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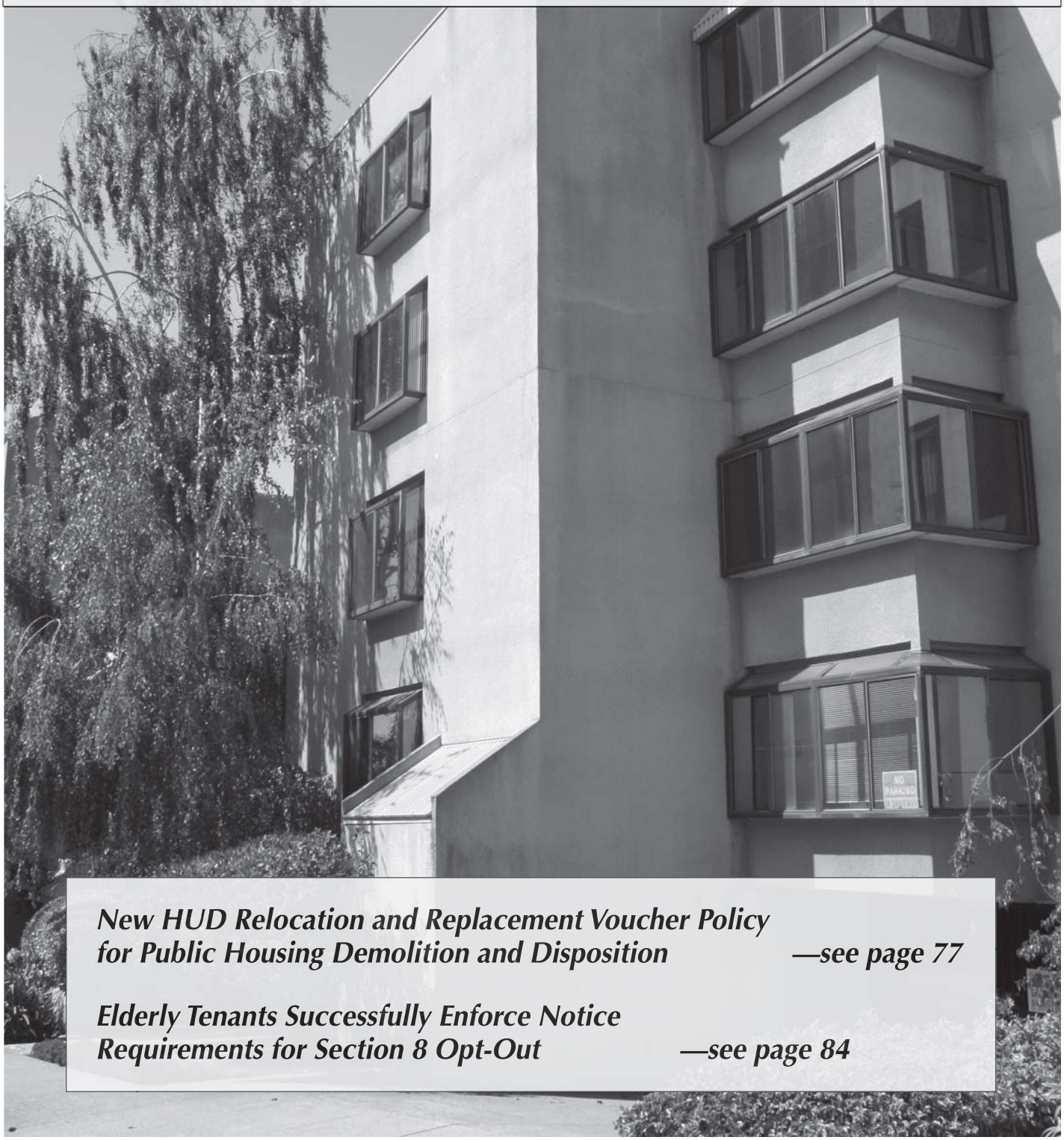

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New HUD Relocation and Replacement Voucher Policy for Public Housing Demolition and Disposition

By Joe Akman*

Introduction

Since 1995, the Department of Housing and Urban Development (HUD) has actively removed public housing units which are at least nominally identified as "severely distressed" from the federally subsidized low-income housing stock. Prior to 1995, the U.S. Housing Act required that units that are demolished or disposed of be replaced on a one-for-one basis.[1] In 1995, this requirement was suspended[2] and, in 1998, repealed by the Quality Housing and Work Responsibility Act.[3] The National Housing Law Project estimates that at least 130,000 public housing rental units designated for demolition have been lost without replacement between 1995 and 2001.[4] Indeed, HUD recently acknowledged that the HOPE VI program, in conjunction with the Public Housing Capital Fund, has reached its goal of contributing to the demolition of 100,000 public housing units.[5]

In 2001, HUD adopted a policy for replacing demolished and disposed units[6] by providing public housing authorities (PHAs) replacement vouchers for each unit that the PHA did not receive replacement funding to rebuild. This policy, which was reaffirmed in 2002, 2004, and 2005,[7] sought to ensure that demolition and disposition

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[1] *See* 42 U.S.C.A. § 1437p(b)(3) (West 1994).

[2] *See* Pub. L. No. 104-19, § 1002(a), 109 Stat. 194, 235 (July 27, 1995).

[3] 42 U.S.C.A. § 1437p (West 2003).

[4] This figure is based on a report from the HUD Special Application Center, Field Office Demo/Dispo Units Total Recap (Nov. 5, 2001), and the HOPE VI revitalization site profiles and summaries for fiscal years 1999-2001, which are available at http://www.hud.gov/offices/pih/programs/ph/hope6/grants/revitalization/.

[5] Office of Management and Budget, Budget of the United States Government, FY 2008, Department of Housing and Urban Development, *at* http://www.whitehouse.gov/omb/budget/fy2008/pdf/budget/hud.pdf.

[6] Submission and Processing of Public Housing Agency (PHA) Applications in Fiscal Year (FY) 2001 for Housing Choice Vouchers for Relocation or Replacement Housing Related to Demolition or Disposition (Including HOPE VI), and Plans for Removal (Mandatory Conversion) of Public Housing Units Under Section 33 of the U.S. Housing Act of 1937, as Amended, PIH 2001-20 (Jun. 21, 2001).

[7] Submission and Processing of Public Housing Agency (PHA) Applications in Fiscal Year (FY) 2001 for Housing Choice Vouchers for Relocation or Replacement Housing Related to Demolition or Disposition (Including HOPE VI), and Plans for Removal (Mandatory Conversion) of Public Housing Units Under Section 33 of the U.S. Housing Act of 1937, As

did not result in the overall loss of assisted housing (whether in the form of public housing or vouchers) administered by a PHA.

HUD Policy Change: PIH Notice 2006-05 and PIH Notice 2007-10

In 2006, HUD issued PIH Notice 2006-05, which contained a deeply buried provision announcing that Housing Assistance Payment and administrative fees for replacement vouchers would only be provided for units *occupied* at the time of a PHA's application for replacement vouchers.[8] On April 30, 2007, HUD issued PIH Notice 2007-10, more clearly illuminating the 2006 policy with respect to demolition and disposition, completing the dramatic departure from the pre-2006 policy. Under this current policy, vouchers will no longer replace all the housing that is disposed or demolished and not replaced. The current policy states that,

> The maximum number of demolition/disposition vouchers for which a PHA may be eligible is based upon the number of *occupied* units that will be demolished, sold or otherwise disposed of minus the number of families that will move to other public housing units…. In addition, demolition/disposition voucher funding will only be provided for public housing units if the PHA has not already received relocation or replacement funding for these same units.[9]

For PHAs and communities that are demolishing or disposing of public housing, this policy effectively reduces the total number of assisted units in the community, since HUD will not provide replacement vouchers either for vacant public housing units or for occupied units whose residents are relocated to other public housing, or where the PHA has already received replacement funding for the units that will be disposed or demolished.

Aside from its obvious adverse impact, the new policy is ambiguous. It does not explicitly state what happens if there is an inadequate number of public housing relocation units. In other words, it is unclear if a PHA would be eligible for vouchers if the need for relocation vouchers exceeds the lost units minus the replacement units. It appears that PHAs will have to use already authorized vouchers to relocate current tenants whenever the sum of the number of replacement units and the number of tenants who want to relocate with vouchers exceeds the number of units being demolished. A more favorable interpretation, not likely to be followed by HUD, is that if no relocation units are available, HUD will provide replacement/relocation vouchers irrespective of whether the number of units replaced and the number of occupied units exceeds the number of units slated for demolition.

The current policy departs from the earlier HUD policy that made a critical distinction between replacement and relocation vouchers.

The current policy places an additional limitation on the maximum number of vouchers that may be awarded. That number is limited by the number of families that request a voucher or for whom the public housing that they desire is not available. Thus, a locality may lose assisted units for a variety of reasons. One reason may be the desire or willingness of the public housing residents living in a threatened development to move to other public housing, not the need of the community for replacement housing. Another reason may be that HUD may place pressure on a PHA to encourage tenants to move to other public housing, as opposed to requesting vouchers, in order to reduce the size of the low-income housing programs.

The current policy also departs from the earlier HUD policy that made a critical distinction between replacement and relocation vouchers. Under the old policy, if there were more tenants who needed vouchers than there was available public housing for relocation, PHAs could request vouchers, which together with the federally funded replacement units, exceeded the total number of units to be disposed of or demolished.[10] The current policy eliminates this possibility.

Amended, PIH 2002-21 (Oct. 2, 2002); Submission and Processing of Public Housing Agency (PHA) Applications for Housing Choice Vouchers for Relocation or Replacement Housing Related to Demolition or Disposition (Including HOPE VI), and Plans for Removal (Required/Voluntary Conversion Under Section 33 of the U.S. Housing Act of 1937, As Amended, and Mandatory Conversion Under Section 202 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996) of Public Housing Units, PIH 2004-4 (Mar. 29, 2004); Submission and Processing of Public Housing Agency (PHA) Applications for Housing Choice Vouchers for Relocation or Replacement Housing Related to Demolition or Disposition (Including HOPE VI), and Plans for Removal (Required/Voluntary Conversion Under Section 33 of the U.S. Housing Act of 1937, As Amended, and Mandatory Conversion Under Section 202 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996) of Public Housing Units, PIH 2005-15 (Apr. 26, 2005). *See* note 9, *infra*.

[8]Implementation of the 2006 HUD Appropriations Act (Public Law 109-15) Funding Provisions for the Housing Choice Voucher Program, PIH 2006-5 (Jan. 13, 2006).

[9]PIH Notice 2007-10 (Apr. 30, 2007) (Voucher Funding in Connection with the Demolition or Disposition of Occupied Housing Units) (*emphasis added*).

[10]Submission and Processing of Public Housing Agency (PHA) Applications for Housing Choice Vouchers for Relocation or Replacement Housing Related to Demolition or Disposition (Including HOPE VI), and Plans for Removal (Required/Voluntary Conversion Under Section 33 of the U.S. Housing Act of 1937, As Amended, and Mandatory Conversion Under Section 202 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996) of Public Housing Units, PIH 2004-4, ¶ 4 (March 29, 2004).

The recently issued PIH notice continues the policy that the critical date for determining occupancy appears to be "at the time of the PHA's application for vouchers." This date may be "as soon as the demolition/disposition application or conversion application is approved," which is the earliest date that an application for vouchers may be submitted. Because PHAs are not obligated to apply for vouchers immediately upon approval of the demolition/disposition application, it may also be weeks or months after the approval is received. Setting the voucher eligibility date late in the demolition disposition process, combined with the fact that HUD does not enforce a policy of full occupancy in the public housing program, assures that there will be a loss of affordable housing units in jurisdictions that are demolishing or disposing of public housing.

Legal Vulnerability

The Bush Administration sought to obtain legislative authorization for this policy change in its HUD Fiscal Year 2007 and 2008 budgets by getting Congress to provide replacement funding only for units *under lease*.[11] However, Congress never provided that authorization.[12] Because the appropriation still provides funds for "relocation and replacement of housing units that are demolished or disposed of…,"[13] HUD's recent policy changes have arguably jumped the gun. Furthermore, the current policy may violate the Administrative Procedure Act and HUD's own rulemaking requirements, which require public notice and comment for issuing new regulations and significant policy changes, which were not followed here.[14]

How PIH 2007-10 May Work in Practice

Example 1

Assume that a PHA plans to demolish 500 public housing units, of which only 200 are occupied at the time of demolition approval. If the PHA plans to replace 300 of the 500 units and the 200 remaining residents request vouchers, the jurisdiction suffers no loss of affordable housing units. On the other hand, if 100 of the 200 remaining occupants choose to, and successfully, relocate to other public housing units, the maximum number of vouchers requested will be 100. Combining the 100 vouchers with the 300 replacement units means that the jurisdiction will lose 100 units as a result of the demolition.

Example 2

Assume that a PHA plans to demolish 500 public housing units, of which 200 are occupied. If that PHA plans to replace 400 of the demolished units and no residents relocate to other public housing, the PHA would only be allowed to apply for 100 vouchers because of the large proportion of replacement units, and as a result would have to use other local resources to house the other 100 residents.[15] If the 200 public housing occupants choose to, and successfully, relocate to other public housing, the PHA will not be able to request any vouchers and will lose 100 affordable units.

Example 3

Assume that a PHA plans to demolish 500 public housing units, of which 200 are occupied. If the PHA plans to replace 200 of the units and 200 of the current occupants request vouchers, it could apply for 200 vouchers. But since only 200 units are being replaced, the jurisdiction will lose 100 units of affordable housing. On the other hand, if 100 of the 200 current occupants choose and successfully relocate to other public housing, the loss in affordable housing units will increase to 200 units because the PHA can only apply for 100 vouchers under the current policy.

Impact on Local Communities

As a practical matter, the current policy means that jurisdictions that demolish or dispose of public housing units are likely to experience a reduction in the overall number of affordable units administered (combined number of public housing units and vouchers). This loss will occur because of what typically happens when a PHA makes a determination to demolish or dispose of property. In most cases, PHAs pursue a natural if not forced process of relocating tenants. Frequently, tenants begin to make moving decisions because of the pending demolition application.[16] In some cases, PHAs induce the relocation of tenants through reduced services, persuasion or other methods. In each of these cases, if the PHA does not

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[11]Office of Management and Budget, Budget of the United States Government, FY 2007, Appendix Department of Housing and Urban Development, *at* http://www.gpoaccess.gov/usbudget/fy07/pdf/appendix/hud.pdf; Office of Management and Budget, Budget of the United States Government, FY 2008, Appendix Department of Housing and Urban Development, *at* http://www.gpoaccess.gov/usbudget/fy08/pdf/appendix/hud.pdf.

[12]The House bill would have adopted the Administration's proposal, but the Senate Committee version did not include the "under lease" limitation. Compare H.R. 5576 (109th Cong., 2d Sess.), pp. 341-42 (as reported from Senate Appropriations Committee, July 26, 2006), with H.R. 5576 (109th Cong., 2d Sess., House version, set forth as stricken text in Senate version, pp. 73-74, *supra*).

[13]Pub. L. No. 109-115, tit. III, 119 Stat. 2396, 2441 (2005) (for FY 2006); H.J.Res. 20, Pub. L. No. 110-5, §§ 101, 104 (Feb. 15, 2007) (for FY 2007, incorporating FY 2006 conditions).

[14]5 U.S.C.S. §§ 551-559 (Lexis 2007); 24 C.F.R. Part 10 (2006).

[15]Presumably, the PHA would use some of its already allocated existing vouchers, which turn over on a regular basis, to meet the need for relocating the residents.

[16]When a PHA plans to demolish or dispose of public housing, the PHA must submit an application to the Special Applications Center, a division of the HUD Office of Public and Indian Housing based in Chicago, for review and approval before proceeding. *See* Demolition/Disposition Processing Requirements Under the New Law, PIH 1999-19, ¶ 10 (Apr. 20, 1999), updated by Demolition/Disposition Requirements Under the 1998 Act, PIH 2003-9 (HA) (Mar. 27, 2003).

rent the vacated units—something which it is not likely to do—the current policy reduces the maximum number of replacement vouchers that it is eligible to receive if all the units are not rebuilt.

Regardless of how the unit loss occurs, the reduction in total number of housing units administered through a PHA has permanent implications.

PHAs and communities can further lose affordable units through HUD's policy of encouraging PHAs with significant accumulation of voucher reserves (undesignated fund balance) not to request additional replacement or relocation vouchers.[17] Alternatively, HUD may require PHAs to use their voucher reserves to address the need for voucher funding in connection with demolition and disposition.[18] If either occurs, the number of available affordable units will decline in the local jurisdiction. Indeed, jurisdictions with reserve funds will be doubly penalized because the public housing units lost will not be replaced with vouchers and the voucher reserves cannot be used to the advantage of serving additional needy families.[19]

Regardless of how the unit loss occurs, the reduction in total number of housing units administered through a PHA has permanent implications for a local jurisdiction because the jurisdiction cannot again increase the overall number of its authorized vouchers to replace the lost units. Thus, the overall number of affordable housing units for the jurisdiction will decline.

The following are examples of what is happening in several jurisdictions. They demonstrate the potential impact of the current policy.

Baltimore

The Housing Authority of Baltimore City (HABC) forcibly moved tenants from Somerset Homes before HUD approved a demolition/disposition plan. Although these relocations violated federal regulations,[20] when the local tenants and a Congressman challenged the PHA's actions, HUD only cautioned HABC against continuing the process.[21] HUD did not seek compliance with its regulation, which requires a PHA to honor its HUD contractual obligation to maintain and operate the development as housing for low-income individuals.[22] At present, fewer than 100 of the 308 units in the development are occupied and HABC has no intention to replace any of the demolished units. If approved for demolition—and assuming the occupancy rate does not increase—HABC will lose at least 208 units as a result of the current policy.

The Somerset Homes development in Baltimore is just one example of the policy's effect on Baltimore's affordable housing stock. HABC is also seeking approval to demolish a number of other developments with no plans to replace any of them.[23] If HUD continues its policy of not enforcing the prohibition against the relocation of tenants prior to the approval of demolition/disposition plans, vacancies at these developments will increase prior to the approval of the demolition/disposition application, which, in turn, means that applications for replacement vouchers will potentially result in even greater losses of affordable housing for the jurisdiction.

New Orleans

In New Orleans, the current policy will lead to significant losses in affordable housing. Prior to Hurricanes Katrina and Rita, New Orleans had approximately 7,200 units of public housing, of which 2,100 were vacant. After the hurricanes, only 1,400 units were occupied and the Housing Authority of New Orleans (HANO) recently submitted an application to demolish 5,000 public housing units and to replace them with only 1,474 units. Assuming that the 1,400 units occupied are among the 5,000 slated for demolition, New Orleans stands to lose no less than 2,126 affordable housing units. At a time when New Orleans has already lost approximately 80% of its affordable housing stock due to the hurricanes, such a loss of public housing will only exacerbate the unique challenges found in New Orleans and the surrounding hurricane

[17]Prior to PIH 2007-10, HUD reduced the amount of replacement voucher funding if the PHA's voucher utilization rate for the previous year fell below 95%. The number of replacement vouchers was reduced according to the dollar amount of underutilization below the threshold. In 2002, the reduction in replacement funding for voucher underutilization was increased slightly to 97%. This change remained in effect in PIH 2004-4 (Mar. 29, 2004) and PIH 2005-15 (April 26, 2005).

[18]PIH 2004-4, ¶ 7 (Mar. 29, 2004).

[19]PHAs have increased the reserve levels for a number of reasons, including concerns about the changing funding formula (which prompted PHAs to react conservatively and not to expend their full allocations) and administrative problems (which prevented full utilization and market conditions that make vouchers less desirable to local landlords).

[20]24 C.F.R. § 970.25 (2007), Annual Contributions Contract as required by HUD.

[21]HUD sent a letter to HABC in response to an inquiry from Congressman Elijah Cummings (D-MD), responding to a complaint by the Somerset Homes Tenant Council that HABC is relocating families without HUD approval of a relocation plan or demolition application (May 3, 2007). HUD should have demanded that HABC cease and desist further relocation activities. Instead, HUD cautioned HABC that they cannot start formal relocation activities until HABC gets HUD approval, and that HABC may not coerce any family to relocate prior to approval of the demolition application. The letter then gave HABC fifteen days to explain what they are doing and gave HABC the option of claiming that it is relocating residents for purposes of vacancy consolidation. HUD provided HABC that option even though HABC had made it quite clear that it is demolishing the entire development. Source, Barbara Samuels, ACLU-MD. *See* Letter from Bill Tamburrino, HUD Hub Director, to Paul Graziano, Executive Director, HABC (May 3, 2007) (on file at NHLP).

[22]24 C.F.R. § 970.25 (2007).

[23]Source: Barbara Samuels, ACLU-MD.

impacted region.[24] Unfortunately, the HUD notice appears to be written in anticipation of its applicability to the hurricane affected jurisdictions as a reference is made in the notice to the Disaster Voucher Program, which only operates for residents from the hurricane affected areas.[25] Contrary to HUD's apparent intentions, the unique situation in the hurricane affected areas demands a distinct policy to ensure that the area does not lose exorbitant amounts of publicly assisted affordable housing.

Cleveland

The Cuyahoga Metropolitan Housing Authority (CMHA) is in the process of developing a demolition/renovation plan for the Garden Valley development that has 628 units, of which only about 350 are currently occupied. CMHA is planning to replace the development with between 486 and 586 new units. In this instance, the current HUD policy will probably not reduce the number of affordable units in Cleveland as long as at least 142 of the 350 current occupants request a voucher. But, even though no loss of affordable housing appears evident, the current policy may create great difficulties for CMHA. Since 486 or 586 units will be replaced, the maximum number of vouchers that may be obtained for relocation/replacement purposes under the current policy is, respectively, 42 or 142. In the event public housing units are not available to meet the needs of the 208 or 308 current occupants that will not be entitled to replacement/relocation vouchers, CMHA will either have to use already authorized vouchers to rectify the shortfall, or perhaps, delay demolition plans until vouchers become available to meet the unmet need.[26]

Conclusion

The current demolition/disposition replacement vouchers policy is likely to lead to the erosion of the number of affordable housing units available through the federal low-income housing programs.[27] As demonstrated by the small snapshots of Baltimore, New Orleans, and Cleveland, the new policy will significantly hinder communities' capacity to serve the housing needs of their lowest-income populations. It will also make it more difficult for local communities and housing advocates to determine the number of units lost as the number is one that can change as tenants relocate to other public housing, move out, or the number of replacement units increases or decreases. ■

[24]Source: Laura Tuggle, New Orleans Legal Assistance Corporation.
[25]*See* note 7, *supra* .
[26]Source: Peter Iskin, The Legal Aid Society of Cleveland.
[27]Although the most recent notice by its terms applies only to replacement vouchers for public housing units, HUD has reportedly taken the position that the statement in its 2006 Notice, PIH 2006-5 (Jan. 13, 2006), applies to limit replacement of privately owned, federally assisted units lost from the inventory as well, despite the fact that its last published notice on the subject, Notice PIH 2001-41, states precisely the opposite.

Under the Radar Revisions to RD Voucher Program

In March of 2006, the Rural Housing Service and the Department of Housing and Urban Development (HUD) published a notice in the Federal Register implementing the Rural Development Demonstration Voucher Program (Rural Voucher Program).[1] The program, which was enacted in the Agricultural Appropriations Act of 2006[2] and reauthorized and refunded in the omnibus supplemental appropriations act of 2007,[3] was designed to protect residents of Section 515 rental housing from displacement when owners of the housing prepay their loans. The Federal Register notice simply announced the program and the manner in which Rural Development (RD)[4] and HUD intended to operate it. It did not request public comments or state if and when formal program regulations would be proposed or adopted. In other words, RD implemented the program without complying with the Administrative Procedure Act (APA)[5] or other agency law.[6]

In October of 2006, RD published a Voucher Guide to direct its staff on how to operate the Rural Voucher Program. RD has never made the Voucher Guide public and it is not available from its website. Presumably, the Voucher Guide can only be secured by filing a Freedom of Information Act Request with the agency.

In April of 2007, a year after it published the original program notice in the Federal Register, RD published an internal agency memorandum that announces significant changes to the program.[7] Curiously, the memorandum claims to merely clarify current program policies. In fact, it goes beyond mere clarification and announces certain changes to the program that became effective upon its publication and others that will become effective July 1, 2007. The memorandum also discloses that RD plans to publish a new Voucher Guide this summer. Because the

[1]71 Fed. Reg. 14084 (March 20, 2007).
[2]Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, Pub. L. 109-97, Title III (Nov. 10, 2005).
[3]Revised Continuing Appropriations Resolution, 2007, Pub. L. 110-5, § 101 (Feb. 15, 2007).
[4]The United States Department of Agriculture A(USDA) has stopped using the name Rural Housing Service with respect to the agency that is administering its rural housing programs. Since the programs are administered in the field by the Rural Development division of the department, it now refers to the housing programs as the Rural Development programs. However, the department has not legally changed the agency's name, consequently, it continues to name RHS as the administering agency in formal publications, such as the Federal Register.
[5]5 U.S.C. § 701 et. seq.
[6]42 U.S.C. § 1490n.
[7]Clarification of Issues for the Rural Development Voucher Demonstration Program, RD Unnumbered Letter (April 27, 2007) *available at* http://www.rurdev.usda.gov/regs/ul/ulapril07.pdf (hereinafter "memorandum").

agency changes were again made without regard to the agency's obligations under the APA, they, as well as the original notice, are subject to challenge.

The balance of this article will review the changes to the Rural Voucher Program that were announced in the agency's memorandum.

HUD and PHAs Are Not Administering RD Vouchers

As originally announced, RD was not planning to administer the Rural Voucher Program. Instead, it had entered into a memorandum of understanding with HUD pursuant to which HUD would award RD vouchers to public housing authorities (PHAs) located near the prepaying development and leave the issuance and administration of the vouchers to the local PHAs.

For reasons that have not been made public, this plan never worked out. In all likelihood, the process under which RD would contact HUD whenever an owner planned to prepay a Section 515 loan and HUD would then contact a local PHA and enter into a contract with that authority to administer the vouchers was too cumbersome, time consuming and expensive, particularly when the number of vouchers involved was very small. As a result, as of April 2007, RD has directly issued over 1,000 vouchers that are administered by its staff.[8] Not a single voucher appears to have been issued through the RD/HUD process.

The RD memorandum announces the termination of the RD/HUD partnership by simply stating that HUD will no longer be involved in the administration of the Rural Voucher Program. Instead, RD field offices and staff will be administering the program directly.

Abandonment of HUD Housing Quality Standards

Since HUD is no longer involved in the Rural Voucher Program, the memorandum also announces that RD will no longer use the HUD Housing Quality Standards to determine the suitability of units rented under the program. Instead, if the voucher unit is in a Section 515 development that has been prepaid, RD will simply execute a form stating that the unit has been inspected within the last twelve months and that the unit is decent, safe, and sanitary. If the unit is not in a 515 development, and presumably if a Section 515 development has not been inspected within the last twelve months, the RD staff person will use RD's Multifamily Housing Inspection Form to establish that the unit is decent, safe, and sanitary.

Vouchers Available When Section 515 Program Is Terminated for Reasons Other than Prepayment

To the benefit of residents of former Section 515 developments, the memorandum announces that vouchers are available not only to residents of developments whose owners have prepaid their Section 515 loans in accordance with the prepayment process set out in RD regulations, but also to residents of Section 515 developments whose loans have been accelerated or foreclosed, or settled as part of a debt settlement or compromise process. In addition, residents of Section 515 developments that have been deeded to RD in lieu of foreclosure are also eligible for vouchers. Interestingly, RD will issue vouchers to residents who remain in Section 515 developments that have been transferred to the agency through a deed in lieu of foreclosure or through a foreclosure purchase when the residents are not eligible for Rental Assistance or Rental Assistance is not available. It is not clear why RD has chosen to use vouchers in these cases since the agency has full control of the rent that it charges in a development that it owns. Technically, it does not need vouchers to reduce the residents' rent payments.

The memorandum also formally announces a practice that RD has apparently followed for some time, namely, making residents of Section 515 developments whose owners have prepaid their loans subject to use restrictions eligible for vouchers. Arguably, this policy may encourage owners of Section 515 developments to prepay their loans subject to use restrictions inasmuch as this minimizes the financial burden that they otherwise would encounter if they were to convince residents that remain in the development to apply for vouchers. Without the voucher option, these owners would be obligated to subsidize the rents of the remaining residents at their pre-prepayment rent levels for as long as the residents choose to remain in the development. If the owner is able to convince the residents to apply for vouchers, it relieves the owner of the obligation to continue to subsidize the residents.

While this practice may benefit residents of these developments by providing them with the option of moving to other housing, it in fact may burden some residents who prior to prepayment received utility reimbursements. This is because the RD voucher program does not reimburse residents for the cost of utilities if that cost exceeds 30% of their income.[9] Moreover, all residents who choose the voucher option take the risk that they will lose their voucher subsidy if the program is not renewed when their voucher assistance expires.

[8]All residents of developments that were prepaid after September 1, 2005, were eligible to receive a voucher. Since the program was not implemented until March of 2006, it is likely that many residents in RD developments that were prepaid did not know about the program when they were displaced. RD claims to have made efforts to contact all voucher eligible residents since the program was established. It is not clear whether they actually did. Advocates who are aware of any residents who were displaced from a Section 515 development after September 1, 2005, should contact RD on their behalf.

[9]*See* next paragraph.

Voucher Assistance Cannot Exceed the Rent Charged at the Prepaid Property

The memorandum announces that the level of assistance extended to voucher holders cannot exceed the difference between the "rent comparability study" rent for the prepaid property and the net tenant contribution prior to prepayment provided that the net tenant contribution is not negative. Where it is negative, the memorandum directs RD staff to change the net tenant contribution to zero. Effectively, the memorandum states that RD will not reimburse residents for the cost of utilities under the voucher program if the residents are paying their own utilities and the cost of utilities exceeds 30% of the residents' income. It is not clear from the memorandum whether RD will include the cost of utilities for other residents who pay their own utilities but who do not receive a reimbursement for the cost of utilities because it exceeds their income.

RD's decision not to include the cost of utilities in the voucher appears to violate the statutes authorizing the vouchers. The Agricultural Appropriations Act for Fiscal Year 2006 states that "the amount of the voucher shall be the difference between comparable market rent for the section 515 unit and the tenant paid rent for such unit." While the appropriations act does not define the term "tenant rent," it does obligate RD to operate the voucher program in accordance with the Rural Housing Voucher Program permanently authorized under Section 542 of the Housing Act of 1949.[10] That statutory section specifically authorizes RD to include the cost of utilities in the tenant rent calculation. Moreover, the appropriations act also directs RD to administer the Rural Voucher Program consistently with the HUD Enhanced Voucher Program regulations and administrative guidances, which also specifically include payment of utility allowances.[11] Accordingly, persons receiving RD vouchers should be able to have their utility costs included in the voucher.

Tenant Recertifications and Voucher Obligation Term

It appears that RD is abandoning the annual tenant certification and recertification process under the voucher program. The memorandum and an attached form notice suggest that RD will accept the prepaying owner's certification of the resident's income and, if the resident's income is less than 80% of Area Median Income, RD assumes that the resident is eligible for the program.

Moreover, effective July 2007, the term of the voucher obligation is being extended to thirty-six months, and it appears that RD will not require residents to recertify their household income for the entire thirty-six-month period. However, the resident notice advises residents that they have to report to RD if their household income increases to the point where it is more than 80% of median income. Presumably, RD terminates the voucher at that time.

It is not clear from the memorandum whether and how resident income recertifications will be carried out at the end of the three-year term. Moreover, the memorandum does not disclose whether the residents have a right to have the voucher payment increased when their household income decreases. This issue may be covered in the agency's Voucher Guide.

Voucher Payments to Owners Will Be Made at the Beginning of the Month

As currently administered, landlords under the Rural Voucher program do not get paid until the end of the month for which the rent is due. This is the practice that RD follows with respect to crediting Rental Assistance to owners in its Section 515 rental housing program. Apparently, this causes some unwillingness among private marketplace owners to participate in the Rural Voucher Program. Accordingly, starting in July of 2007, owners will be paid at the beginning of the month just as other private landlords are paid.

Resident Notices

Attached to the RD memorandum is a new resident notice that advises residents of RD developments whose owners have applied to prepay their loans of their rights and options should the prepayment be approved. Unfortunately, the notice is lengthy, discusses options that may or may not occur and is not written in plain English. Accordingly, it is likely to confuse residents with respect to their options should an owner's prepayment request be approved.

For example, the notice advises residents that they are eligible to receive vouchers if their owner prepays the RD loan. It also advises them that they are eligible for letters of priority entitlement that give them priority for admission to another RD development and, if they are receiving Rental Assistance, that they can transfer the Rental Assistance to the new development. The notice makes no effort to evaluate the benefits or drawbacks of either option and does not even discuss what happens if a number of residents from a prepaid development try to move to another RD development at the same time.

Resident Appeal Rights

The RD resident notice for the first time acknowledges residents' rights to appeal RD decisions with respect to the Rural Voucher Program. The notice states that residents have the right to appeal decisions made with respect to their eligibility for the voucher program and the voucher

[10] 42 U.S.C. § 1490r.
[11] 42 U.S.C. § 1437f(t), HUD Section 8 Renewal Policy Guide (Jan. 19, 2001) (as amended).

amount determination. The resident appeals may be filed with the National Appeals Division in accordance with regulations found at 7 C.F.R. Part 11. It is not clear from the notice whether tenants can, as part of the voucher payment determination, also appeal the rent comparability determination. It is also not clear whether other determinations, such as the determination that a unit may not meet the RD health and safety standards, are appealable by residents or landlords. Legally, voucher participants should be able to appeal any RD decision that denies, limits, or reduces any assistance under the program.[12]

Other Changes or Clarifications

The RD memorandum announces or reaffirms several other policies with respect to the voucher program. Specifically, it makes clear that the RD vouchers may not be used to purchase homes, as is authorized under the HUD Housing Choice Voucher program. It reaffirms the March 2006 Federal Register Notice that voucher payments may not be made retroactively to a period where the unit has not been inspected and approved by RD and a Housing Assistance Payment (HAP) contract has been signed with the owner. It also makes clear that the HAP payment amount may not exceed the rent charged at the property.

The memorandum announces that RD has hired two consultants. The first is The Signal Group, based in Portland, ME, to conduct rent comparability studies for the agency and thereby determine the market rent for the prepaid Section 515 developments. That comparable market rent is used to establish the upper limit of the voucher payment. It appears that the rent comparability study undertaken by The Signal Group is exclusively for RD's use and is treated confidentially.

The second consultant hired by RD is Quadel. The duties and activities of Quadel are not specified in the memorandum, which only states that Quadel will assist RD in delivering vouchers and monitoring the program.

Conclusion

The changes announced by RD to its voucher program are generally favorable to residents. The one exception is RD's failure to include the cost of utilities in the RD voucher subsidy calculation, something which adversely affects all voucher holders who have to pay their own utilities. It is, however, disturbing that RD is cavalierly proceeding to operate the program under the radar without publishing formal regulations and without allowing the public to comment on the manner in which the program is being administered. ■

[12] *See* 42 U.S.C. §1489(g).

Elderly Tenants Successfully Enforce Notice Requirements for Section 8 Opt-Out

A federal court in California has issued a preliminary injunction to block an owner from proceeding with threatened rent increases and evictions for nonpayment until it complies with federal statutory notice requirements to end participation in the project-based Section 8 program. *Park Village Apts. Tenants Ass'n v. Mortimer Howard Trust*, No. C 06-7389 SBA, 2007 WL 519038 (N.D.Ca., Feb. 14, 2007). This decision should be useful in cases where owners fail to provide the specific notices often required by federal or state law to convert housing to market-rate use. It should also help when owners, often with the blessing of the Department of Housing and Urban Development (HUD), seek to convert based upon a defective notice when one year has elapsed since it was issued.

Factual Background

Park Village is an eighty-four-unit complex for low-income seniors located in a stable neighborhood in Oakland, California, close to many commercial and social services. It was constructed under a conditional use permit permitting higher density and less parking so long as the property houses seniors for at least fifty years from 1978. The owner executed a project-based Section 8 contract with HUD for all of the units at initial rent-up, and the property has housed seniors ever since.

When the original term of the contract expired in 1999, the owner and HUD executed a five-year renewal until 2004. When that renewal then expired, another renewal contract was signed for a one-year term ending November of 2005, and the owner so informed the tenants.

As that one-year renewal approached its expiration, the owner engaged in negotiations with HUD's contract administrator for a two-year renewal contract at a slightly increased rent, pursuant to applicable rent adjustment rules. As those negotiations remained uncompleted, on the eve of the expiration in November of 2005, the owner sent a one-year notice to the tenants stating its intention to renew the contract. The 2004-05 contract then expired, and the tenants continued to pay the tenant contributions as if the Section 8 contract remained in place. Several weeks later, the contract administrator notified the owner that the rent increase had been approved, and tendered a proposed standard renewal contract and rent schedule.

The owner then expressed concern about certain language in the HUD form renewal contract, specifically the provision expressly acknowledging the possibility that enacted statutes might supercede the contract terms. The contract administrator stated that any such concerns should be expressed to HUD, since it lacked authority

to change any of HUD's forms. Several months later, the owner sought clarification from HUD on whether any statutes might affect the contract provisions. After another month passed, on March 6, 2006, the owner sent a notice to each tenant stating that the Section 8 contract had expired in November, and that each tenant must pay the full contract rent of $1192 or vacate the unit. A few days later, the owner sent another notice to the tenants stating that they owed an additional $12 monthly to cover a utility allowance formerly included in the housing assistance payments, which was not being paid by anyone while Section 8 assistance was not flowing.

Immediately after the owner's rent increase notices to the tenants, HUD responded to the owner's requests for clarifications twice about statutory changes, noting the few that existed (primarily income targeting requirements and definitions concerning "decent, safe and sanitary").

The owner then sent another letter to the tenants claiming that its earlier letters to the tenants satisfied the statutory notice requirements, or that the November 2005 contract expiration should be deemed notice. He also informed HUD that, while he was willing to negotiate a renewal contract, he was unwilling to submit to any arrangement that authorized grading concerning the physical conditions to determine contract compliance. Several weeks later, in April, HUD informed the owner that both the thirty-day rent-increase-or-vacate notice and the additional utility charge notice were illegal. In May, HUD sent the owner another letter essentially refusing to further negotiate the form contract provisions, and again informing him that the utility charge was illegal.

After five months passed, in October, the owner sent the tenants a ninety-day notice of termination, purportedly pursuant to state law[1] for owners seeking to terminate various Section 8 subsidies, giving them the option to enter into a new lease at $1192 or vacate the unit. HUD responded by reiterating its offer to enter into a renewal contract that would provide assistance retroactive to November 2005 when the last contract expired, subject to the same terms proposed then under a form renewal contract.

Because the owner refused to rescind the March and October notices, the tenants filed suit.

The Tenants' Complaint

In November, the tenants filed an action in state court, alleging that the owner had violated both state and federal laws establishing the required notice for owners seeking to terminate project-based Section 8 contracts. California law[2] requires a one-year notice containing specified content at least one year prior to the proposed nonrenewal of the contract, as well as a six-month notice if the owner decides to proceed. The federal statute,[3] as implemented by HUD guidelines,[4] requires notice one year prior to the termination (which includes both the owner's nonrenewal as well as an expiration) stating the owner's intention to opt-out or renew the contract. The federal statute[5] also specifies remedies for the owner's failure to provide the notice, including prohibitions on the owner's collection of additional rent or evictions until one year after notice is given. An additional claim was based upon breach of the last project-based renewal contract, of which the tenants were third-party beneficiaries. The tenants sought injunctive and declaratory relief for these violations.

The City of Oakland filed a contemporaneous action alleging violations of the California notice law and local rent control ordinances.[6] Because the tenants' complaint involved a federal claim over which a federal court would have had original jurisdiction, the owner was entitled to remove the action to federal court,[7] and did so.[8]

The Court's Ruling

The tenants' motion for preliminary relief essentially sought the relief specified by federal law[9]—that the owner be prohibited from collecting additional rents and from evicting the tenants. Helpful in establishing the violation was the owner's failure to provide a notice stating its election to opt-out, as required by HUD's guidelines that are expressly authorized by the statute.

In response to the tenants' motion, the owner made two claims: first, that he intended to renew the contract and it was HUD's failure, not his; second, that he had "substantially complied" with the requirements. The court rejected the first argument, finding that regardless of any intent to refuse to renew, an expiration is a termination requiring notice, and notice was not given. A similar fate befell the substantial compliance claim, since unlike another case where a court refused to rely on a technical violation,[10] strict compliance would have generated no confusion.

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[1]Cal. Civil Code § 1954.535.
[2]Cal. Gov't Code § 65863.10.
[3]42 U.S.C.A. § 1437f(c)(8)(A) (West Supp. 2006).
[4]HUD, *Section 8 Renewal Policy*, § 11-4.
[5]42 U.S.C.A. § 1437f(c)(8)(B)(West Supp. 2006).
[6]*City of Oakland v. Mortimer Howard Trust,* No. RG-06-296078 (Cal. Super. Ct., pending, May 2007).
[7]28 U.S.C. § 1441.
[8]Although the owner also removed the city's action to federal court, after assignment to the same judge as a related case, *City of Oakland v. Mortimer Howard Trust,* No. 06-7390 SBA (N.D. Cal.2006), it was remanded to state court, as it involved no federal claim.
[9]42 U.S.C. § 1437f(c)(8)(B) provides:

> In the event the owner does not provide the notice required, the owner may not evict the tenants or increase the tenants' rent payment until such time as the owner has provided the notice and 1 year has elapsed. The Secretary may allow the owner to renew the terminating contract for a period of time sufficient to give tenants 1 year of advance notice under such terms and conditions as the Secretary may require.

[10]*Owens v. Charleston Housing Authority,* 336 F.Supp.2d 934, 940-41 (E.D.Mo.2004) (excusing technical noncompliance of Section 8 opt-out notice's failure to contain certification re tenants' ability to remain with replacement vouchers where project was to be demolished).

The court evaluated each of the owner's purported notices, and found none of them sufficient. None of them clearly stated the owner's intention concerning renewal or opt-out one year in advance of the proposed termination. Because of the tenants' substantial likelihood of success on this federal claim, the court found it unnecessary to decide whether the state requirements were satisfied.

Finally, the court reviewed the issue of whether the tenants faced irreparable injury from the violations, if not enjoined. The owner sought to counter any allegations of harm by pointing to the vouchers that would be made available for alternative housing. Since the owner had made clear his desire to be free of HUD entanglement or any role in providing low-income housing, the court found sufficient harm in light of plaintiffs' status as seniors on fixed low incomes, many with health problems, and the inability of damages to remedy the notice violations.

This ruling, that the statutory clock only begins upon the provision of legally sufficient notice, should prove especially useful.

For essentially the same reasons, the court waived any bond requirement.

One final aspect of the court's ruling is especially noteworthy. The owner had sought to limit the effectiveness of the injunction to March 6, 2007, contending that the tenants received notice of his intent not to renew in the March 6, 2006, letter stating that the Section 8 contract had expired and demanding rents of $1192. The court said that because that letter did not meet the statutory requirements, it did not effectively "start the clock."[11] Because both owners and even sometimes HUD contend that the statute's one-year requirement begins with the service of a defective notice, this ruling, that the statutory clock only begins upon the provision of legally sufficient notice, should prove especially useful.

The owner has appealed to the United States Court of Appeals for the Ninth Circuit,[12] while settlement discussions between the parties continue.

The Oakland rent board has also issued a decision preventing the owner from seeking any rent higher than those collected as the tenants' share under the expired housing assistance contract.

The tenants were represented by Bay Area Legal Aid, with assistance from the National Housing Law Project as co-counsel. ■

[11] *Park Village Apts. Tenants Ass'n*, 2007 WL 519038 at *8.

[12] *Park Village Apts. Tenants Ass'n v. Mortimer Howard Trust*, No. 07-15382 (9th Cir., pending May 2007).

Court Refuses Eviction Based on Children's Disability-Related Conduct

By Liam Garland*

A Ventura, California, trial court recently found in favor of a tenant who was being evicted on the bases of his children's outbursts, excessive noise, and behavior perceived by neighbors as off-putting. That landlord, the court found, was required to waive past breaches of the lease where those breaches were causally related to the mental disabilities of the tenant's children, and posed no direct threat to other tenants. *Essex Management Corp. v. McAlister*, No. CIV 245572, 2007 Extra LEXIS 4 (Cal. Super. Ct., Ventura Co., Feb. 15, 2007).

This thorough ten-page written decision is the first in several years (and possibly the first ever in California) to explore the interplay between the right of renters with mental disabilities to reasonable accommodation under the federal Fair Housing Act when their disability-related conduct is the cause for the eviction.[1] Drawing heavily on other cases addressing similar issues, the court avoided the shallow analysis often found in other opinions.

The court described the challenges posed by the tenant family's continued tenancy:

> At least by the summer of 2006, life in the McAlister apartment was, at times, tumultuous. Yelling, screaming and banging were frequently heard by neighbors coming from within McAlister's unit, sometimes after 10:30 p.m. McAlister was witnessed angrily pursuing his son in common areas of the complex. Each of the children exhibited conduct to the neighbors and their children demonstrating an intention to hurt themselves. Some of the neighbors were fearful of McAlister and his children. The residents of two units expressed an intention to leave the complex, unless the McAlisters were removed.[2]

This behavior prompted plaintiff, a large property management company serving California, Oregon, and

* This article was written by Liam Garland, who represented the McAlisters in the eviction proceedings. Mr. Garland is the litigation director for the Housing Rights Center in Los Angeles, CA.

[1] For more information on the topic of reasonable accommodation for people with mental disabilities, see Garland, *Fairer Housing for People with Disabilities*, 40 Clearinghouse Review 503 (Jan./Feb. 2007), and Bazelon Center for Mental Health Law, Fair Housing Information Sheet #8, "Reasonable Accommodations for Tenant Posing a 'Direct Threat' to Others," available at http://www.bazelon.org/issues/housing/infosheets/fhinfosheet8.html.

[2] *Essex Management Corp. v. McAlister*, No. CIV 245572, 2007 Extra LEXIS 4 at *5 (Cal. Super. Ct., Ventura Co., Feb. 15, 2007) (hereinafter *Essex).*

Washington, to issue McAlister a three-day notice to cure or quit. Because the tenant also received assistance under the Section 8 housing choice voucher program, the landlord also issued a ninety-day notice to terminate tenancy, a requirement under California law.

McAlister contacted the Housing Rights Center, a Southern California fair housing organization that made several requests on his behalf to have the notices rescinded on the basis that the complained-of conduct was attributable to the mental illnesses of McAlister's children. McAlister also attempted to cure the breaches in response to the notices. Within two weeks of receiving the notices, McAlister's daughter was moved to an out-of-state home for children with special needs. Testimony from McAlister and his children's doctor suggested that once the daughter was absent from the home, the son's behavior improved and there were no subsequent serious noise episodes.

The court noted that neighbors' fear, speculation, or stereotypes about persons with disabilities were not a proper basis to evict a person with a disability.

The court termed McAlister's request as a "waiver of the past breaches of [his] lease agreement to the extent those breaches were causally related to his children's disabilities."[3] Applying analysis from *Giebeler v. M & B Associates*,[4] the court found that McAlister had met his *prima facie* burden of proving a request for reasonable accommodation, and that his request was both possible and reasonable on its face. Addressing one of the landlord's arguments, the court also joined with *Douglas v. Kriegsfeld Corp.*[4] in finding that requests for reasonable accommodation are permissible *during* an eviction proceeding, not only *before* issuance of a termination notice, and that these requests could take the form of letters from the tenant's counsel. Throughout its deliberate analysis, the court repeatedly cited *Douglas* for support on several important elements of a reasonable accommodation claim.

The landlord also argued that granting the accommodation—of permitting the McAlister family to remain tenants—was an undue financial burden because other tenants would not renew their leases. Indeed, two neighboring tenants testified to their discomfort with the children's "different" or nonconforming behavior, and that they intended to terminate their leases if McAlister's family remained tenants. Relying on the *Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act* (May 17, 2004), which the court found was entitled to substantial deference, it noted that neighbors' fear, speculation, or stereotypes about persons with disabilities were not a proper basis to evict a person with a disability. Rather "[a] determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence (e.g., current conduct, or a recent history of overt acts)." Specifically, the court found that permitting the landlord to evict the McAlister family on the basis of neighbors' impressions would "condone the very type of subjective notions that the FHAA strives to overcome."[5]

Moreover, the court found the landlord's burden was minimal—and certainly not undue—given the cost in granting the accommodation was re-letting only ***one*** unit out of more than 500. Had McAlister remained a tenant, the court reasoned, the landlord would have to re-let his neighbors' two units after they moved; had McAlister been evicted, his unit would require re-letting.

Finally, the landlord argued that the eviction could proceed under the "direct threat" exception to the federal Fair Housing Amendments Act. The Act permits a landlord to deny a dwelling "to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."[6] Based on two federal district court decisions, *Roe v. Sugar River Mills Assoc.*[7] and *Roe v. Housing Authority of City of Boulder*,[8] the court found that the landlord could not find protection under this exclusion unless it demonstrated "that no 'reasonable accommodation' will eliminate or acceptably minimize any risk [the tenant] poses to other residents".[9]

After assessing the evidence, the court found that at worst the children posed a threat not to others but only to themselves, and that there had not been a serious incident attributable to the McAlister family since the daughter had vacated the unit. For this reason, the court found the landlord had not met its burden to prove the McAlisters were a "direct threat."

The court concluded by sympathizing with the manager's and neighbors' frustrations, but explaining that their resolve to address the situation by simply getting rid of the family was inconsistent with the goals of the Fair Housing Act. The court noted, "[t]he concept of 'reasonable accommodation' is centered on the assumption that the affected parties will work jointly, in good faith, to achieve workable solutions to the challenges presented by a given disability." ■

[3] *Id*. at *18.
[4] 343 F.3d 1143, 1156-57 (9th 2003).
[5] 884 A.2d 1109 (D.C. App. 2005).
[5] *Essex* at *21.
[6] 42 U.S.C. § 3604(f)(9).
[7] 820 F.Supp. 636 (D. N.H. 1993).
[8] 909 F.Supp. 814 (D. Colo. 1995).
[9] *Essex* at *15.

New York City's Preservation Law Preempted by Federal and State Law

By Jason Lee*

In a pair of opinions, the Supreme Court of the State of New York, while showing sympathy to the growing affordable housing problem, ruled that the New York City preservation law, Local Law 79[1], was preempted by both federal and state law. *Mother Zion Tenant Association v. Donovan*, No. 402239 (N.Y. Supreme Court decided Apr. 11, 2007) and *Real Estate Board of New York, Inc. v. City of New York*, No. 114439 (N.Y. Supreme Court decided Apr. 11, 2007). These decisions come several years after a federal appellate court, reversing a trend established by several federal trial courts, found that a Minnesota notice law was both expressly and impliedly preempted under the Supremacy Clause of the Constitution.[2] The two opinions in New York took a similar approach in analyzing the preemption issue, except the decision on federal preemption was solely based on conflict preemption, as express preemption was not found in either case.

Background

During the late 1980s, Congress wrestled with the threatened loss of subsidized units as twenty-year prepayment restrictions for HUD-subsidized mortgages began to expire. Congress then passed the Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA)[3] to address the growing concern that the supply of affordable housing would drastically fall as owners began to remove their properties from affordable housing programs through mortgage prepayments. LIHPRHA was designed to preserve federally assisted affordable housing by providing additional market-value financial incentives to existing owners or new purchasers in exchange for long-term use restrictions.[4] As federal policy was being developed, property owners began to protest state and local restrictions on prepayment, seeking to insulate the level of federal incentives being offered. Eventually, owners obtained Section 232 of LIHPRHA, preempting state and local laws that "restrict or inhibit prepayment" for properties that were eligible for prepayment under LIHPRHA.

In 1995, Congress began reducing funding for the LIHPRHA program and by 1998, funding for LIHPRHA had been completely terminated. At the same time, Congress restored authorization for owners to prepay without regard to LIHPRHA's restrictions.[5] Despite all of this, LIHPRHA was never repealed and Section 232 is still often used by property owners to argue that state and local preservation laws are invalid.

Federal laws governing properties with project-based Section 8 contracts permit most owners to withdraw from the program when their fixed-term contracts expire.[6] This enables most owners to convert their properties to market-rate operations, absent other restrictions imposed by federal, state or local laws, while providing some preservation tools.[7]

Both before and after the creation and operation of the federal preservation programs, many state and local governments attempted to address the affordable housing crisis by passing their own preservation laws in order to stem the conversion of existing federally assisted housing to market-rate use.[8] Most of these laws require the owners of federally assisted housing to provide notice to tenants and state and local governments of the intended conversion. Some of the laws provide a right of first refusal to tenants or other specified preservation purchasers in the event of a sale or even purchase rights in the event of conversion; still others extend rent control systems to cover the converted properties after their removal from the federal affordable housing program.

The State of New York, like a few other states, created its own housing programs, designing the Mitchell-Lama program to encourage private financing of low- and moderate-income housing. In return for offering private developers long-term, low-interest government mortgage loans and real estate tax abatements, the developer had to agree to limited rents and profits and to regulation of tenant selection and the transfer of property.[9] Owners are allowed to withdraw from the program after twenty years without the permission of the commissioner.[10] New York City is home to thousands of Mitchell-Lama units, many of which are subsidized by federal Section 236 interest reduction payments. Another state statute, the Urstadt

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[1]Administrative Code of City of NY §§ 26-801, *et seq*.

[2]*Forest Park II v. Hadley*, 408 F.3d 1052 (8th Cir. 2003).

[3]LIHPRHA is codified at 12 U.S.C.A. §§ 4101-4125 (West, WESTLAW through P.L. 110-27 approved 05-25-07), and Section 232's preemption provision is codified at 12 U.S.C. § 4122 (West, WESTLAW through P.L. 110-27 approved 05-25-07).

[4]*See* http://www.nhlp.org/html/pres/index.cfm#1 for more information.

[5]Pub. L. No. 105-276, § 219, 112 Stat. 2487 (1998) (uncodified).

[6]*See* Multifamily Assisted Housing Reform and Affordability Act of 1997, as amended, 42 U.S.C.A. § 1437f note (West Supp. 2007) ("Multifamily Housing Assistance"), especially Section 524 establishing rent levels for renewal contracts.

[7]NHLP, *New York City Enacts Preservation Purchase Law*, 36 Hous. L. Bull. 45, 45 (2006).

[8]*See* http://www.nhlp.org/html/pres/state/index.htm for more information. *See also* NHLP, *A Brief Review of State and Local Preservation Purchase Laws*, 36 Hous. L. Bull. 217, 217 (2006) for information regarding state and local preservation rights.

[9]Private Housing Finance Law §§ 20 to 23, 28, 31, and 38.

[10]Public Housing Finance Law § 35.

Law, bars municipalities from enacting laws that regulate residential rents which were exempt from such regulation at the time of Urstadt's enactment or later decontrolled.[11]

But despite these state programs, the affordable housing crisis in New York City continued to grow as housing costs escalated and building owners continued to withdraw from federal, state and local assisted housing programs. In response, the City Council passed Local Law 79 in 2005, providing an additional tool for preserving assisted housing for low- and moderate-income families.[12] Local Law 79 enabled a tenant association to exercise a right to purchase or a right of first refusal to purchase a building where an owner intends to sell or take other action that would result in the owner withdrawing from an assisted rental housing program. If the tenants decide to purchase the property, the NYC Department of Housing and Preservation Development (HPD) is required to convene an advisory panel in order to determine the appraised market value of the property. If the tenants do not purchase the building and it is removed from the assisted rental housing program, the owner or purchaser is required to allow the current tenants to remain in their apartments for six months from the date of the conversion or until the tenant's lease expires, whichever is longer, at the same terms and conditions as before the building was withdrawn from the assisted rental housing program.

Rather than abide by this law, the owners and the HPD in *Mother Zion* and *Real Estate Board* challenged it in the state trial court. The owners in *Real Estate Board* filed suit for a declaratory judgment finding that Local Law 79 was void because it was preempted by federal and state housing law. In *Mother Zion*, the project-based Section 8 contract for the property was expiring and the owner sought to withdraw from the Section 8 program. However, the owner and HPD refused to follow Local Law 79 when tenants, in response to the owner's decision to withdraw, sought to exercise their right of first refusal to purchase the building. HPD, after being informed of the tenants' intent to purchase the building, refused to convene the appraisal advisory panel. The tenant association then filed suit seeking a judgment to compel HPD to convene an appraisal panel and a declaration that the owner is subject to the requirements of Local Law 79. Just like the owners in *Real Estate Board*, HPD and owners in *Mother Zion* argued Local Law 79 was void because it was preempted by state and federal law. Both cases were heard in the state trial court by Judge Marilyn Shafer.

Decision

In both cases, the court found that Local Law 79 was preempted by federal housing law. However, this ruling was not based upon LIHPRHA's express preemption provision. Because the property in *Mother Zion* did not involve federal programs relating to mortgage loans, but rather expiration of a project-based Section 8 contract, the express preemption provision in LIHPRHA did not apply and the case was distinguishable from that portion of *Forest Park II*. In *Forest Park II*, the Eighth Circuit had held a Minnesota preservation law was preempted expressly by LIHPRHA and impliedly under conflict preemption.[13] The law was invalid under conflict preemption because it frustrated the purposes of Congress in allowing prepayment and interfered with the affordable housing framework, even though it shared the general objective of federal housing statutes. And while the express preemption holding in *Forest Park II* was not accepted by the court in *Mother Zion*, *Forest Park's* reasoning regarding implied and conflict preemption was relied upon in the decision, even though only an expiring Section 8 contract was involved.

The court found that Local Law 79 was preempted by federal housing law. However, this ruling was not based upon LIHPRHA's express preemption provision.

Under federal laws governing Section 8, when a project-based Section 8 contract expires, an owner may withdraw from the program. If the owner does withdraw, Congress has provided that assistance will be provided directly to the tenants of that property. Local Law 79, the court found, interfered with those federal laws. The *Mother Zion* opinion noted, despite the fact that Local Law 79 had the same ultimate goal as the federal law, that it could run afoul of conflict preemption if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[14] Essentially, the court saw Local Law 79 as forcing the property owners to either remain in the federal housing program or sell their property to the tenants. In the court's view, this directly conflicted with the scheme established by Congress and was therefore voided by conflict preemption.

[11]McKinney's Uncons Laws of NY § 8605.

[12]*See* NHLP, *New York City Enacts Preservation Purchase Law*, 36 Hous. L. Bull. 45, 45 (2006), for more information regarding New York City's Local Law 79.

[13]408 F.3d 1052 (8th Cir. 2003). *See* NHLP, *Federal Appellate Court Issues Stunning Preemption Decision*, 33 Hous. L. Bull. 378, 379 (2003) for more information regarding the Eighth Circuit's *Forest Park II* decision.

[14]*Mother Zion*, slip op. at 13, quoting International Paper Co. v. Ouellette, 479 U.S. 481, 492 (1987).

The *Mother Zion* court rejected several of the tenants' arguments against implied preemption of Local Law 79. First, the court refused to follow a prior federal district court case[15] in favor of giving greater weight to a federal appellate decision.[16] Further, the court noted that the provisions of Local Law 79, especially the right of purchase, constituted a far greater obstacle to withdrawing from federal programs than did the additional notice requirement reviewed in the district court case.

The court rejected the argument that Congress no longer sought to expressly preempt state and local housing preservation law.

And while the tenants presented two federal cases which ruled that local rent control statutes were not preempted by federal housing law,[17] the *Mother Zion* court distinguished those statutes from Local Law 79.[18] The court did not address state law preemption in *Mother Zion* because the finding that Local Law 79 was preempted by federal law was enough to settle the matter.

The court in *Real Estate Board* found Local Law 79 to be preempted by state law, as well as federal law. The court reiterated its reasoning from *Mother Zion* with respect to the federal law preemption claims. Further, the court rejected the argument that Congress no longer sought to expressly preempt state and local housing preservation law. This argument was based on Congress' decision not to include a preemption clause in the Housing Opportunity Program Extension Act of 1996 (HOPE),[19] which superceded federal restrictions on mortgage prepayments previously contained in LIHPRHA, along with the defunding of LIHPRHA.[20] The court refused to accept the argument that these changes in law indicated Congress no longer had a reason to preempt state and local housing regulation without express indication of such an intent in the legislative history.

In considering the state law claims, the court in *Real Estate Board* found that while the Mitchell-Lama program did not expressly preempt Local Law 79, there was a conflict between the two. When Mitchell-Lama was amended in 1960, the state legislature acted to remove impediments to withdrawing from the program. However, Local Law 79, the court said, imposed additional restrictions on withdrawal and, therefore, on rights granted by state law. Further, the state legislature, not the city, had the authority to make policy decisions regarding affordable housing. Therefore, "the provisions of Local Law 79 which would mandate a right of first refusal to tenants of a building withdrawing from Mitchell-Lama are inconsistent with [and] preempted by the Mitchell-Lama law."[21]

The court then went on to say that because the Urstadt Law expressly barred local laws from regulating or controlling residential rents, the provision of Local Law 79, which requires a current tenant's rent to be maintained for a limited period of time after the property withdraws from Mitchell-Lama, is in direct conflict with the express language of the Urstadt Law and is preempted.[22]

Conclusion

Although, for the moment, the decisions in *Mother Zion* and *Real Estate Board* impair New York City's efforts to preserve affordable housing, both cases are being appealed and the preemption issue will continue to be disputed. The court itself noted that the withdrawal of rental property from affordable housing programs could have devastating effects on low- and moderate-income families and that immediate legislative action is necessary to not only address the preemption issue, but the housing issue as well. ■

[15]Kenneth Arms Tenant Assoc. v. Martinez, No. Civ. S-01-832 LKK/JFM, 2001 U.S. Dist. LEXIS 11470 (E.D. Cal. July 3, 2001).
[16]Forest Park II v. Hadley, 408 F.3d 1052 (8th Cir. 2003).
[17]*See* Independence Park Apts. v. United States, 449 F3d 1235 (Fed Cir. 2006); TOPA Equities, Ltd. v. City of Los Angeles, 342 F3d 1065 (9th Cir. 2003).
[18]The cases raised by the tenants involved statutes of general applicability and the court distinguished Local Law 79 for not being generally applicable. While this distinction is relevant in determining the applicability of LIHPRHA's express preemption clause, it has little bearing upon the question of conflict preemption facing the court in *Mother Zion*.
[19]Pub. L. No. 104-120, 110 Stat 834.
[20]*Real Estate Board*, slip op. at 18.
[21]*Id.* at 12.
[22]*Id.* at 13.

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.

Termination—Voucher Program

Smith v. Hamilton County, 2007 WL 1095680 (Ohio App. 1 Dist. Apr. 13, 2007). Plaintiff appealed the judgment of the lower court affirming the revocation of her Section 8 housing voucher because she had claimed her two sons as household members even though she did not have legal custody of them because the children were in the primary custody of their grandmother following a social services action some years earlier. The lower court, affirming the decision of the administrative hearing officer, stated that defendant, Hamilton County, "need only show that Smith made inaccurate statements on her application and recertification to show that she was ineligible to receive a Section 8 housing voucher. Fraud or other form of intentional misrepresentation is not relevant to the analysis." The Court of Appeals reversed, stating that the correct legal standard to terminate Smith's Section 8 housing voucher was whether she acted fraudulently by listing her two sons as household members on her application and again on her recertification. The court of appeals went on to conclude that under the circumstances it was perfectly reasonable for Smith to have listed her children as household members and the error would not amount to more than a serious violation. Accordingly, it held that Hamilton County did not have the legal right to terminate Smith's Section 8 voucher.

Eligibility—Voucher Program Lifetime Sex Offender

Cunningham v. Parkersburg Housing Authority, 2007 WL 712392 (S.D.W.Va. Mar. 6, 2007). The court denied the claim of the plaintiff, a lifetime sex offender registrant, that: (1) the restriction against providing Section 8 housing assistance to lifetime registered sex offenders, as stated in 42 U.S.C. § 13663, violates the Equal Protection Clause of the United States Constitution and (2) the retroactive application of the restriction violates the Constitution's Ex Post Facto Clause. In reaching its conclusion, the court concluded that sex offenders are not a suspect class for purposes of equal protection analysis. Accordingly, it subjected the rule to the less restrictive "rational basis" analysis and concluded that the Section 8 restriction does not violate the equal protection component of the Due Process Clause because it is rationally related to the legitimate governmental purpose of aiding low-income families in obtaining safe and secure public housing. In light of the regulatory and non-punitive nature of § 13663, the court also concluded that the restriction does not violate the Ex Post Facto Clause.

Eligibility—Voucher Program Arrest Record

Perry v. City of Milwaukee Housing Authority, 2007 WL 1168733 (E.D. Wis. Apr. 18, 2007). After being denied Section 8 housing benefits because of two domestic battery arrests, the plaintiff filed an action asserting that his arrests and the materials contained in the records of those arrests were irrelevant and should not be considered because he had not been convicted following those arrests. The court rejected plaintiff's argument and noted that 24 C.F.R. § 982.553(c) provides that "[t]he PHA may terminate assistance for criminal activity by a household member as authorized in this section if the PHA determines, based on a preponderance of the evidence, that the household member has engaged in the activity, regardless of whether the household member has been arrested or convicted for such activity." The court concluded that because the housing authority's decision was consistent with the federal housing regulations, the decision must be given reasonable deference.

Rent Abatement—Voucher Program Recovery of HAP Payment

Anderson v. District of Columbia Housing Authority, 2007 WL 1280576 (D.C., May 3, 2007). The District of Columbia Court of Appeals concluded that plaintiff, a Section 8 tenant, was not entitled to recover 100% of a $6,210 rent abatement award made by the trial court for numerous housing code violations in her rental unit. The award included rent paid by the District of Columbia Housing Authority (DCHA) to the landlord under the Section 8 Program. The court concluded that the plaintiff's award must be limited to the $234 in out-of-pocket rent contributions she made during the course of her tenancy. In reaching its decision, the court stated that although the plaintiff was entitled to a habitable unit, which she did not receive, she was not entitled to recover DCHA's portion of the rental payments because DCHA asserted its right to recover its portion of the rent abatement award. Accordingly, the court held that these funds must be returned to the public trust for future use.

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[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.

Reasonable Accomodation—Fair Housing Act Sufficiency of Request

Colon-Jimenez v. GR Management Corp., 2007 WL 642004 (1st Cir., Mar. 5, 2007). Affirming the district court decision, the Court of Appeals denied *pro se* appellants' claim for reasonable accommodation that would have allowed them to transfer to a different apartment because of their alleged mental disabilities. The court denied the claim because it concluded that the appellants failed to provide their landlord with a sufficiently direct and specific request for special accommodation.

California Proposition 209—Race Conscious Legislation
Federal Equal Protection Clause

Coral Construction v. City and County of San Francisco, 2007 WL 10040369 (Cal. App. 1 Dist. Apr. 18, 2007). Since 1984, the City and County of San Francisco has operated various iterations of a Minority/Women/Local Business Utilization Ordinance. The ordinance called for race- and gender-conscious remedies to ameliorate the effects of past discrimination in the awarding of city contracts. However, when the State of California adopted Proposition 209, which prohibited state and local government entities from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting, the ordinance's continued validity was severely threatened. As a result, the city reviewed the ordinance, made extensive legislative findings, and reauthorized it to remedy the specifically identified city contracting practices and conditions in the community and industry that cause the exclusion or reduction of contracting opportunities for minority- and women-owned businesses in the city's prime and subcontracting programs. In 2001, the plaintiff sought and secured a writ of mandate that compelled the City to implement race- and sex-neutral contracting policies and practices and direct the city to cease implementing its then existing MBE/WBE Ordinance.

The appellate court held that the trial court erred in failing to consider whether the federal equal protection clause mandates race-conscious legislation to remedy past discrimination such that Proposition 209 is trumped by the federal imperative of the ordinance. The appellate court remanded the case back to the trial court to determine whether the city established that the ordinance is narrowly tailored to remedy an extreme case of past discrimination by the city such that the preference program could be constitutionally required.

New Jersey Affordable Housing Policies—Mount Laurel Doctrine

In re Adoption of Third Round Substantive Rules of the New Jersey Council on Affordable Housing, 2007 WL 949607 (390 N.J.Super. 1, 914 A.2d 348, Jan. 25, 2007). The New Jersey Council on Affordable Housing (COAH) was created to provide an administrative mechanism for implementing the *Mount Laurel* doctrine (i.e. every municipality has an obligation to provide a realistic opportunity for affordable housing to its resident poor, and that the obligation to provide for the needs of the region will be borne by those municipalities designated as growth areas). In the instant matter, several parties challenged the validity of COAH's substantive rules pertaining to the calculation of affordable housing need between 1999 to 2014 and how COAH would go about satisfying the housing need between 2004 and 2014. Although the court acknowledged that New Jersey's Legislature granted COAH considerable authority to adopt policies and to fashion regulations that will provide a realistic opportunity for the construction of affordable housing, the court held that under the circumstances several of the existing policies were invalid because they were either unsupported by the record or relied upon State Planning Commission data that had not been publicly issued. As such, the court ordered the agency to amend its rules to conform to the constitutional and statutory mandate.

Disparate Impact—Home Loan Underwriting Standards
Fair Housing Act

Beaulialice v. Federal Home Loan Mortgage Corporation, 2007 WL 744646 (M.D.Fla. Mar. 6, 2007). Plaintiff alleged that the Federal Home Loan Mortgage Corporation's automated underwriting software imposes a disparate impact on minorities because of the disproportionate effect that the software's bankruptcy override feature has on minority loan applications. Although the court concluded that Plaintiff may bring a disparate impact claim under the Fair Housing Act, the court ultimately denied the plaintiff's claim because it concluded that the claim was barred by the applicable statutes of limitation and the doctrine of unclean hands.

Disparate Impact—Land Use Plan and Regulations
Fair Housing Act

Reinhart v. Lincoln County, 2007 WL 1041428 (10th Cir., Apr. 9, 2007). In the district court, the plaintiffs claimed that the newly enacted land-use plan and amended land-use regulations of the defendant, Lincoln County, had a

discriminatory effect on persons protected by the Fair Housing Act (FHA). Specifically, they alleged that the new regulations resulted in additional costs that made it impossible for them to provide affordable housing, thereby injuring a protected class (i.e. racial minorities and single-mother households). The district court granted Lincoln County's motion for summary judgment and the plaintiffs appealed. The court of appeals stated that in order to establish that the new regulations disparately impact a protected group, the plaintiffs would have to show that the new regulations increased the cost of a dwelling by some amount and then show that this increase disparately impacts the ability of members of the protected group to buy a dwelling. Because the Reinharts failed to provide any meaningful evidence indicating before-and-after costs of dwellings and the percentages of protected and non-protected persons who would have been priced out of the market as a result of the cost increase, the court held that the plaintiffs failed to establish a *prima facie* case of disparate impact under the FHA and thus affirmed the district court's judgment. ■

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 (USDA—Rural Housing Service/ Rural Development (RD)) issued in March and April of 2007. 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 Final Regulations

72 Fed. Reg. 12,533 (March 15, 2007)
Timeliness Expenditure Standards for the Insular Areas Program

Summary: This final rule implements regulatory timeliness standards for the Insular Areas Program, as established by the Housing and Community Development Act of 1974. The expenditure standards will ensure that grantees carry out their programs in a timely manner. The standards take into consideration and reflect the unique circumstances faced by Insular Area grantees in their ability to expend Community Development Block Grant allocations. The final rule provides that an Insular Area grantee may submit an abbreviated consolidated plan rather than a full consolidated plan. This final rule also makes technical and conforming changes to the Insular Areas program. The final rule follows publication of an August 7, 2006, proposed rule on which HUD did not receive any public comments. Accordingly, HUD is adopting the August 7, 2006, proposed rule without change.

Effective Date: April 16, 2007.

72 Fed. Reg. 16,677 (April 4, 2007)
HOME Investment Partnerships Program; American Dream Downpayment Initiative and Amendments to Homeownership Affordability

Summary: This rule follows publication of, and considers the public comments on, two earlier HUD rules. First, this rule makes final the March 30, 2004, interim rule establishing regulations for a downpayment assistance

[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.

component under the HOME Investment Partnerships Program, referred to as the American Dream Downpayment Initiative (ADDI). Through the ADDI, HUD makes formula grants to participating jurisdictions under HOME for the purpose of assisting low-income families to achieve homeownership. In addition, this rule also makes final HUD's November 22, 2004, interim rule, which revised and clarified the HOME homeownership affordability requirements of HOME. In response to the public comments received on both interim rules, this final rule clarifies that the purchase of manufactured homes is an ADDI eligible activity, and broadens and clarifies the use of HOME funds to help preserve affordable housing previously assisted with HOME funds.

Effective Date: May 4, 2007.

72 Fed. Reg. 19,069 (April 16, 2007)
Certification and Funding of State and Local Fair Housing Enforcement Agencies

Summary: This final rule revises and updates HUD's regulation implementing Section 810(f) of the federal Fair Housing Act. This regulation establishes the criteria for certification of state and local fair housing laws that are substantially equivalent to the federal Fair Housing Act, as well as for decertification of state and local fair housing laws that are deemed no longer substantially equivalent. This final rule also revises the funding criteria for agencies participating in the Fair Housing Assistance Program.

Effective Date: May 16, 2007.

72 Fed. Reg. 20,017 (April 20, 2007)
Native American Housing Assistance and Self-Determination Act (NAHASDA); Revisions to the Indian Housing Block Grant Program Formula

Summary: This final rule makes several revisions to the regulations for the Indian Housing Block Grant (IHBG) program allocation formula. Through the IHBG program, HUD provides federal housing assistance to Indian tribes in a manner that recognizes the right of Indian self-determination and tribal self-government. This final rule follows publication of a February 25, 2005, proposed rule and takes into consideration the public comments received on the proposed rule. Other than one conforming change, this final rule adopts the February 25, 2005, proposed rule without change. HUD negotiated the proposed rule and final rule with active tribal participation and using the procedures of the Negotiated Rulemaking Act of 1990.

Effective Date: May 21, 2007.

HUD Proposed Regulations

72 Fed. Reg. 14,015 (March 23, 2007)
Implementation of OMB Guidance on Nonprocurement Debarment and Suspension

Summary: This proposed rule would relocate HUD's regulations governing nonprocurement debarment and suspension to a new part in Title 2 of the Code of Federal Regulations. The relocation is part of a government-wide initiative to create one location where the public can locate both the Office of Management and Budget (OMB) guidance for grants and agreements and the associated federal agency implementing regulations. The proposed new part would adopt the OMB guidance on nonprocurement debarment and suspension and supplement it with HUD-specific clarifications and additions. The proposed rule would also make conforming changes to HUD regulations referencing the nonprocurement debarment and suspension regulations. This proposed regulatory action is an administrative simplification that would make no substantive change in HUD policy or procedures for nonprocurement debarment and suspension.

Comment Due Date: May 22, 2007.

72 Fed. Reg. 20,405 (April 24, 2007)
Uniform Physical Condition Standards and Physical Inspection Requirements for Certain HUD Housing; Revision to Response Time for Requesting a Technical Review of a Physical Inspection Report

Summary: HUD assesses the physical conditions of multifamily properties and notifies owners of its assessment. The owners, under certain circumstances, are provided an opportunity to seek a technical review of HUD's physical condition assessment and HUD may take action in certain cases where the housing is found not to be in compliance with the physical condition standards. Currently, the regulations establish different time frames for owners to request a technical review, depending on whether HUD transmits the inspection results through the Internet or certified mail. In order to improve uniformity in the technical review request process, this proposed rule would implement a standard time frame of thirty calendar days for the submission of a request for a technical review for both physical inspection results that are transmitted to the owner via the Internet or in hard copy form via certified mail.

Comment Due Date: May 24, 2007.

HUD Federal Register Notices

72 Fed. Reg. 9347 (March 1, 2007)
Notice of Submission of Proposed Information Collection to OMB; Civil Rights Front End and Limited Monitoring Review

Summary: The department is soliciting public comments on two checklists developed by the Office of Public and Indian Housing (PIH) that will be used to conduct civil rights monitoring reviews of twenty public housing agencies (PHAs) in Fiscal Year (FY) 2007, in support of HUD's strategic goal of ensuring equal opportunity

in housing. PIH staff will complete checklist A (On-site Limited Review of Civil Rights-Related Program Requirements for Low Rent and Housing Choice Voucher Programs) during onsite comprehensive reviews. PHAs will complete checklist B (On-site Limited Review of Section 504 Monitoring). The information collected will be used to evaluate a PHA's compliance with the Fair Housing Laws.

Comments Due Date: April 2, 2007.

72 Fed. Reg. 9348 (March 1, 2007)
Regulatory Waivers for Public Housing Programs To Assist With Transition to Asset Management

Summary: This notice advises the public of a process for seeking expedited waivers of HUD program regulations to assist public housing agencies (PHAs) as they convert to asset management. This notice, which concerns regulations governing HUD's Office of Public and Indian Housing (PIH), does not apply to: PHAs with less than 250 units that do not elect to convert to asset management, Indian and Tribally Designated Housing Entities, local tribal governments, or PHAs that administer only the Section 8 Housing Choice Voucher program ("Section 8-only PHAs"). The expedited regulatory waiver process applies only to waivers of PIH program regulations applicable to PHAs.

Comments Due Date: April 2, 2007

72 Fed. Reg. 10,013 (March 6, 2007)
Additional Waivers Granted to and Alternative Requirements for the State of Louisiana Under Public Laws 109-148 and 109-234

Summary: HUD is authorized by statute to waive statutory and regulatory requirements and specify alternative requirements for the Community Development Block Grant program funded by these laws, upon the request of the state grantee. This notice describes the additional waivers for the disaster recovery grants made to the state of Louisiana under the subject appropriations acts.

Effective Date: March 12, 2007.

72 Fed. Reg. 10,019 (March 6, 2007)
Additional Waivers Granted to and Alternative Requirements for the State of Mississippi Under Public Laws 109-148 and 109-234

Summary: HUD is authorized by statute to waive statutory and regulatory requirements and specify alternative requirements for the Community Development Block Grant grants authorized by these statutes upon the request of the state grantees. This notice describes the additional waivers for the disaster recovery grants made to the State of Mississippi under the subject appropriations acts.

Effective Date: March 12, 2007.

72 Fed. Reg. 9961 (March 6, 2007)
Statutorily Mandated Designation of Difficult Development Areas and Qualified Census Tracts for Section 42 of the Internal Revenue Code of 1986: Revision of Definition of Effective Date.

Summary: This notice revises the definition of "effective date" in a notice published in the Federal Register on September 28, 2006, designating "Difficult Development Areas" (DDAs) and "Qualified Census Tracts" (QCTs) for purposes of the Low-Income Housing Tax Credit (LIHTC) under Section 42 of the Internal Revenue Code of 1986. HUD is responsible for designating DDAs and QCTs annually. The September 28, 2006, notice provided a definition of "effective date" that is revised by this notice to define "multiphase" LIHTC projects and to specify how such projects are to be treated when DDA or QCT designations change between phases.

72 Fed. Reg. 11,433 (March 13, 2007)
Fiscal Year 2007 SuperNOFA for HUD's Discretionary Programs

Summary: On January 18, 2007, HUD published its Notice of Fiscal Year (FY) 2007 Notice of Funding Availability Policy Requirements and General Section to the SuperNOFA (General Section). HUD published the General Section of the FY 2007 SuperNOFA in advance of the individual NOFAs to give prospective applicants sufficient time to begin preparing their applications, and to register early with Grants.gov in order to facilitate their application submission process. Today's publication contains the thirty-eight funding opportunities or program NOFAs that constitute HUD's FY 2007 SuperNOFA. In addition, today's publication provides a revised listing of programs contained in the FY 2007 SuperNOFA and corrects two items contained in the General Section published on January 18, 2007.

Dates: Application deadline and other key dates are contained in each individual program NOFA and in Appendix A of this notice.

72 Fed. Reg. 12,628 (March 16, 2007)
Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons: Update of Web Site Reference

Summary: This notice updates an obsolete website reference that was included in HUD's final "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient (LEP) Persons," as required by Executive Order (EO) 13166, published in the Federal Register on January 22, 2007, and which became effective on March 7, 2007.

72 Fed. Reg. 12,695 (March 16, 2007)
The Violence Against Women and Department of Justice Reauthorization Act of 2005: Applicability to HUD Programs

Summary: This notice addresses inquiries to HUD about: (1) The applicability to HUD programs of certain provisions of the Violence Against Women and Department of Justice Reauthorization Act of 2005, as amended by a technical corrections bill signed into law in August 2006, and (2) HUD's plans to issue rules or guidance on this new law. The Violence Against Women and Department of Justice Reauthorization Act of 2005 and the technical corrections described in this notice became effective upon enactment. This notice presents information from HUD's Offices of Community Planning and Development, General Counsel, Housing, and Public and Indian Housing, and provides an overview of key provisions that affect HUD programs, identifies those provisions that require program participants to take action to be in compliance, and advises of efforts underway within HUD to further facilitate compliance with this new law, including rules and guidance that are under consideration or development.

72 Fed. Reg. 14,130 (March 26, 2007)
Mortgage and Foreclosure Rights of Servicemembers Under the Servicemembers Civil Relief Act: Informational Notice

Summary: This notice provides information regarding the homeowner notification requirement of Section 106(c)(5) of the Housing and Urban Development Act of 1968. The Servicemembers Civil Relief Act (SCRA) provides legal rights and protections that are applicable to the debts of service members and their dependents. Notice is to be provided to all homeowners who are in default in order to inform them of mortgage and foreclosure rights available to them under the SCRA if they are service members or dependents of service members. HUD has developed, in consultation with the Departments of Defense and Treasury, a final disclosure form to be used by mortgagees for fulfilling this notice requirement. HUD made the form available on its website in July 2006, and the form is also attached as an appendix to this notice.

72 Fed. Reg. 15,783 (April 2, 2007)
Notice of Regulatory Waiver Requests Granted for the Fourth 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 October 1, 2006, and ending on December 31, 2006.

72 Fed. Reg. 15,896 (April 3, 2007)
Announcement of Funding Awards for the Emergency Capital Repair Grant Program; Fiscal Year 2006

Summary: This announcement notifies the public of Emergency Capital Repair Grant funding decisions made by the department in Fiscal Year 2006. This announcement contains the names of the awardees and the amounts of the awards made available by the Department of Housing and Urban Development.

72 Fed. Reg. 15,894 (April 3, 2007)
Announcement of Funding Award—FY 2006; Office of Healthy Homes and Lead Hazard Control Grant Programs

Summary: This announcement notifies the public of funding decisions made by the department in competitions for funding under the Office of Healthy Homes Lead Hazard Control Grant Programs and the Reopened Lead Hazard Reduction Demonstration Grant Program Notices of Funding Availability. This announcement contains the name and address of the award recipients and the amounts awarded.

72 Fed. Reg. 16,382 (April 4, 2007)
Notice of Proposed Information Collection for Public Comment on the Final Evaluation of the Moving to Opportunity Program

Summary: HUD is submitting a proposed information collection activity to the Office of Management and Budget (OMB) for review. It is soliciting public comments on the subject proposal. This request is for the clearance of several survey instruments for the Final Evaluation of the Moving to Opportunity (MTO) demonstration program. Authorized by Congress in the Housing and Community Development Act of 1992, MTO is a unique experimental research demonstration designed to learn whether moving from a high-poverty neighborhood to a low-poverty neighborhood significantly improves the social and economic prospects of poor families.

Comments Due Date: June 4, 2007.

72 Fed. Reg. 16,808 (April 5, 2007)
Announcement of Funding Awards for Resident Opportunities and Self-Sufficiency Elderly/Persons With Disabilities Program for Fiscal Year 2006

Summary: This announcement notifies the public of funding decisions made by the department for funding under the Fiscal Year FY) 2006 Notice of Funding Availability for the Resident Opportunities and Self-Sufficiency Elderly/Persons with Disabilities Program funding for FY 2006. 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.

72 Fed. Reg. 16,809 (April 5, 2007)
Notice of Delegation of Authority to Regional Directors in the HUD Regional Offices

Summary: In this notice, the Secretary delegates to the Regional Directors the authority to waive certain HUD handbook provisions and directives and announces the procedures that will govern these waivers. Specifically, the delegation provides Regional Directors with concurrent authority to waive certain HUD handbook provisions and directives. Currently, the Regional Directors are located in Region I (Boston, MA); Region II (New York, NY); Region III (Philadelphia, PA); Region IV (Atlanta, GA); Region V (Chicago, IL); Region VI (Fort Worth, TX); Region VII (Kansas City, KS); Region VIII (Denver, CO); Region IX (San Francisco, CA); and Region X (Seattle, WA). Any waiver of HUD handbook provisions and directives made in the field must be in writing and must specify the grounds for granting it. All waiver decisions by a Regional Director in the Office of Field Policy and Management must be jointly concurred by the appropriate regional program director or Assistant Secretary. In addition, the Department will make available for public inspection, for at least a three-year period, a record of all waivers of HUD handbook provisions and directives.

Effective Date: March 30, 2007.

72 Fed. Reg. 18,269 (April 11, 2007)
Notice of Submission of Proposed Information Collection to OMB; Survey of HUD-Approved Housing Counseling Agencies

Summary: The survey will gather information on the organizational characteristics of all HUD-approved housing counseling agencies, including the type of services they provide, number and characteristics of their staff, size of their budget for counseling services and sources of funds, the characteristics of their counseling service delivery process and opinions regarding key policy issues facing the industry. This survey is part of a broader study to help inform the efforts of the Department of Housing and Urban Development to support the housing counseling industry by providing more systematic information and it will lay the groundwork for an impact evaluation of pre-purchase housing counseling.

Comments Due Date: May 11, 2007.

72 Fed. Reg. 19,011 (April 16, 2007)
Notice of Proposed Information Collection for Public Comment on Updating the Low-Income Housing Tax Credit Database

Summary: HUD is soliciting public comments on its submission to the Office of Management and Budget information collection activity relating to the Low Income Housing Tax Credit Program. HUD, while not responsible for administering tax credits, has special responsibilities in understanding and evaluating credit usage, both because the LIHTC helps provide for the housing needs of low-income persons and because credits work in conjunction with HUD subsidies in some units. Absent this data collection, HUD will not have at its disposal the most current, comprehensive LIHTC data, rendering HUD unable to determine the types of areas in which the units are located, the concentration of such units geographically and with respect to other subsidized housing types, or whether incentives to develop LIHTC units in a set of HUD-designed Difficult Development Areas and Qualified Census Tracts have been effective. In addition, without these data, both HUD and private researchers will be unable to conduct sample-based studies on the LIHTC due to the difficulty of constructing a valid sample without a complete data set on the universe of LIHTC projects.

Comments Due Date: June 15, 2007.

72 Fed. Reg. 19,211 (April 17, 2007)
Public Housing Operating Fund Program; Guidance on Implementation of Asset Management

Summary: Under HUD's regulations for the Public Housing Operating Fund Program, public housing agencies (PHAs) with 250 or more units are required to convert to asset management. PHAs with less than 250 units may elect to convert but are not required to do so. On September 6, 2006, HUD published a Federal Register notice providing interim guidance to assist PHAs in the conversion to asset management. On that same date, HUD posted on its website Public and Indian Housing (PIH) Notice 2006-33, Changes in Financial Management and Reporting Requirements for Public Housing Agencies Under the New Operating Fund Rule (24 CFR part 990), that provided interim guidance on changes in PHA financial management and reporting necessitated by the conversion to asset management. Both the September 6, 2006, Federal Register notice and PIH Notice 2006-33 were issued for public comment. This notice advises the public that HUD has posted its final guidance for both subject areas on the HUD website. The final guidance takes into consideration the public comments received on both sets of interim guidance, and responds to the significant issues raised by the public commenters.

72 Fed. Reg. 20,356 (April 24, 2007)
Notice of Submission of Proposed Information Collection to OMB; Fair Housing Initiatives Program (FHIP) Survey

Summary: HUD is soliciting public comments on its proposal to collect information on the Fair Housing Initiatives Program (FHIP). As part of a larger evaluation, this FHIP agency survey will show how FHIP grantees use the funds they receive from HUD to conduct fair housing activities. It will also show how other monetary resources are implemented and how much of their activities are

fair-housing related. It will also show which activities are common to FHIP grantees throughout the nation and which are regional or local.

Comments Due Date: May 24, 2007.

72 Fed. Reg. 22,676 (April 30, 2007)
Semiannual Regulatory Agenda

Summary: HUD is publishing its agenda of regulations already issued or that it expects to be issued over the next several months. The agenda also includes rules currently in effect that are under review and describes those regulations that may affect small entities, as required by Section 602 of the Regulatory Flexibility Act. The purpose of publication of the agenda is to encourage more effective public participation in the regulatory process by providing the public with advance information about pending regulatory activities.

HUD Notices

CPD-07-03 (April 17, 2007)
Instructions for Urban County Qualification for Participation in the Community Development Block Grant (CDBG) Program for Fiscal Years (FYs) 2008-2010

Summary: This notice establishes requirements, procedures and deadlines to be followed in the urban county qualification process for FYs 2008-2010. Information concerning specific considerations and responsibilities for urban counties is also provided.

PIH 2007-6 (March 7, 2007)
Process for Public Housing Agency Voluntary Transfers of Housing Choice Vouchers, Project-Based Vouchers and Project-Based Certificates

Summary: This notice applies to public housing agencies (PHAs) that administer the Housing Choice Voucher (HCV), Project-Based Vouchers (PBV) and/or Project-Based Certificates (PBC) programs. Five-year mainstream vouchers and Section 8 Moderate Rehabilitation units will be addressed under a separate notice. The purpose of this notice is to clarify the circumstances under which HUD will consider a voluntary transfer of budget authority and corresponding baseline units for the HCV program (including PBVs and PBCs) from the divesting PHA's Consolidated Annual Contributions Contract (CACC) to the receiving PHA's CACC. It also explains the process and procedures associated with such a transfer.

PIH 2007-9 (April 10, 2007)
Updated Changes in Financial Management and Reporting Requirements for Public Housing Agencies Under the New Operating Fund Rule (24 CFR part 990)

Summary: This notice transmits changes in financial management and reporting for public housing agencies pursuant to the Revisions to the Public Housing Operating Fund Program, Final Rule, published in the Federal Register on September 19, 2005 (79 FR 54983). These changes are contained within the attached supplement to the Financial Management Handbook, Handbook 7475.1 REV., CHG-1, Changes in Financial Management and Reporting for Public Housing Agencies Under the New Operating Fund Rule (24 CFR 990) Revised, April 2007.

PIH 2007-10 (April 30, 2007)
Voucher Funding In Connection with the Demolition or Disposition of Occupied Public Housing Units

Summary: The purpose of this notice is to describe the funding process for providing housing choice vouchers in connection with the demolition or disposition of occupied public housing units. This notice applies to public housing agencies seeking vouchers for relocation or replacement housing related to demolition or disposition (including HOPE VI), and plans for removal (required and voluntary conversion under Section 33 of the U.S. Housing Act of 1937, as amended, and mandatory conversion under Section 202 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996) of public housing units.

Rural Housing Service Proposed Rules

72 Fed. Reg. 16,730 (April 5, 2007)
Farm Labor Housing and Rural Rental Housing Programs; Reserve Account Requirements

Summary: Through this action, the Rural Housing Service is proposing to amend its regulation to change the requirements of the Reserve Account for the Sections 514/516 Farm Labor Housing program and the Section 515 Rural Rental Housing program. The intended effect of this action is to address reserve account requirements of new construction rental housing funded under Sections 514/516 and Section 515 and does not affect reserve accounts for existing portfolios.

Comment Due Date: June 4, 2007.

Rural Housing Service Federal Register Notices

72 Fed. Reg. 19,684 (April 19, 2007)
Notice of Funds Availability (NOFA) for the Section 533 Housing Preservation Grants for Fiscal Year 2007

Summary: RHS announces that it is soliciting applications under its Housing Preservation Grant (HPG) program. The HPG program is a grant program which provides qualified public agencies, private nonprofit organizations, and other eligible entities grant funds to assist very low- and low-income homeowners in repairing and rehabilitating their homes in rural areas. In addition, the HPG program assists rental property owners and

cooperative housing complexes in repairing and rehabilitating their units if they agree to make such units available to low- and very low-income persons.

Application Dates: June 18, 2007, at 5 p.m. at the local Rural Development State Office.

72 Fed. Reg. 19,680 (April 19, 2007)
Notice of Funds Availability (NOFA) for Section 514 Farm Labor Housing Loans and Section 516 Farm Labor Housing Grants for Off-Farm Housing for Fiscal Year 2007

Summary: This NOFA announces the timeframe to submit applications for Section 514 Farm Labor Housing (FLH) loans and Section 516 FLH grants for the construction of new off-farm FLH units and related facilities for domestic farm laborers. The intended purpose of these loans and grants is to increase the number of available housing units for domestic farm laborers. Applications may also include requests for Section 521 rental assistance (RA) and operating assistance for migrant units. This document describes the method used to distribute funds, the application process, and submission requirements.

Application Dates: June 18, 2007, 5 p.m., local time for each Rural Development State Office.

72 Fed. Reg. 22,243 (April 30, 2007)
Semiannual Regulatory Agenda, Spring 2007

Summary: This agenda provides summary descriptions of significant and not significant regulations being developed in agencies of the U.S. Department of Agriculture.

72 Fed. Reg. 21,207 (April 30, 2007)
Notice of Funding Availability (NOFA) for the Section 515 Rural Rental Housing Program for New Construction in Fiscal Year 2007

Summary: This NOFA announces the timeframe to submit applications for Section 515 Rural Rental Housing loan funds, including applications for the nonprofit set-aside for eligible nonprofit entities, the set-aside for the most Underserved Counties and Colonias (Cranston-Gonzalez National Affordable Housing Act), and the set-aside for Empowerment Zones and Enterprise Communities (EZ/ECs) and Rural Economic Area Partnership (REAP) zones, and a designated reserve for states with rental assistance programs.

Application Dates: June 29, 2007, 5 p.m., local time for each USDA Rural Development State Office.

72 Fed. Reg. 21,211 (April 30, 2007)
Notice of Funding Availability: Section 515 Multi-Family Housing Preservation and Revitalization Restructuring Program (MPR) for Fiscal Year 2007

Summary: Rural Housing Service announces the availability of funds and the timeframe to submit applications to participate in a demonstration program to preserve and revitalize existing rural rental housing projects financed by Rural Development under Section 515 of the Housing Act of 1949.

Application Dates: May 30, 2007, 5 p.m., Eastern Time.

Rural Housing Service Administrative Notices

AN 4253 (March 15, 2007)
Separate File for Prepayment/Transfers

Summary: Rural Development Instruction 2033-A provides for prepayment requests and supporting documentation to be filed in "Position 3" of the loan file. This Administrative Notice advises that each state will create a separate "nine position" file folder for all Prepayment and Transfer Applications. The intent of this creation is to ensure complete documentation of any events or materials associated with a request to prepay a loan. This complete documentation will help ensure Rural Development meets its regulatory obligations and will provide timely and complete information to the Office of General Counsel and the Department of Justice when litigation occurs.

Expiration Date: March 31, 2008.

AN No. 4257 (March 21, 2007)
Single Family Housing Guaranteed Loan Program: Acceptable Foreclosure Time Frames

Summary: This Administrative Notice clarifies and standardizes the acceptable foreclosure time frame by state for Single Family Housing Loans Guaranteed by the Single Family Housing Guaranteed Loan Program.

Expiration Date: March 31, 2008.

AN No. 4259 (1980-D)(March 27, 2007)
Single Family Housing Guaranteed Loan Program Foreclosure Sale Bids

Summary: This Administrative Notice provides guidance on foreclosure sale bids for security property on which there is a Single Family Housing Guaranteed Loan Program loan guarantee.

Expiration Date: March 31, 2008.

AN No. 4260 (1980-D) (March 29, 2007)
Single Family Housing Guaranteed Loan Program Existing Dwelling Inspection Requirements: Acceptable Origination Appraisal Forms

Summary: This Administrative Notice elaborates upon the forms of dwelling inspections acceptable for loans guaranteed under the Single Family Housing Guaranteed Loan Program.

Expiration Date: April 30, 2008.

RHS Unnumbered Letters

Survey of Section 515 Multi-Family Housing (MFH) Transfers (April 25, 2007)

Summary: The Office of Rental Housing Preservation is conducting a national survey of all Section 515 transfers that were approved and closed between October 1, 2005, and September 30, 2006. The results of the survey will assist ORHP in understanding the type of transfers being underwritten; the type and amount of third-party funds being used to rehab the Office's properties; the transfer workload in the states; and identify potential training needs of the field. The Office of Rental Housing Preservation is asking that states provide a copy of Form RD 3560-20, "Multi-Family Housing Transfer and Assumption Review and Recommendation," for each MFH transfer that was approved and closed between October 1, 2005, and September 30, 2006.

Due Date: Copies of the forms must be faxed by May 15, 2007.

Clarification of Issues for the Rural Development Voucher Demonstration Program (April 27, 2007)

Summary: This unnumbered letter is to clarify the current policies of the Rural Development Voucher Demonstration Program for the Multi-Family Housing portfolio. The Rural Development Voucher Program applies to any property financed through Section 515 where the mortgage is paid off prior to the maturity date in the promissory note. This includes foreclosed properties. The Rural Development Voucher may not be used for the purchase of a home.

Expiration Date: April 30, 2008. ■

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