs and owners encourage residents to move before they are even allowed to apply for replacement vouchers. Congress should override this policy and clarify that one-for-one replacement of the lost units is required.

Tenant Empowerment

Tenant involvement in the operation and major life cycle events of federally assisted housing leads to more responsive operations and smoother transitions. Recognizing this, Congress has sought to increase tenant capacity by permitting tenant participation in specific

⁶Pub. L. No. 108-199, § 219, 118 Stat. 397 (2004).

⁷Pub. L. No. 109-115, § 318, 119 Stat. 2463 (2005); Pub. L. No. 110-161, Div. K, Tit. II, § 215 (Dec. 27, 2007).

⁸Pub. L. No. 105-65, § 531 (1997).

⁹42 U.S.C. § 1437f(t) (West Supp. 2007).

decisions and providing funding for outreach and technical assistance activities. HUD, however, has not provided this funding to tenants since 2001, and has given funds to unqualified groups to work with tenants. Thus, it is important for Congress to clarify that HUD must spend the authorized funds each year and ensure that recipient organizations working with tenants are both qualified and independent from the ownership or management of the threatened property.

In order to improve project operations, tenants must also receive certain information about the property in a timely fashion. For example, HUD recently agreed to begin posting Real Estate Assessment Center (REAC) scores on the Internet, which will give residents and affected communities early notice of any problems with assisted properties. However, much more is needed to advance preservation goals. Tenants and community preservation allies should be able to easily obtain information on Section 8 opt-out or renewal notices, prepayment notices, and other relevant information filed by owners with HUD concerning their plans. This can be done through specific statutory authority, as well as stronger language recognizing tenants' rights to access information from HUD and owners. HUD data could serve as an "Early Warning System" for tenants and nonprofit owners who may be interested in preserving a property, permitting time to develop community preservation plans for threatened properties and to identify the necessary resources.

Often HUD and local governments do not have the resources to enforce regulations against owners of federally assisted properties. Because enforcement makes an impact on the daily life of tenants, tenants should be enlisted as partners in enforcement. Tenants should be identified as third-party beneficiaries to HUD contracts, such as Section 8 Housing Assistance Payment contracts, rehab escrow deposit agreements, and mark-to-market restructuring commitments, permitting tenants to enforce violations where HUD is slow to do so. In addition, Congress should further specify flexible enforcement tools, such as allowing tenants to pay rent into an escrow fund controlled by HUD, to make repairs using rent money, and to allow special inspections and reviews where necessary. Beyond enabling greater enforcement, these improvements would increase owners' incentives to comply with housing quality standards.

Tax Legislation

Tax incentives were a major component of creating and preserving affordable housing, but the current tax structure of property ownership often makes it economically infeasible for owners to transfer property. Sellers are often subject to capital gains taxes on the whole sales price, which often exceeds the cash sales proceeds when mortgage debt is assumed. Many owners are thus encouraged to hold on to properties until death delivers a step-up in tax basis. Congress should create tax incen-

tives that exempt certain owners from capital gains taxes if they transfer properties to qualified purchasers for continued use as affordable housing. Additionally, Congress should end the current policy prohibiting Section 8 Moderate Rehabilitation properties from also obtaining tax credit funding that is often needed for necessary improvements.

Conclusion

After the better part of a decade of neglect, Congress is now poised to take up an ambitious agenda to reform federal preservation policy. The National Preservation Working Group's comprehensive recommendations should receive serious consideration by the House and Senate Committees as they assemble their bills this year. The *Bulletin* will report on key developments in this effort to preserve the affordable housing stock. ■

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 website.³ Copies of the cases are *not* available from NHLP.

Public Housing: Eviction, Local Right to Cure Law not Preempted by HUD One-strike Rule

Pratt v. District of Columbia Housing Authority, 2008 WL 449705 (D.C., Feb. 21, 2008). The District of Columbia Court of Appeals reversed a lower court's jury decision granting the housing authority the right to evict a public housing resident for the criminal activity of her son. The court held that the plaintiff was entitled to cure the lease violation under District of Columbia law and that federal one-strike rules did not preempt the District of Columbia statute because the lease between the parties did not specifically incorporate, as required by federal law, the right to evict pursuant to the federal one-strike law. Accordingly, the court concluded that the resident had a right to cure the lease violation and that the housing authority's effort to evict without first granting the right to cure violated the tenant's statutory rights.

¹ <http://www.westlaw.com>.

² <http://www.lexis.com>.

³ For a list of courts that are accessible online, 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>.

Public Housing: Eviction, Setting Aside Settlement Agreement to Vacate the Unit

New York City Housing Authority v. Jackson, 48 A.D.3d 818, 853 N.Y.S.2d 138 (N.Y.A.D., Feb. 26, 2008.) In a holdover proceeding, the appellate court upheld a Supreme Court order setting aside a settlement agreement between a public housing resident, a person with a mental disability, and the city's housing authority. The settlement agreement had been reached by an appointed guardian ad-litem for the plaintiff who claimed that he was not adequately represented. The court of appeals held that setting aside of the settlement agreement was within the Supreme Court's discretion and would put the parties back in the same position that they were prior to the settlement agreement having been entered into.

Voucher Program: Termination for Criminal Activity

Costa v. Fall River Housing Authority, 71 Mass.App.Ct. 269, 881 N.E.2d 800 (Mass.App.Ct., Feb. 27, 2008). Plaintiff, a participant in the Housing Choice Voucher program, challenged the housing authority's termination of her voucher for engaging in prostitution. The lower court held in favor of the plaintiff, finding that the housing authority did not have grounds to terminate the voucher and failed to provide the plaintiff with adequate due process. The court of appeals reversed the lower court conclusion that the housing authority could not terminate a voucher for acts of prostitution; however, it affirmed on the grounds that the housing authority violated the voucher holder's due process rights. Specifically, it found that the housing authority's reliance on a police report and newspaper article to establish criminal activity denied the voucher holder the right to question witnesses. It also held that participation of a housing authority official, who had conducted an informal meeting with the voucher holder and upheld the housing authority's decision to terminate the voucher, in the grievance hearing panel violated the voucher holder's right to have an impartial hearing panel. Lastly, the appellate court rejected the housing authority's claim that the voucher holder's guilty plea in criminal proceedings established a violation of regulations. It found that the guilty plea may be introduced as evidence in the hearing but is not dispositive of the criminal activity since it was not a finding of guilt after a trial.

Voucher Program: Termination for Breach of Program Rules; Hearing Officer Appears Not to Have Exercised, Discretionary Authority

Carter v. Lynn Housing Authority, 450 Mass. 626, 880 N.E.2d 778 (Mass. Feb. 13, 2008). In a split decision, the Massachusetts Supreme Court reversed an appellate court decision upholding a housing authority's decision to terminate the

plaintiff's voucher on the ground that she had breached the Section 8 program requirements by causing waste to an apartment which she had previously leased under the voucher program and for which she was held liable in a court proceeding. The court held that the hearing officer's decision did not make any factual findings and failed to indicate whether, as required by HUD regulations, he had considered all relevant circumstances such as the seriousness of the case, the extent of participation or culpability of individual family members, mitigating circumstances related to the disability of a family member, and the effects of denial or termination of assistance on other family members who were not involved in the action or failure. In other words, the court concluded, there was no evidence in the record that showed that the hearing officer had knowledge of his discretion to impose a penalty less severe than a voucher termination or that he exercised that discretion. Accordingly it reversed the appellate court decision.

Voucher Program: Evidence Fails to Show that Landlord's Termination of Program Participation Was Racially Discriminatory

Wadley v. Park at Landmark, LP, 2008 WL 398984 (4th Cir., Feb. 12, 2008)(Unpublished, *per curiam*). The circuit court upheld a lower court finding that the plaintiff, an African-American Section 8 voucher holder, failed to present evidence sufficient to withstand summary judgment with regard to his claim of discriminatory intent and impact in either the landlord's adoption of a Section 8 non-renewal policy or in the termination of his lease. The court refused to consider the plaintiff's claim that he was denied the right to discover such evidence under a motion to compel filed with the magistrate because the plaintiff failed to timely appeal that decision to the district court.

Voucher Program: Eviction, Former Voucher Holder's Waiver of Right to Trial by Jury

Kenmore Associates, L.P. v. Burke, 2008 WL 586258 (N.Y.City Civ.Ct., Feb. 21, 2008)(unpublished). The court found that a former voucher holder did not waive right to a trial by jury in an eviction action based upon the fact that the lease between the landlord and resident had a Section 8 lease addendum that specifically denied the landlord the right to incorporate in the lease a waiver of a right to a trial by jury. The court rejected the landlord's argument that the lease addendum no longer applied because the voucher assistance had been terminated. The court concluded that the addendum was part of the original lease and that under the city's rent stabilization ordinance, the lease was automatically renewed each year with the Section 8 lease addendum.

Voucher Program: Private Right of Action to Enforce City's Obligation to Inspect Unit

Bose v. City of New York, 2008 WL 564761 (E.D.N.Y., Feb. 27, 2008). The court upheld a magistrate's conclusion that the plaintiff, a Section 8 voucher holder, did not have a private right of action against the city's housing department for its failure to inspect and enforce HUD regulations setting inspection and Housing Quality Standards. The magistrate found that none of these statutory or regulatory obligations created a private right of action enforceable under Section 1983.

Public Housing: Survivors' Right to Succeed

Aponte v. New York City Housing Authority, 48 A.D.3d 229, 850 N.Y.S.2d 427 (N.Y.A.D. 1 Dept., Feb. 5, 2008). The court upheld a lower court decision that affirmed a grievance hearing officer's denial of the petitioners' claim that they were surviving members of the deceased's household. The court found that there was no evidence introduced at the hearing that showed that the family members had permission to live in the unit prior to the death of the resident.

Public Housing: Survivors' Right to Succeed

McLeon v. NYCHA Hope Gardens, 48 A.D.3d 686, 852 N.Y.S.2d 323 (N.Y.A.D., Feb. 19, 2008). The court of appeals reversed a Supreme Court decision that the petitioner was a member of the deceased public housing resident's household and therefore a surviving member entitled to continue to reside in the dwelling. The court found that there was no evidence in the administrative hearing record that the petitioner had applied to become a member of the resident's household while the resident was still alive or that the housing authority had any knowledge that the petitioner was residing in the apartment. Accordingly, it reversed the earlier decision and upheld the housing authority's initial administrative decision.

Assisted Housing: Survivors' Right to Succeed

Lee v. Department of Housing Preservation and Development of City of New York, 48 A.D.3d 376, 852 N.Y.S.2d 103 (N.Y.A.D. 1 Dept., Feb. 28, 2008). The court found that the hearing decision, that the plaintiff did not maintain the apartment as her primary residence for many years, was supported by evidence presented at the hearing and that the housing development department was entitled to evict the plaintiff. It also denied the right of a third party to raise the right to succeed to the unit on the ground that the issue was raised for the first time on appeal.

Voucher Program: State Discrimination Judgment Is not Dischargeable in Bankruptcy Action

In re Benham, 2008 WL 397668 (Bkrcty. D.Mass., Feb. 5, 2008). The court held that a Massachusetts judgment, that the petitioner had discriminated against a Section 8 voucher holder on the basis of source of income, was not dischargeable in bankruptcy proceeding because the voucher holder was injured and discrimination was willful and malicious. Accordingly, judgement is not dischargeable under bankruptcy code (11 U.S.C. § 523(a)(6)).

RHS Section 515 Housing: Owners' Damages for Imposition of Prepayment Restrictions

Tamerlane, Ltd. v. United States, 2008 WL 590876 (Fed.Cl., Feb. 29, 2008). The court of claims rejected RHS Section 515 owners' claim that they are entitled to damages as a result of the passage of the Emergency Low Income Housing Preservation Act prepayment restrictions. The court held that the owners' claim accrued when they sought to prepay their loans and RHS responded by offering and granting them incentives to remain in the program, all of which occurred more than six years before the owners filed their damage action. Accordingly, the owners' claims were barred by the statute of limitations.

Preservation: Owner's Right to Prepay State Housing Finance Agency Rental Housing Loan

Woodrow Wilson of Middletown, LLC v. Connecticut Housing Finance Authority, 2008 WL 642970 (Conn.Super., Feb. 22, 2008) (Unpublished). The court rejected the plaintiff owner's contention that it was entitled to prepay a state housing finance agency's multi-family housing loan because the apartment complex was not located in an area that had a housing need. The court determined that under the census bureau's definition of metropolitan statistical areas, the development was located in the Hartford metropolitan area, which had a demonstrable need for affordable housing. Accordingly, the court rejected the plaintiff's contention that it was entitled to prepay the loan. ■

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), the Department of Agriculture (USDA/Rural Housing Service/Rural Development (RD)) and the Veterans Administration issued in February of 2008. 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 website,¹ (2) bound volumes of the Federal Register, (3) HUD Clips,² (4) HUD,³ and (5) USDA's Rural Development website.⁴ Citations are included with each document to help you secure copies.

HUD Proposed Rules

73 Fed. Reg. 7169 (Feb. 6, 2008)

Independent Public Accountant Roster

Summary: This proposed rule would establish a roster of approved independent public accountants and public accounting firms (IPAs) that would be permitted to perform audits or related services required by participants in certain HUD programs and submitted to HUD. The proposed rule would also establish eligibility, application, and removal procedures for IPAs listed on the IPA Roster. HUD believes this proposed rule would implement an additional protection to ensure the accuracy of financial data submitted to HUD by its program participants.

Comment Due Date: April 7, 2008.

HUD Federal Register Notices

73 Fed. Reg. 6198 (Feb. 1, 2008)

Privacy Act of 1974; Notice of a Computer Matching Program Between HUD and the Small Business Administration (SBA)

Summary: HUD intends to conduct a recurring computer matching program with the SBA to utilize a computer information system of HUD, the Credit Alert Interactive Voice Response System with SBA's debtor files. HUD has revised the "records to be matched" section of this notice to reflect the new HUD Privacy Act Systems of Records involved in the matching program. This update

¹http://www.access.gpo.gov/su_docs.

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

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

⁴<http://www.rdinit.usda.gov/regs>.

does not change the authority and the objectives of the existing HUD and SBA matching program.

Effective Date: March 3, 2008, or at least forty days from the date copies of the signed computer matching agreement are sent to the Office of Management and Budget (OMB) and Congress, whichever is later, providing no comments are received which would result in a contrary determination.

Comment Due Date: March 3, 2008.

73 Fed. Reg. 6988 (Feb. 6, 2008)

Announcement of Funding Awards for Fiscal Year 2007 for the Housing Choice Voucher Program

Summary: This document notifies the public of funding awards for Fiscal Year 2007 to housing agencies (HAs) under the Section 8 housing choice voucher program. The purpose of this notice is to publish the names, addresses, and the amount of the awards to HAs for non-competitive funding awards for housing conversion actions, public housing relocations and replacements, moderate rehabilitation replacements, and HOPE VI voucher awards.

73 Fed. Reg. 7575 (Feb. 8, 2008)

Notice of Proposed Information Collection: Comment Request Management Review for Public Housing Projects

Summary: HUD has submitted to the Office of Management and Budget an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to a final rule amending the regulations of the Public Housing Operating Fund Program, which requires public housing authorities (PHAs) to operate using an asset management model consistent with the regulations. To support the transition to asset management and align HUD oversight with asset management, a new management review format is required to review PHAs on a project level, rather than PHA-wide. The forms are modeled after the asset management model consistent with the management norms in the broader multifamily industry.

Comment Due Date: April 8, 2008.

73 Fed. Reg. 10,044 (Feb. 25, 2008)

Continuation of Interest Reduction Payments After Refinancing Section 236 Projects

Summary: The proposed information collection requirement described below 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. Owners of Section 236 projects may submit information to HUD to request continuation of interest reduction payments after refinancing. As part of these refinancing transactions, HUD requires the execution of interest Reduction Payment Agreements and Use Agreements. HUD uses the information to ensure that projects are maintained as low-income housing resources.

Comment Due Date: March 26, 2008.

73 Fed. Reg. 10,264 (Feb. 26, 2008)
Announcement of Funding Awards for the Housing Choice Voucher Family Self Sufficiency Program for Fiscal Year 2007

Summary: This announcement notifies the public of funding decisions made by the department for funding under the Fiscal Year (FY) 2007 Notice of Funding Availability for the Family Self Sufficiency (FSS) funding for FY 2007. This announcement contains the consolidated names and addresses of those award recipients selected for funding based on the rating and ranking of all applications and the allocation of funding available for each state.

73 Fed. Reg. 10,274 (Feb. 26, 2008)
Announcement of Funding Awards for the Public Housing Family Self-Sufficiency Program for Fiscal Year 2007

Summary: This announcement notifies the public of funding decisions made by HUD under the FY 2007 Notice of Funding Availability for the Public Housing Family Self-Sufficiency Program funding for FY 2007. This announcement contains the consolidated names and addresses of those award recipients selected for funding based on the rating and ranking of all applications and the allocation of funding available for each state.

73 Fed. Reg. 10,460 (Feb. 27, 2008)
**Notice of Proposed Information Collection:
Comment Request Study of Rents and Rent Flexibility**

Summary: The proposed information collection requirement described below will be 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. The department is conducting, under contract with Abt Associates and its partners, Applied Real Estate Analysis Inc. (AREA) and the Urban Institute, an exploration into alternative rent structures to the current income-based system used in the Public Housing and Housing Choice Voucher programs. These two programs serve over 3 million low-income and extremely low-income families.

Comment Due Date: April 28, 2008.

HUD Notices

**Relocation and Real Property Acquisition Requirements—
Suspensions and Waivers Available for Community
Planning and Development Programs To Assist with
Recovery and Relief for Presidentially Declared Disaster
Areas (CPD-08-02, 2/26/08)**

Summary: The purpose of this notice is to provide preliminary guidance on relocation issues that may arise in presidentially declared disasters. This notice also lists statutory and regulatory requirements governing the HOME Investment Partnerships and Community Development Block Grant programs that program participants

may request HUD to waive or suspend in order to eliminate or reduce impediments to recovery efforts in presidentially declared disaster areas.

**Extension of Notice PIH 2007-1 (HA) - Requirement for
Designation of Public Housing Projects (PIH-2008-10
(HA), 1/31//08)**

Summary: This notice extends Notice PIH 2007-1 (HA) that reiterates the streamlined requirements for designating public housing projects for occupancy by elderly families only, disabled families only, or elderly and disabled families only. This notice also includes the requirements and procedures for renewal of, or changes to, previously HUD approved designation plans.

**Enhanced Voucher Requirements for Over-housed
Families (PIH-2008-12 (HA), Feb. 15, 2008)**

Summary: This notice sets forth the enhanced voucher policies that are applicable to families residing in units where the actual number of bedrooms exceeds the family unit size for which the family qualifies under the public housing agency subsidy standards (i.e., "over-housed families"). These new policies are effective prospectively from the issuance date of this notice and supersede the previous policies set forth in HUD Notice PIH 2001-41 that concern over-housed enhanced voucher families. These policies apply to both enhanced voucher families that are determined to be in an over-housed situation in the future, as well as any over-housed family where the enhanced voucher subsidy is currently based on the gross rent of the over-sized unit. ■

NHLP's HUD Housing Programs: Tenants Rights (3rd Edition 2004) and 2006-2007 Supplement with Updated CD ROM



Dubbed the **Green Book** by users across the country, *HUD Housing Programs: Tenants Rights (3rd Ed. 2004)* is a **comprehensive, issue-oriented guide to the federal housing programs**. Meticulously researched and clearly written by expert NHLP staff attorneys and outside contributors, it is the only book that explains and analyzes all applicable laws central to effectively representing tenants assisted under the HUD programs. NHLP's comprehensive manual provides a practical road map through the complexity of the federal housing programs, including public housing, subsidized rental housing, vouchers, section 8 homeownership, and others. Evictions, resident participation, loss of units, utility allowances and other key issues are also covered.

The companion 2006-2007 Supplement offers new information and the latest developments in the law on tenants' rights under the HUD housing programs since publication of the 3rd Edition of the Green Book in 2004. With your purchase of the *2006-2007 Supplement*, you also receive, at no charge, the latest edition of the CD-ROM document library that includes all documents from the 3rd edition and new material from the *2006-2007 Supplement*.

The essential resource for anyone working within the scope of the federal housing programs. The *HUD Housing Programs: Tenants Rights* and the *2006-2007 Supplement* provide the most up-to-date and comprehensive guide to the federal housing programs available anywhere and contain the most recent applicable authorities for virtually all common problems encountered in a federal landlord-tenant relationship including state and federal cases, federal statutes and regulations, and HUD handbooks, notices, and opinion letters.

Complete pricing and order form on page 81.

When HUD's housing laws change,
When tenants' rights are modified,
When HUD housing programs are altered...
You need to know.

↑ LATEST ADDITIONS
& CHANGES

**NHLP's HUD Housing
Programs: Tenants Rights
and
2006-2007 Supplement**

ORDER NOW! SPECIAL SAVINGS—\$70 OFF SEPARATE VOLUME PRICE

NATIONAL HOUSING LAW PROJECT | PUBLICATION ORDER FORM



PUBLICATION	UNIT PRICE	QTY.	TOTAL PRICE
Combined Set: HUD Housing Programs: Tenants' Rights (3d ed. 2004) and new 2006-2007 Supplement	\$ 415	<input type="checkbox"/>	<input type="checkbox"/>
HUD Housing Programs: Tenants' Rights 2006-2007 Supplement	\$ 130	<input type="checkbox"/>	<input type="checkbox"/>
Housing Law Bulletin (10-issue subscription)	\$ 175	<input type="checkbox"/>	<input type="checkbox"/>
Welfare and Housing—How Can the Housing Assistance Programs Help Welfare Recipients? (2000)	\$ 5	<input type="checkbox"/>	<input type="checkbox"/>
Housing for All: Keeping the Promise (1995)	\$ 5	<input type="checkbox"/>	<input type="checkbox"/>
The Family Self-Sufficiency Program: An Advocate's Guide (1994)	\$ 10	<input type="checkbox"/>	<input type="checkbox"/>
A Passage from Poverty: Self-Sufficiency Policies and the Housing Programs (1991)	\$ 10	<input type="checkbox"/>	<input type="checkbox"/>

SUBTOTAL (All prices include shipping)	<input type="checkbox"/>
CALIFORNIA SALES TAX (Excludes Bulletin 8.75% in Alameda County 8.25% in rest of CA)	<input type="checkbox"/>
TOTAL	<input type="checkbox"/>

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 94610

QUESTIONS
For information on first-class mailing and large quantity discounts, call 510.251.9400 x3108



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

NONPROFIT ORG.
U.S. POSTAGE
PAID
OAKLAND CA
PERMIT NO. 612

FIRST CLASS MAIL