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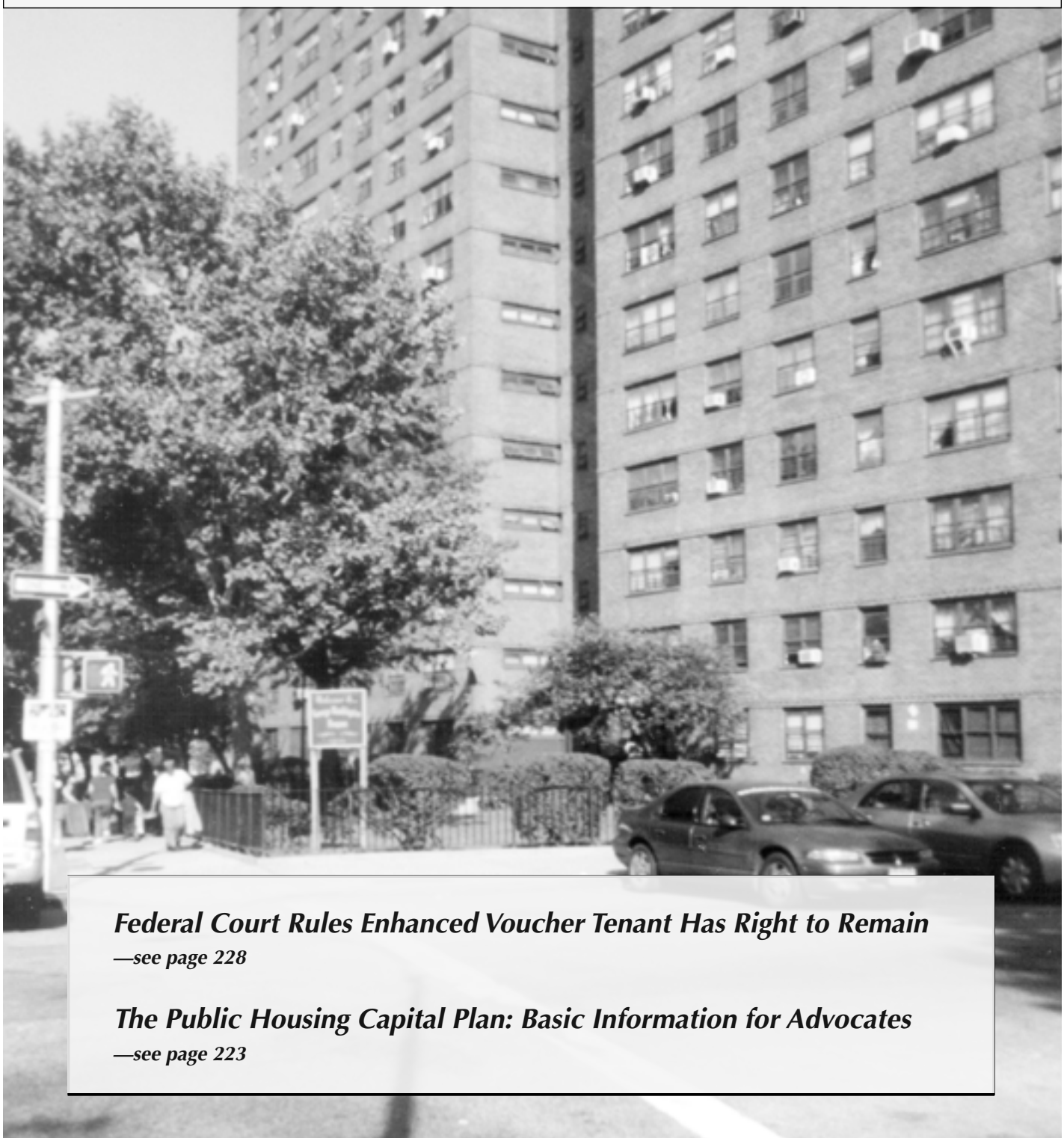

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SPECIAL FEATURE

AN ESSENTIAL RESOURCE FROM THE NATIONAL HOUSING LAW PROJECT

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Cover: George Washington Plaza, a public housing development in east Harlem, New York, NY. Photo by Catherine Bishop.

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FY 2005 Appropriations Update

Negotiations over the Fiscal Year (FY) 2005 VA-HUD Appropriations Act drew to a hurried close on November 20.[1] Where the Bush Administration sought to slash federally subsidized housing (and other discretionary spending and social programs), Congress is, instead, authorizing sufficient funds to maintain a host of programs, but at a reduced level. These reductions come at a time when the public's need for assistance has only increased. It is hard to say whether Congress is showing backbone in insisting that social programs receive a basic level or support—or whether it indicates that Congress is gradually succumbing to pressure to abandon the growing number of have-nots who comprise the body politic of the United States.

The Fiscal Backdrop

The Congressional Budget Office's 2001 projection of a surplus in 2004 has turned out to be unfounded. Instead, our country now has a federal deficit of $422 billion.[2] The dollar's value has declined markedly, which could trigger inflation.[3] The resulting rise in interest rates nationally would, historically, result in higher credit card and other personal finance rates, increasing the debt burden of the American public. An increased debt burden will mean less money available to pay for housing and increased demand for shrinking affordable housing programs. The 2005 "Defense and Homeland Security" bills constitute more than half of the total proposed 2005 budget.

Section 8 Voucher Assistance

Organizing by community groups, advocates and PHAs helped to stop some of the worst of the Section 8 proposals. Neither the House nor the Senate approved the proposed block-granting of the voucher program. The Bush Administration's proposal to cut voucher funding drastically has also been rejected. Still, proposed funding levels by the House and Senate committees probably fall a little short of funding needs for maintaining current voucher levels. HUD will fund PHAs on a formula/dollar basis, as contrasted with the cost-based system which was in place prior to FY 2004.

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[1]The official title of the Act is the "Fiscal 2005 HUD Appropriation (H.R. 5041, S. 2825), Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2005."

[2]Congressional Budget Office, The Economic and Budget Outlook: Summer Update (2004).

[3]*See* David Streitfeld, *Dollar's Decline Is Reverberating: If foreign investors look elsewhere, interest rates could climb and living standards could fall*, Los Angeles Times (Nov. 2004), *at* http://www.latimes.com/business/la-fi-dollar14nov14,0,5679791.story. See also, Richard Kogan, David Kamin, Center on Budget And Policy Priorities, New Congressional Budget Office Estimates Show Continued High Deficits And Further Fiscal Deterioration (2004).

The Act funds tenant-based Section 8 at $14,836,096,000—a level that is slightly above the 2004 funding level. Allowable expenditures include renewal of expiring housing choice vouchers, enhanced vouchers, relocation assistance, and payment of fees to public housing agencies administering voucher programs. The Family Self-Sufficiency program funding has dropped down to $46 million—a loss of $2 million compared to FY 2004 levels.

The Act reduces administrative funds for the program below FY 2004 levels as well as reducing program reserves to one week. Readers are well aware of the debacle of the Department of Housing and Urban Development's (HUD) limitation on the distribution of voucher funds last year and its formula change which resulted in a 3% decline in the number of vouchers in use. Approximately 60,000 families were not assisted as a result. PHAs continue to hold back vouchers and have reduced the amount of rent paid per voucher as a result of HUD's actions. It is likely that PHAs will continue to release fewer vouchers in order to try to safeguard themselves against further funding hardships or regulatory hurdles that HUD may impose in the future.[4]

Regrettably, the conference report instructs that "HUD may also provide agencies with flexibility to adjust payment standards and portability as necessary to manage within their 2005 budgets."[5] How HUD will interpret and implement this comment is not known. However, if calendar year 2004 is any guide, the interpretation will not be expansive or generous. The language allows HUD to institute restrictive policies for reducing the payment standard and limiting portability, which is a basic element of the voucher program. Perhaps recognizing that there must be some restraint, the congressional conferees further caution that "[a]gencies shall ensure that current elderly and disabled voucher families be protected against significant impact resulting from adjustment made by agencies to maintain their voucher programs within their 2005 budgets"[6] and elsewhere instructed PHAs to "protect the most at-risk families."[7]

HUD is required to renew PHA funding contracts in calendar year 2005 based on Voucher Management System leasing and cost data averaged for the months of May, June and July of 2004, and applying a 2005 Annual Adjustment Factor to be established by HUD. Some flexibility is allowed only for first-time renewals of tenant protection or HOPE VI vouchers. Moving to Work (MtW) PHAs will continue to be funded per their MtW agreements. PHAs are prohibited from using voucher funds to support the leasing of more units than the agency's authorized level.

PHAs will be forced to operate within prescribed budgets, as determined by HUD, without any flexibility or amendments. Thus, there will be no allowance for such exigencies such as rent increases in the private market or overall average reductions in tenants' incomes. As a consequence, any increase in the cost of the voucher program will be passed on to participants as a higher cost burden or fewer vouchers will be released onto the market in affected jurisdictions. HUD does not have a central fund or other funds to replenish program reserves. In other words, PHAs that have reserves and dip into them will not be reimbursed by HUD under Fiscal Year 2005 Appropriations. Thus, there is no encouragement to PHAs to increase utilization up to the authorized level. In fact, because of the fixed dollar amount of the subsidy, the only way that PHAs could increase utilization above the May, June and July of 2004 level would be by reducing their average costs. PHAs should know what those costs are shortly: within 45 day of the enactment of the FY 2005 Act, HUD must inform each PHA of its annual budget. HUD cannot cause additional harm, as it did in FY 2004, by delaying in informing PHAs of the dollar amount of their annual budgets.

PHAs will be forced to operate within prescribed budgets, as determined by HUD, without any flexibility or amendments. Thus, there will be no allowance for such exigencies such as rent increases in the private market or overall average reductions in tenants' incomes.

Within the Working Capital Fund is a $25 million set-aside, which HUD may allocate to PHAs "that need additional funds to administer their section 8 programs." Though it is clear that the set-aside may be used only to support Section 8 tenant-based program activities, it is not clear how eligibility for funds will be determined. HUD has thirty days from the enactment of this Act to issue notice implementing this provision. It is not clear whether that will be a notice to the public. If it is, advocates and PHAs should avail themselves of the opportunity to comment on HUD's proposal for how and when these funds may be accessed. This may represent the best opportunity to ensure a minimal safety net for PHAs and program participants.

Tenant-based rental assistance and project-based assistance will be funded in two different "accounts," theoretically to establish better oversight of expenditures.

Project-Based rental assistance will be funded approximately 10% more than the Fiscal Year 2004 level.

[4] *Id.*

[5] H.R. Rep. No. 108-792, at 21 (2004), *available at* http://thomas.loc.gov/home/omni2005/index.htm.

[6] *Id.*

[7] *Id.*

Public Housing

Already strapped PHAs will be buffeted by decreasing public housing funding levels. The Act sets the Public Housing Operating Fund at 68% of 2004 levels. Most of the reason for the huge differential between this year and last year's funding levels is that PHA funding is being shifted from a fiscal year to a calendar year. Thus, for example, a PHA already funded in its original fiscal year through March of 2005 would receive only another nine months' worth of funding under the FY 2005 Appropriations Act. Consequently, the total funds needed to maintain PHAs' public housing operations, even at 2004 levels, will be greatly reduced. This does not, however, mean that the Operating Fund will be sufficient to meet PHAs' true cost of operations. In real terms, the Public Housing Capital Fund has been cut by approximately 3.6%.[8] Moreover, Congress failed to provide funding for PHAs to transition from a fiscal year to a calendar year basis. The Senate had proposed to allocate $30 million for this transition.

HOPE VI revitalization funds have been cut by around 3.4% compared to FY 2004 levels. However, HUD has not asked for any HOPE VI funding for FY 2005. HOPE VI presents a mixed blessing, as it has resulted in a net loss of public housing units affordable to extremely low-income residents and widespread displacement of such families from their neighborhoods while providing substantial funds to redevelop a small number of public housing sites.[9]

A program designed to provide supportive services and resident empowerment activities to public housing residents will also suffer a reduction. The Resident Opportunity and Self-Sufficiency (ROSS) program will receive almost 3% less in funding than it did in 2004.

Significantly, the Congressional conferees removed from the appropriations bill the Senate proposal regarding limitations on PHA activities regarding voter participation. The Conference Report, however, states that PHAs cannot use HUD funds for partisan activities, which is redundant, as such partisan activities are already precluded by the Hatch Act.[10] In addition, Congress added an inartfully drafted provision that proposes to include within tenant income that is available for housing costs the amount of scholarship income received by an athlete.

Native American Housing Funds

Congress reduced Native American Housing Block Grant funds by approximately 3.6 % compared to 2004 levels. A smaller reduction was made to the Indian housing Loan Guarantee Fund Program. The Block Grant program provides flexible funds to Indian tribes and tribally designated housing entities to address their community housing needs. Funds may be used for operating expenses and capital needs. These funds are the primary, and in many cases only, source of funding for desperately needed housing for Native Americans. The guaranteed loan program permits Native Americans to build or purchase homes on trust land. Without the guarantee, private lenders are reluctant to loan money for homeownership on trust land.

Despite the fact that Native Americans continue to be the most impoverished and underserved group in the United States, housing joins the list this year of the myriad of Native American programs that the federal government proposes to cut significantly. Other proposed cuts target education programs (primary through university level), health services, and law enforcement/tribal court services.

Native Hawaiian Housing Funds

The Hawaiian Housing Block Grant Program, created in the year 2000, will be continued at last year's funding level of $9 million under the Community Development Fund. Funds may be used for affordable housing development to serve low-income Native Hawaiians. It is not clear why the funds are being included under Community Development instead of being funded as a separate line item. The Native Hawaiian Housing Loan Guarantee Fund, similar in purpose to the Native American program, will be funded at $1 million—a slight reduction from last year's funding level.

Housing needs in Hawaii, for Native Hawaiians in particular, are severe. For purposes of state programs, "Native Hawaiian" is currently defined as a person with at least 50% Hawaiian blood, and their successors or assignees of less than 50% Hawaiian blood. Government figures on the total number of Hawaiian residents who fall into this category range from a low of 45,000 to a high of 70,000.[11] A 2003 study commissioned by the Department of Hawaiian Home Lands found that 62% of Native Hawaiian households living on Hawaiian homelands are low or very low-income—a 20% increase in poverty level since a 1995 HUD study.[12] Of low-income Native Hawaiian households, 68% experience housing problems, such as affordability, overcrowding, structural quality, availability or some combination of these problems. For very low-income households, nearly 75% experience a housing problem of some sort.[13]

[8]See NHLP, *Proposed Cuts to Public Housing Remain Unresolved*, 34 Hous. L. Bull. 199, 213 (2004) (discussing the effect of the then-proposed cut of 4.3%).

[9]*See* NHLP, et al., False HOPE: A Critical Assessment of the HOPE VI Public Housing Redevelopment Program (2002), *available at* http://www.nhlp.org/html/pubhsg/FalseHOPE.pdf.

[10]*See* NHLP, *Proposal to Limit Public Housing Authority Voter Participation Programs Is Criticised*, 34 Hous. L. Bull. 199, 212 (2004).

[11]Approximately 57% of Native Hawaiians live in Hawaii, per U.S. Census 2000 figures.

[12]Department of Hawaiian Home Lands, Native Hawaiian Housing Plan 6 (2003) *available at* http://www.hawaii.gov/dhhl/accepted.2004nhhp.pdf.

[13]*Id. at* 7.

Housing for Persons with AIDS

The Housing Opportunities for Persons with AIDS (HOPWA) program, which has been vitally important for helping to ensure that people living with HIV/AIDS and their families are housed, will receive less funding this year than in 2004. The Act reduces HOPWA funding by approximately 4%. Existing permanent supportive housing contracts that are expiring will receive continued funding before any new, competitive grants (provided the housing was funded under the national competition for HOPWA funds and still meets program requirements). HOPWA funds pay for permanent housing, rental assistance and supportive services. The majority of people served are extremely low-income, while another almost 30% are low-income.[14]

Housing for the Elderly

Housing for the Elderly refers to the Section 202 program, which funds acquisition, rehabilitation or construction of housing for low-income seniors, as well as project-based rental assistance for units already constructed under the program. The Act reduces funding for this program by about 3.5% below its 2004 level.

Housing for People with Disabilities

The Act reduces funding for Housing for People with Disabilities (also known as the Section 811 program) by almost 4%. The program funds acquisition, rehabilitation or construction of supportive housing for people with disabilities, as well as project-based rental assistance for existing Section 811 buildings. In addition to the funding cut, it is worth noting the House and Senate's admonishment of HUD for not anticipating the true cost of its tenant-based contracts entered into prior to fiscal year 2004. Congress, however, did authorize additional funds to address the expense. The admonishment is in alignment with the general suspicion Congress seems to have of how HUD manages its assisted housing programs.

Fair Housing

The federal government funds the Fair Housing Assistance Program, which assists HUD-certified, state and local fair housing enforcement agencies. The Fair Housing Initiatives Program provides support to nonprofit organizations, state and local government agencies as well as other, non-federal entities, for the purpose of eliminating or preventing housing discrimination and improving housing opportunities for protected classes. Funding under the Act for these activities is reduced by over 3%.

Rural Housing and Economic Development

The House proposes a 3.5 % cut in Rural Housing and Economic Development funding for 2005. These funds help nonprofits, community development corporations, Native-American tribes, state housing finance agencies, and other economic development agencies provide for the housing and development needs of rural communities. The Section 515 Rural Rental Housing Program will receive a massive 14% cut, with funding at $100 million for Fiscal Year 2005 compared to $116.5 million in 2004. The new preservation loan program will receive $3 million.[15]

Conclusion

Congressional acquiescence to underfunding and defunding of essential federal programs is hurtful and short-sighted. Line items labeled "defense" and "anti-terrorism" are sacred cows when it comes to appropriations discussions. Few Americans, including members of Congress, are willing to question these items in the federal budget for fear of being labeled un-American or unpatriotic. As a consequence, these sacred cows eat their way through precious funds that could make the lives of residents in this country safer and better. Other policies of this administration—including massive tax cuts to those who are already wealthy, and handouts to large corporations—have also threatened the safety, security, and quality of life of the other residents in this country. Until we address these fundamental inequities, we will continue to fight a piecemeal battle to save the frayed strands that constitute America's disappearing safety net. ■

On December 8, 2004, President Bush signed into law the Consolidated Appropriations Act, 2005, Pub. L. No. 108-447 (2004), which incorporated the 2005 VA-HUD Appropriations Act.

[14]*See* HUD, Office of Policy Development and Research, National Evaluation of the Housing Opportunities for Persons with AIDS Program (HOPWA) (2001), *available at* http://www.huduser.org/periodicals/rrr/rrr_4_2001/0401_1.html.

[15]For more analysis of the impact of cuts on rural housing programs, visit the Housing Assistance Council's Web site at http://www.ruralhome.org.

The Public Housing Capital Plan: Basic Information for Advocates[1]

For years, the United States Department of Housing and Urban Development (HUD) has provided capital funding for modernization of federal public housing separate from the ongoing operating subsidy. From the late 1980s until the mid-1990s, this was known as the Comprehensive Improvement Assistance Program (CIAP). For a period of time in the mid-1990s for larger housing authorities, CIAP was replaced by the Comprehensive Grant Program (CGP).

In 1998, HUD replaced the CIAP and CGP programs with the Capital Fund. However, HUD has never issued the kind of detailed regulations or handbook provisions for this program that it did for the prior programs. While there are some limited but important provisions in the statute or regulations about the capital fund, many of the details are found in the Public and Indian Housing (PIH) Notices that HUD issues about what should be in the Public Housing Authority (PHA) Plan template.[2] HUD also continues to use a number of the forms designed for the prior programs and to carry over some of the old rules until they can be replaced by revised rules.[3] These rules include the following:

- A public housing authority (PHA) may not use more than 10% of its annual grant for administrative costs.[4]
- Unless the PHA is a "high performer" (i.e., it has a high score through the Public Housing Assessment System (PHAS)), it may not use more than 20% of its annual grant for management improvements.[5]
- The PHA may budget initially up to 8% of its annual grant for contingencies; these are then rebudgeted within the annual statement for particular items and obligated.[6]

Moving to Work (MtW) PHAs may be subject to different rules. If different rules apply, they are most likely set forth in the terms of the MtW agreement. Attachment 1 to a recent HUD notice describes some of the variables and deadlines that are applicable to the capital fund for MtW PHAs.[7]

The Current Rules Regarding the Capital Fund

Eligible Activities under the Capital Fund

Under the law, HUD's Capital Fund can be used for the following activities:[8]

- the development, financing, and modernization of public housing projects, including redesign, reconstruction, and reconfiguration of public housing sites and buildings (including accessibility requirements) and the development of mixed-finance projects;
- vacancy reduction;
- addressing deferred maintenance needs and the replacement of obsolete utility systems and dwelling equipment;
- planned code compliance;
- management improvements, including the establishment and initial operation of computer centers in and around public housing through a Neighborhood Networks initiative, for the purpose of enhancing the self-sufficiency, employability and economic self-reliance of public housing residents by providing them with onsite computer access and training resources;
- demolition and replacement;
- resident relocation;
- capital expenditures to facilitate programs to improve the empowerment and economic self-sufficiency of public housing residents and to improve resident participation;

[1]This article was adopted virtually verbatim from training materials prepared by Mac McCreight of Greater Boston Legal Services.

[2]PHA Plan Template, Form HUD-50075 (July 2003), *available at* http://www.hudclips.org. In addition, the *Public Housing Agency [PHA] Plan, Desk Guide*, which is available at http://www.hud.gov/offices/pih/pha/index.cfm, contains guidance on the PHA's application for capital funds.

[3]*See, e.g.*, HUD, PHA Plan, Desk Guide (2001) (provides that until the new capital fund rules are published, the regulations at 24 C.F.R. Part 968 remain in effect). *See also* Fiscal Year 2004 Capital Fund Grants Processing Notice, PIH 2004-15, ¶ 20 (Aug. 9, 2004).

[4]Instructions for Submitting Second Public Housing Agency (PHA) Plans for PHAs with Fiscal Years beginning on July 1, 2001 and Capital Performance and Evaluation Reporting Requirements for January and April 2001 PHAs, PIH 2001-4, ¶ II. D.8 (Jan.19, 2001) (extended by PHA Plan Guidance; Further Streamlining of Small PHA Plans; Early Availability of Capital Formula Funding for Obligation; Extension of Notices PIH 99-33 (HA), PIH 99-51 (HA), PIH 2000-22 (HA), PIH 2000-36 (HA), PIH 2000-43 (HA) and PIH 2001-4 (HA), PIH 2001-26 (HA) (Aug. 2, 2001).

[5]PIH 2001-4, *supra* note 4. The regulations for PHAS are found at 24 C.F.R. Part 902 (2004). PHAs that are "high performers" under PHAS get some special treatment from HUD; in addition to some rules being loosened, they are eligible for some small bonuses in capital funding, and to receive capital funds redistributed from other PHAs that have not fully used them. 24 C.F.R. §§ 905.10(j) and 905.120(c)(3) (2004). If the PHA is not a "high performer" under PHAS, advocates ought to urge the PHA to propose, in its new Five-Year Plan, to take steps to become a high performer. See PHA Plan Template, *supra* note 2 ("Goals" heading).

[6]PIH 2001-4, *supra* note 4.

[7]PIH 2004-15, *supra* note 3, at attachment 1.

[8]42 U.S.C.A. § 1437g(d)(1), (g)(1) (West 2003); 24 C.F.R. § 905.10(k) (2004).

- capital expenditures to improve the security and safety of residents;
- homeownership activities (where applicable).

In addition, all but small PHAs may use up to 20% of the Capital Funds allocated for a PHA in any year for operating expenses (which are usually covered by HUD's Operating Fund), but only if the PHA Plan provides for this.[9] Small PHAs—those operating fewer than 250 public housing units—may use any of the capital funds for either operating or capital needs.[10]

Parts of the Capital Plan

There are basically four parts to the Capital Plan. Some of these have names which are similar to the overall PHA Plan, and this can cause confusion. Thus, there is an Annual Statement, but this is different than the PHA Annual Plan. There is also a Five-Year Action Plan, but this is different than the Five-Year Plan portion of the PHA Plan.

Annual Statement — This identifies capital activities the PHA is proposing for the upcoming year. One table sets forth a program-wide summary of budget categories. A second table identifies each development in which the PHA plans to conduct capital improvements and gives a brief description of the work planned, its estimated cost, and development account number. A third table identifies the estimated timetable for obligation (placing under contract) and expenditure (spending) for each activity; this is only required, however, if the timeline is expected to go beyond HUD's usual obligation and expenditure deadlines (eighteen months and thirty-six months, respectively).[11]

Five-Year Action Plan — This was at first optional, but is now required. HUD considers that the Capital Fund Program Five-Year Action Plan "is one of the most important documents of a PHA."[12] This plan must list any anticipated large capital items for the next five-year period by development name, development number, description of the item, estimated cost and planned start date, and total cost of all large capital items per development. "Large capital items" are any work items that are $1 million or more or which would amount to 10% or more of the PHA's annual Capital Fund grant. A PHA can choose to list smaller items, but need not list anything less than $25,000. A PHA can also include information on the number of vacant units or percentage of vacancies at developments, but HUD doesn't require this.[13] PHAs usually will want to list as many work items as necessary in the Five-Year Action Plan so that in case they need to switch the items being completed, there is no need to amend the PHA Plan through advance notice/comment by the Resident Advisory Board (RAB) and the public.[14] The PHA can obligate capital funds for any activity in the Five-Year Action Plan.[15] This plan is a "rolling" plan—each year's five-year plan picks up from the information in the prior plan, revises it as necessary, and adds another year.

Performance and Evaluation Reports — These reports, sometimes called P&Es, indicate how the PHA has obligated and spent capital funds that it received from HUD in the prior few years. The reports must include any year for which the PHA is still expending funds. These reports include any cost decreases or increases in the original estimated costs for work items.[16] The RAB and local tenant organizations often need to have both the Performance and Evaluation Reports, the Annual Statement, and the Five-Year Action Plan and track them over time to find out what's happened with all of the funds for a particular development, or to compare what's happening across all of the PHA's developments. For example, a local tenant organization may remember that kitchen modernization was a priority item for the development at one point, and have to check the P&E reports to see if the work is currently planned or under contract, and check the Five-Year Action Plan to see if it has been shifted to a future year, or has been deleted altogether.

Replacement Housing Factor Funding — The Capital Plan also discusses how Replacement Housing Factor (RHF) funds are used by the PHA. RHF funds are received

[9]42 U.S.C.A. § 1437g(g)(1) (West 2003).

[10]*Id.* at § 1437g(g)(2).

[11]Announcement of Availability of PHA Plan Template, Instructions and Supplemental Guidance on Preparation and Submission of PHA Plans on HUD Website; Announcement of Streamlining of Capital Fund and Public Housing Drug Elimination Program Planning Requirements, PIH 99-33, ¶ 4, component 7 (July 30, 1999) (extended by PIH 2001-26 (HA), *supra* note 4).

[12]PHA Plan Desk Guide, *supra* note 2, at ¶ 3.20.3.

[13]Additional Instructions for Submitting First PHA Plans under the Final Rule and Extension of Due Date for Submission of PHA Plans for PHAs with Fiscal Years Beginning January 1, 2000 and April 1, 2000; Guidance for PHAs with Fiscal Years Beginning July 1, 2000 and after; Availability of Required Format for Public Housing Drug Elimination Program (PHDEP) Plan, PIH 99-51, ¶ VI.B. component 7 (Dec. 14, 1999) (extended by PIH 2001-26 (HA), *supra* note 4). Information on the number of vacant units in a development is reported on the Physical Needs Assessment, Comprehensive Grant Program (CGP), HUD Form 52832 (Oct. 1996), which all but small PHAs are required to fill out. 24 C.F.R. § 968.315 (2004) (physical needs assessment to identify all work that a PHA would need to bring each development up to modernization standards must be completed without regard to the availability of funds.)

[14]PHA Plan Guidance; Streamlining of Small PHA Plans; Extension of Notices PIH 99-33 (HA) and PIH 99-51 (HA), PIH 2000-43, ¶ IV.D.1. (Sept. 18, 2000) (extended by PIH 2001-26 (HA), *supra* note 4). *See also* 24 C.F.R. § 968.305 (2003) (definition of fungibility).

[15]PIH 2004-15, *supra* note 3, at ¶ 11.

[16]PIH 2001-4, *supra* note 4, at ¶ II.D.3.

when the PHA has reduced the number of federal public housing units through disposition or demolition; this often happens, for example, through the HOPE VI process, where a PHA reduces the density of a public housing development. RHF funds are used to develop new affordable housing for low-income families (this is not necessarily public housing). In order to qualify for as much RHF funding as possible, PHAs must show that they are also obtaining a significant amount of other matched funds (for example, from the state, city or other sources). The PHA must describe what its plan is for creation of affordable housing; when sufficient funding is secured, it must meet HUD deadlines for obligating and spending funds, and must report on these expenditures. Not all PHAs have RHF funding.[17]

Obligation and Expenditure Deadlines for Capital Funds

A key issue for Capital Funds is making sure that they are obligated (placed under contract) and spent within the deadlines set by Congress and HUD.

Two-Year (Twenty-Four Month) Obligation of Funds Deadline; HUD Extensions — Under the law, a PHA must obligate capital funds within two years (twenty-four months) from the date on which the funds become available to it or, if it has to accumulate adequate funds to do the work, within twenty-four months of the date that it accumulates the funds. HUD may extend this deadline where it finds that there were barriers due to: litigation; obtaining necessary federal, state, or local government approvals; complying with environmental requirements; relocation of residents; or other events beyond the PHA's control. If the amount of unobligated funds is less than 10% of the original grant, HUD is to ignore this. HUD can also extend the time period by one year (twelve months) due to the size of the PHA, the complexity of its capital program, any limitations in timely obligation due to state or local law requirements, or other factors it may find important.[18]

Four-Year (Forty-Eight Month) Spending Deadline — Under the law, a PHA must spend any capital assistance not later than four years (plus the period of any extension approved by HUD) after the date on which the funds become available to the PHA for obligation.[19]

Penalties for Not Meeting Obligation and Spending Deadlines — There are stringent penalties for not obligating or spending capital funds on time. HUD cannot provide new assistance to the PHA, and must withhold funds that would otherwise be provided. Funds not provided to the PHA are to be redistributed to high-performing PHAs. HUD can also recapture funds already provided to the PHA.[20]

Strategies that PHAs Undertake to Avoid Missing Deadlines — Sometimes a PHA may be up against an obligation or spending deadline for reasons which are outside of its control. The work may be complex, or there may be unanticipated design or contract problems. Other items may have taken priority (for example, HUD may require a PHA to create more accessible units, which might mean that the PHA would have to put off other work that it had planned). There may be other work items which are not yet up against the deadline (i.e., they were originally funded in a later year) which are proceeding ahead of schedule. In order to avoid losing funding, a PHA may switch these work items, and say that the earlier year's funding is now being used to fund the later year work-item. These changes make sense, but the RAB should be informed so that it can be sure about what's going on, and that any work deferred to a later year is still going to be completed.

Some Practical Considerations in Working on the Capital Plan

Knowing What the Priorities/Needs Are at Each Development — This is a daunting task when the RAB has only a small number of members; public housing representatives on the RAB may know what the priorities/needs are at their development, but may not know what is needed elsewhere. This requires outreach, and getting local tenant organizations to share information. To determine the needs at particular developments, tenant organizations and advocates may also review the Physical Needs Assessment which all PHAs, except small PHAs, are required to fill out. The information provided on these forms is general but ought to include information on what is needed to bring the development up to modernization and energy conservation standards and replacement of equipment systems and structural elements.[21]

Keeping Track of the Money — This is a long-term research task. The RAB will want to know how money has been planned and spent over a long period of time, and how funding has been shifted. It may be, for example, that a particular development was originally slated for funds for particular needs, but those funds had to be reprogrammed. If that happened the question remains as to whether that work will be completed in the future.

Finding Out Why — There are many tables to track with

[17]See PIH 2004-15, *supra* note 3, at ¶ 19.

[18]42 U.S.C.A. §1437g(j)(1-2) (West 2003); 24 C.F.R. § 905.120(a-b) (2004). *See also* PIH 2004-15, *supra* note 3, at ¶ 14.

[19]42 U.S.C. § 1437g(j)(5) (West 2003); 24 C.F.R. § 905.120(d) (2004).

[20]42 U.S.C.A. § 1437g(j)(3, 5-6) (West 2003); 24 C.F.R. § 905.120 (c) and (e) (2004). *See also* PIH 2004-15, *supra* note 3.

[21]HUD Form 52832, *supra* note 13.

many numbers. If the PHA is planning on prioritizing projects in a particular way, or changing how money has been planned for in the past, the RAB needs to find out why. Often there are good reasons—but sometimes there are situations that need more discussion, and where the RAB may have different priorities.

Figuring Out a Way to be Fair — It is difficult, when dealing with Capital Funds, to figure out a way to be fair. The PHA does not get all of the funding it needs—just the funding that Congress and HUD decide to give out each year.[22] This means that the PHA must often make tough choices. In addition, to do certain work—for example, to create enough accessible units to avoid suit by HUD, or to complete a HOPE VI redevelopment—the PHA may have to set aside substantial funds, and therefore will have less funding available for other projects. While some tenants might argue that each development should get similar capital funding (on a per-unit basis), the reality is that developments have very different capital needs, with some having systems that are wearing out and others with systems that could last another five to ten years. One way to approach this is to say that every development with a particular type of critical need—for example, roofs that are leaking—should get funding before developments that have a less critical need (for example, the need to modernize bathrooms). Reasonable people can differ on this approach and how the funds may be spent.

Balancing How Money Is Used–Operating and Capital Funds — As noted above, PHAs can use the Capital Fund for operating expenses. Congress and HUD have been underfunding the Operating Fund. In addition, some grants like the Public Housing Drug Elimination Program (PHDEP), have been eliminated, and PHAs with security needs have had to figure out other ways to meet security needs. But use of Capital Funds for operations may result in underfunding of Capital Needs. The balance between using the capital fund for operating costs and maintaining the capital fund for capital improvements has to be discussed. Residents and other interested parties should understand the consequences of the approach selected. ■

[22] *See* NHLP, *Proposed Cuts to Public Housing Remain Unresolved*, 34 HOUS. L. BULL. 199, 213 (2004).

2004 HJN Meeting a Success

The twentieth National Meeting of the Housing Justice Network (HJN) took place on October 3 and 4, 2004, in the heart of Washington, D.C. The energized gathering drew nearly 200 housing attorneys and other advocates from across the country, including one attorney who made the nine-hour plane ride from Hawaii to attend.

The day before the meeting, NHLP conducted a one-day basic federal housing training which was geared primarily to new housing attorneys. The eight-hour training featured NHLP staff attorneys as well as four guest trainers: **Mona Tawatao**, of Legal Services of Northern California; **Larry McDonough**, of Mid-Minnesota Legal Services; **Linda Perle**, of the Center for Law and Social Policy; and **Mike Hanley**, of the Greater Upstate Law Project. More than ninety people were in attendance, and those who stayed for the two-day HJN Meeting reported that the training provided a solid foundation for the more in-depth HJN sessions.

The meeting featured two plenary sessions, a handful of working group meetings, a meet-and-greet reception, and twenty-eight informational workshops on topics encompassing the spectrum of low-income housing issues. Sessions covered HUD and rural preservation issues and strategies, fair housing litigation, Low Income Housing Tax Credit properties, budget issues, the voucher crisis, public housing rents, loss of public housing, environmental health and housing issues, community organizing, predatory lending, and much more. The two plenary sessions featured panel discussions on environmental health and housing and the future of HUD low-income housing programs.

The meeting also provides an opportunity to recognize excellence in the field, and to present exceptional advocates to an audience of peers and colleagues who have benefited from their work. NHLP gave out two awards at the October meeting: the David B. Bryson Memorial Award and the new Housing Justice Award.

Barbara Sard of the Center on Budget and Policy Priorities accepted the 2004 David B. Bryson Memorial Award, presented by **Anita Bryson** and **Barbara Samuels**. Recipients of the Bryson Award have demonstrated exemplary commitment to solving the housing problems of extremely low-income people, have been successful in a variety of forums, and are known for unwavering support of colleagues and others working in the legal services and housing advocacy communities. They have embodied the principles exemplified by David Bryson and carried on his legacy of stalwart and selfless pursuit of housing justice. Ms. Sard earned the award for her tireless work in the area of low-income housing policy and the extensive and exhaustive advocacy she has done in the wake of the increasingly fierce budget attacks on the beleaguered Housing Choice Voucher program.

Marc Jolin of Oregon Legal Services accepted the 2004 Housing Justice Award, presented by **Demetria McCain** of NHLP and **Ed Johnson**, Mr. Jolin's colleague at Oregon Legal Services. The Housing Justice Award, which debuted this year, recognizes new talent in the field of affordable housing and low-income housing rights, underscoring the importance of uniting direct service work with local, state or federal policy advocacy. An honoree's work encompasses activities that benefit individual residents, resident organizations, or people in need of housing. To be eligible for the Housing Justice Award, the advocate must have worked in the field for no more than seven years. Mr. Jolin earned the award for his extensive and creative research work to build the legal theory supporting the right of Low Income Housing Tax Credit tenants to good cause eviction protection. This has recently resulted in an IRS ruling requiring such protection for about 1.2 million low-income households.

NHLP would like to thank our special guests whose contributions to the meeting were invaluable, including our plenary panelists and our keynote speaker—Professor **John C. Brittain**, Professor of Law at Texas Southern University's Thurgood Marshall School of Law, who gave a rousing speech on the intersection of racial integration in education and housing rights.

The Housing Justice Award, which debuted this year, recognizes new talent in the field of affordable housing and low-income housing rights, underscoring the importance of uniting direct service work with local, state or federal policy advocacy.

The plenary session on Environmental Health and Housing provided many attendees with a new perspective on the relationship between physical ailments and the physical condition of a family's housing and neighborhoods, and how grassroots activism can turn existing data into effective tools for advocacy. Moderated by **Steve Fischbach** of Rhode Island Legal Services, the panel featured **Peter J. Ashley**, Dr.PH, from HUD's Healthy Homes and Lead Hazard Control; **Matthew Chachere**, staff attorney from Northern Manhattan Improvement Project; **Denise Oliveira**, staff attorney at Boston Medical Center; and **Mae Bradley**, Executive Director of the Committee for Boston Public Housing and the Healthy Public Housing Initiative.

The session on the Future of the Public Housing and Voucher Programs was especially timely, in light of sweeping changes being considered in Congress and in the White House that threaten low-income housing supports. Moderated by **Sheila Crowley**, President of the National Low Income Housing Coalition, the panel featured **Wayne Sherwood**, principal of the Maryland-based Sherwood Research Associates and distinguished low-income housing advocate and researcher; **Barbara Sard**, Director of Housing Policy for the Center on Budget and Policy Priorities; **Sunia Zaterman**, Executive Director of the Council of Large Public Housing Agencies and Executive Vice President of the Housing Research Foundation; and **Kara Stein**, legal counsel to U.S. Senator Jack Reed (D-Rhode Island).

NHLP extends special thanks to HJN funders and supporters: **AARP Foundation Litigation**, which generously underwrote our Sunday night reception and also printed all of our training and conference materials, and **Telesis Corporation**, whose contribution supported this year's meeting.

The 2004 meeting would not have been possible without the attendees and the more than seventy workshop presenters who took the time and made the effort to join us for the training and the meeting. It is never easy to find the time to get away or the funding to support these outings—and we were enormously pleased that a record number of advocates were able to attend the 2004 gathering. In our attendee evaluations, we received very high marks for the pre-meeting training, the workshop sessions and the meeting overall, and everyone surveyed said that they planned to attend the next one.

It is this kind of experience—the collective energy and passion, the animated conversations among attorneys who face identical hurdles and find the strength and the strategies to keep going, the first-time face-to-face meetings of advocates who have only emailed each other through the HJN listservs—that makes the HJN meeting a unique, dynamic and rewarding convocation of some of the most important lawyers working in America today.

For information on the next HJN meeting, watch your inboxes and mailboxes for save-the-date announcements. The next meeting is tentatively scheduled for June 2006 in the Washington, D.C. metropolitan area. ■

Federal Court Rules that Enhanced Voucher Tenant Has Right to Remain

In a case of first impression, a federal district court in New York has recently ruled that federal law requires owners leaving the project-based subsidy programs to accept the replacement subsidies provided by Congress. *Jeanty v. Shore Terrace Realty Ass'n*, No. 03 Civ. 8669 (BSJ), 2004 WL 1794496 (S.D.N.Y. Aug. 10, 2004). Last November, after a hearing but without an opinion, the court had issued a preliminary injunction that required the owner to accept a tenant's voucher. In this ruling, the court relied both on a federal statute establishing the enhanced voucher program[1] and other HUD policies to permanently enjoin the owner from refusing to accept the tenant's voucher and to renew her lease so long as she remained eligible for the voucher and complied with the terms of her lease. This ruling provides clear and direct support to the position that Congress itself has required owners to accept these subsidies, joining the position long espoused by tenant advocates and even by Department of Housing and Urban Development (HUD) since 2000.

Background

When private owners leave HUD's multifamily housing programs, either by opting out of their project-based Section 8 contracts or by prepaying their HUD-subsidized loans, many tenants are eligible to receive enhanced vouchers, pursuant to annual appropriations acts during the late 1990s and permanent legislation passed in 1999.[2] These new vouchers can usually cover the entire amount of any new higher market rent for the unit, if that amount is determined reasonable by the public housing authority (PHA).

For many years, some owners have disputed any duty to accept these vouchers to avoid tenant displacement, despite HUD's repeated policy statements. Owners, HUD and PHA staff, and tenants alike have also been uncertain about the duration of the duty to accept. For some of this time, Congress' lack of explicit direction was part of the problem,[3] but Congress soon acted,[4] clarifying the enhanced voucher statute by restoring the inadvertently omitted language. The Conference Report explicitly stated that this revision was a clarification of law, not new law.[5] Subsequently, in its Section 8 renewal policy guide, HUD reiterated that tenants receiving enhanced vouchers have the right to remain in their units as long as the property remains available for rental use, meets housing quality standards, and rents for an amount approved as "reasonable" by the local PHA.[6] This protection is not time-limited, but extends beyond the first lease following conversion, lasting until the owner has good cause to terminate the tenancy for noncompliance with the lease.[7] HUD policy seeks to implement this requirement by requiring owners to certify on their "opt-out" or renewal form that they will comply with the tenants' right to remain, as well as through language containing this commitment in the one-year notice form.[8] Despite these policies, and despite issuing numerous letters informing specific owners of these duties, occasional owner resistance persists, giving rise to enforcement litigation like *Jeanty*.

The Case and Decision

After opting out of its project-based contract in 2003, project owner Shore Terrace offered all but four of its tenants leases and agreed to accept their enhanced vouchers. However, while it was willing to sign unassisted leases for the four, and did so, it refused to accept their vouchers, allegedly because they were chronically late in paying rent or had refused access for repairs. The PHA informed the tenant that the owner had refused to sign the assistance contract, and indicated that it was issuing her a voucher to move.

The tenant filed suit against the owner challenging its refusal to accept her enhanced voucher as a violation of the enhanced voucher statute. The PHA was sued as well. Although strongly supporting the tenant's legal position under federal law, the PHA believed it lacked the power to force the owner to accept the voucher assistance.

The court found that the statute was clear on its face, rejecting as "illogical" the owner's claim that while the tenant has the right to remain, the owner has no duty to

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[1] 42 U.S.C.A. § 1437f(t) (West 2003).

[2] Pub. L. No. 106-74, § 538, 113 Stat. 1047, 1122 (1999) (establishing Section 8(t) of the United States Housing Act and codified at 42 U.S.C. § 1437f(t)).

[3] In Fiscal Year (FY) 1999, Congress inadvertently omitted the tenants' "election to remain" from the Appropriations Act. Pub. L. No. 105-276, 112 Stat. 2461 (1998). However, HUD set forth the policy in its implementing Notice H 99-36 (Dec. 29, 1999).

[4] *See* FY 2001 Military Construction and FY 2000 Emergency Supplemental Appropriations Act, Pub. L. No. 106-246, § 2801, 114 Stat. 511, 569 (2000) (was H.R. 4425). This provision amended Section 8(t) of the United States Housing Act, 42 U.S.C. §1437f(t), to state that "the assisted family may elect to remain in the same project in which the family was residing on the date of the eligibility event . . . ."

[5] "[The report] inserts language as proposed by the House and the Senate clarifying the intent of title V, subtitle C, section 538 of Public Law 106-74." H.R. Rep. No. 106-710 (2000).

[6] HUD, Office Of Multifamily Housing, Section 8 Renewal Policy: Guidance For The Renewal Of Project-Based Section 8 Contracts, ¶ 11-3B (2001) [hereinafter Section 8 Renewal Policy Guide], *available at* http://www.hudclips.org (click shortcut link on left to "Section 8 Renewal Policy Guide"). *See also* Section 8 Tenant-Based Assistance (Enhanced and Regular Housing Choice Vouchers), PIH 2001-41 (Nov. 14, 2001).

[7] Section 8 Renewal Policy Guide, *supra* note 6.

[8] *Id*. at ch. 8.

accept the voucher.[9] In the court's words, "[i]f a landlord's obligation to accept enhanced vouchers upon opt-out was merely voluntary, then § 1437f's grant to the tenant of the right to remain would be illusory," noting that the right to elect to remain appears within the enhanced voucher subsection of the statute and hence cannot be divorced as the owner contended.[10] The court also found unpersuasive the owner's attempt to rely on the generally voluntary nature of an owner's participation in the voucher program, distinguishing the additional protections afforded by the entirely separate enhanced voucher statute.

Although because of the statute's clarity it was unnecessary to do so, the court also pointed to HUD's reasonable interpretation in the Section 8 renewal policy guide and in a separate notice that owners are obligated to accept the vouchers, to which it would defer. Additional support came from the court's view of the statute's legislative history.

An additional question raised by the litigation was the duration of the owner's duty to accept the enhanced voucher, specifically at the point of lease expiration. Employing a similar analysis as used for the duty to accept, the court found it illogical to provide a right to remain but not recognize a duty to offer a lease renewal, referring to the absence of any time-limit language in the statute as further support. Buttressing this conclusion, the court pointed to HUD's reasonable interpretation in the Section 8 renewal policy guide.[11]

After issuing the declaration that the refusal violated the statute and the permanent injunction requiring acceptance of the voucher, the court reserved plaintiff's claim for attorney's fees and costs. The owner has since filed an appeal of the judgment with the United States Court of Appeals for the Second Circuit, but no stay of the injunction has been issued. ■

[9] *Jeanty*, 2004 WL 1794496, at *3 (citing 42 U.S.C. § 1437f(t)(1)(B): "the assisted family may elect to remain in the same project in which the family was residing on the date of the eligibility event for the project.").

[10] *Id.*

[11] *Id.* at *5 (citing SECTION 8 RENEWAL POLICY GUIDE, *supra* note 6, at ¶ 11-3B).

Federal Court Rules that HUD Violated Federal Disposition Act

Residents of a large HUD-owned multifamily property have successfully challenged HUD's sale of the property to the City of Baltimore for demolition and redevelopment as middle-income housing. Dean v. Martinez, 366 F. Supp. 2d 477, 2004 WL 2115605 (D. Md. Sept. 21, 2004). Although their complaint raised many other significant claims and related issues, this is the first judicial decision in more than a decade that has found that the Department of Housing and Urban Development (HUD) violated the federal property disposition statute. The court also kept alive the tenants' Fair Housing Act claims against HUD and the city, leaving them for later resolution.

Factual and Legal Background

At issue in the case was HUD's proposed disposition of the Uplands, a 979-unit property in western Baltimore that was originally insured and subsidized by HUD under the Section 236 program, and subsequently assisted under the Section 8 Loan Management Set-Aside program for almost all of the units. After default, the mortgage was assigned to HUD and HUD assumed control of the property as mortgagee-in-possession (MIP). When the default was not cured, HUD scheduled a foreclosure sale for June of 2003, as part of a plan to acquire title and immediately transfer the property to the city for demolition and redevelopment. The city's redevelopment plan proposed that only a small portion of the replacement units, funded in part with up-front grants from HUD totaling $36 million, would be affordable to very low-income families like those who formerly resided in the property. Tenants were to be receive vouchers to find housing on the private market.

While it was in control as MIP for more than two years prior to foreclosure, HUD moved to vacate the property, offering most tenants vouchers to move, along with some relocation assistance. Most residents moved without vouchers and relocation assistance. Many moved to surrounding counties due to the tight rental market in the city. Prior to relocating tenants or encouraging them to leave, HUD did not conduct a market analysis to determine the availability of affordable housing to voucher holders or the voucher success rate, which reportedly had hovered below 50% in the city. Prior to the foreclosure, about forty tenant families, primarily African-American, senior, disabled, and single-parent households, did not move. Many had been denied vouchers by the PHA or could not use them to lease up in the market due to poor credit. Even those with vouchers faced the prospect of relocation to areas of concentrated poverty or substandard housing. HUD then informed the remaining residents they would be moved to a hotel, and offered time-limited relocation assistance.

Prior to the foreclosure, HUD took the position that tenants had no right to be consulted regarding the planned foreclosure and disposition process, nor any guaranteed right to return following redevelopment. At this time, HUD failed to provide residents with notice of the proposed general terms and conditions concerning the foreclosure and acquisition and retransfer plan, as well as specific information regarding the future use and operation of the project, or any opportunity to comment. HUD performed no analyses concerning the feasibility of using vouchers in the local market, local housing needs or any fair housing impacts.

Facing the foreclosure and the threat of imminent displacement and the long-term loss of their homes, the remaining tenants got organized. After establishing a tenants association, they developed their own preservation plan, seeking to preserve some number of units affordable to Section 8-eligible tenants at the redeveloped site, using tools that included the existing Section 8 contract, up-front grants and project-based vouchers, in partnership with an experienced developer.

Facing the foreclosure and the threat of imminent displacement and the long-term loss of their homes, the remaining tenants got organized

When neither HUD nor the city were willing to revise the terms of the demolition and redevelopment plan prior to the scheduled foreclosure sale, the tenants filed suit to challenge the plan, including its relocation component, naming both HUD and the city as defendants. The suit claimed that the plan violated the Multifamily Housing Property Disposition Act,[2] the Fair Housing Act,[1] and the Uniform Relocation Act,[3] entitling the tenants to relief under the federal Administrative Procedure Act.[4]

The residents first sought preliminary relief against the June 2003 foreclosure sale, but the court denied the motion, so HUD acquired title to the property at the foreclosure sale. Within a month, HUD issued an initial disposition plan, disclosing an intent to sell the property to the city for $10 and provide an up-front grant for redevelopment. In exchange, HUD proposed to require the city to maintain at least 74% of the redeveloped units as "affordable housing," generally for families earning no more than 80% of area median income. However, up to 31% of these "affordable" units could be targeted to families earning up to 115% of area median income (AMI).[5] The remaining 26% of the units could be sold or rented at market rates. The initial plan proposed no deeper targeting of the units to very-low or extremely low-income families. Former tenants would have a first option to rent or buy these redeveloped units, although the only provision to accomplish this would be a clause preventing the new owner from discriminating against voucher holders. The plan indicated that the city would assume relocation responsibilities for any tenants remaining on the premises when HUD eventually transferred the property to them.

HUD then distributed this initial plan to the remaining tenants for a thirty-day comment period, although without informing tenants that the full record was available for their review. The Uplands Tenants Association and individual tenants filed comments, primarily opposing the demolition decision and the high affordability standards for the redeveloped property, which made illusory the right to return to the redeveloped property. HUD then reopened the comment period, apparently in order to make available the full administrative record.

HUD issued a final disposition plan virtually identical to the initial plan in all major respects, making no reference to the tenant comments, and then sold the property to the city in January 2004. The city then condemned the property as unsafe, ordering tenants to vacate within ten days. Over the next two months, the tenants vacated the property, and the city prepared to schedule demolition and solicit redevelopment proposals.

Since preliminary relief was denied, the parties filed cross-motions for summary judgment, which the court considered in this opinion. The tenants sought to have HUD's disposition plan set aside or invalidated under the APA, and HUD sought to have the tenants' claims dismissed or decided in its favor. At this point the court was not considering any motion filed by the city. The court considered several of the tenants' arguments: (1) that HUD violated the procedural requirements of the federal disposition statute, (2) that HUD failed to comply with its duty to further fair housing, and (3) that HUD's relocation activities were inadequate under relocation and fair housing laws.

The federal disposition statute requires that HUD develop a disposition plan containing certain terms, that tenants be given the opportunity to comment, and that HUD consider those comments. In addition, the statute requires that HUD's plan must address eight specific goals, while choosing the least costly means of doing so. Those goals include preserving affordable housing, maintaining properties in decent condition and minimizing the need to demolish them, minimizing involuntary displacement, supporting fair housing strategies, and acting consistently

[1]12 U.S.C.A. § 1701z-11 (West 2001).

[2]42 U.S.C.A. §§ 3601, 3608(e)(5) (West 1994).

[3]42 U.S.C.A. §§ 4601, 4625 (West, WESTLAW through P.L. 108-356, approved 10-21-04).

[4]5 U.S.C.A. § 702 (West, WESTLAW through P.L. 108-356, approved 10-21-04).

[5]Dean v. Martinez, 336 F. Supp. 2d 477, 481 (D. Md. 2004).

with local housing market conditions. The tenants claimed that HUD violated this statute because it neither considered their comments, nor addressed these goals.

The court began its analysis of this claim by emphasizing that the APA standard of judicial review is highly deferential to the agency. On whether HUD violated a legal duty to consider the tenants' comments, the court found HUD's treatment of the tenants' comments acceptable, although perhaps less than desirable, pointing out that HUD solicited comments, extended the comment deadline, prepared a summary of tenant concerns, and stated that they had been considered. The court did not believe that the statute requires an explicit response to the tenants' comments, and thus granted HUD's motion on this aspect of the claim.

However, on the issue of whether HUD adequately considered the goals expressed in the disposition statute, the court granted partial summary judgment to the tenants, finding insufficient support in the record. HUD had argued that its decision was consistent with the statute because the record reflected the prohibitive cost of maintaining and repairing the property. On this point, the court clearly and convincingly rejected HUD's myopic view:

> Such cost concerns, while relevant in light of the statute's command that HUD act "in the least costly fashion among reasonable available alternatives," 12 U.S.C. § 1701z-11(a)(3), may not by themselves justify HUD's action. HUD, rather, was obligated to determine that the cost of maintaining and rehabilitating the property "outweigh[ed] other goals expressed in the statute." [citing cases].[6] Because there is no evidence to suggest that HUD attempted such a weighing of competing statutory considerations, the only reasonable interpretation of the record is that HUD's action was arbitrary and capricious.

336 F. Supp. 2d at 484.

The court appeared especially astounded by HUD's failure to document consideration of the statutory goals in light of its earlier explicit discussion of them at the preliminary injunction hearing held prior to the foreclosure sale. Another aspect of this problem was whether HUD considered the statutory goals when developing the weak affordability standards in the final disposition plan and contract with the city. The court found no evidence in the record to support HUD's decision that a mix of 74% "affordable" and 26% market-rate was appropriate, or that 80% of AMI is the appropriate targeted income level for "affordable" units, despite a local HUD official's assertion that tenants could use vouchers in the local market because all units were within the local payment standard.

As is customary, when in trouble on the merits, HUD sought to have the claims dismissed on procedural grounds. The first contention was that the tenants allegedly lacked standing because their injury was speculative. In other words, until the city establishes affordability standards, it remained unclear whether the tenants could return with their vouchers to the redeveloped site. The court rejected HUD's ploy, stating that the affordability criteria cannot be separated from other aspects of HUD's disposition, and that in any event the plaintiffs' temporary displacement from HUD's decision sufficed to confer standing to challenge it. HUD's second procedural defense, related to the standing claim, was that the tenants' claims were not yet ripe because the extent of their injury remains unknown until the city finalizes its redevelopment plan. This too was rejected, because HUD's decision was complete, and postponing review would cause hardship for several parties to the transaction.

The court thus set aside the disposition decision and remanded the case to HUD for reconsideration in light of the statutory objectives.

The tenant's second claim, also brought under the APA, alleged that HUD had violated its duty to affirmatively further fair housing because it failed to consider the fair housing implications of its disposition decision.[7] Because almost all of the former Uplands tenants are African-American, the effect of the plan, especially the weak affordability standards for the redeveloped site, will be to force the tenants into higher-poverty and racially concentrated census tracts. HUD again sought to defend this claim on procedural grounds, beyond the standing and ripeness issues already raised and rejected by the court. HUD's additional contention was that the APA doesn't permit review of HUD's decision because the tenants have an adequate remedy for their injuries under their fair housing claim against the city. The court had no trouble rejecting this defense, because the action challenged was HUD's own, not that of a regulated entity. The court also recognized that HUD's fair housing duties are broader than the city's,[8] requiring HUD to take steps to ensure fair housing, not just avoid discriminating.

Evaluating the merits of the claim, the court denied HUD's motion for summary judgment, finding the record devoid of any evidence supporting the consideration of fair housing policies when developing the plan and its affordability criteria. In the court's words,

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[6] In fact, the court's instruction that, if properly documented, HUD could allow cost to outweigh the other goals is apparently incorrect. The cases cited for this proposition were decided in 1985 and 1987, prior to Congress' revision of the statute in 1988 to specifically reject cost as the predominant factor in disposition decision-making. Pub. L. No. 100-242, § 181, 101 Stat. 1815, 1868 (1988).

[7] 42 U.S.C.A. § 3608(e)(5) (West 1994).

[8] *Dean*, 336 F. Supp. 2d at 487 (citing Darst-Webbe Tenant Ass'n Bd., 339 F.3d 702, 713-14 (8th Cir. 2003)); NAACP v. HUD, 817 F.2d 149, 157-160 (1st Cir. 1987).

there was no evidence to suggest that HUD considered the impact of the city's redevelopment plans on the racial composition of the Uplands area and other neighborhoods—something HUD was obliged to consider not only as a matter of its "affirmative[ ]" duty under § 3608(e)(5), but also because "supporting fair housing strategies" is a specified goal under the Disposition Act, *see* 12 U.S.C. § 1701z-11(a)(3)(G)."[9]

At the same time, the court declined to issue summary judgment in the tenants' favor on this claim, largely because of uncertainty surrounding whether individual programmatic decisions, rather than patterns or policies, are vulnerable to affirmatively furthering claims. The court effectively instructed HUD to consider the fair housing implications of its decision on the remand, since fair housing is one of the statutory disposition goals, and indicated that it would review that explanation later.

The final claim raised by the motions was whether HUD's relocation activities were in compliance with the requirements of the Uniform Relocation Act (URA)[10] and fair housing laws. The court considered only the URA claim, because HUD had not sought judgment on the relocation component of the fair housing claim, and in any event that aspect would be reevaluated on the administrative remand. After noting the extensive actions required by the URA (e.g., moving expenses and comparable replacement dwellings), the court apparently bought HUD's characterization that the claims were those of a few disgruntled tenants. The court found that HUD's URA duties under § 4625(c)(3) are satisfied if tenants are given a "reasonable opportunity" to locate comparable replacement housing. In other words, in this court's view, so long as the prescribed services are "made available," the duty is satisfied, even though the results fail to match. The court also stated that comparability does not require equivalence. Apparently, the court chose to overlook the fact that of the approximately 600 vouchers made available for tenants in the 979-unit property, less than 300 were actually leased up in the market by former Uplands tenants. Finding no URA violation, the court entered judgment for HUD.

In a novel twist, although finding HUD's disposition decision illegal and setting it aside, the court did not set aside the sale of the property to the city. Rather, it simply remanded the decision to the agency for further consideration. Ostensibly, the court left the sale in place in order to avoid hardship to the city in the event that HUD might be able to justify the decision with a different record. Apparently, the court will permit HUD to revisit the statutory goals afresh, and if it can develop a sufficient record to justify the original or a revised plan under those goals, the sale could proceed. ■

[9]*Dean*, 336 F.Supp.2d at 488.

[10]42 U.S.C.A. § 4625 (West, WESTLAW, through P.L. 108-356, approved 10-21-04).

Supreme Court Agrees to Hear Oil Industry's Rent Control Case

On October 12, 2004, the United States Supreme Court granted a petition for certiorari filed by the state of Hawaii in *Lingle v. Chevron USA, Inc.*[1] The Court will review the decision of the Ninth Circuit Court of Appeals in a case brought by Chevron USA, Inc. challenging a Hawaii statute, which set rent caps for service stations that are leased from oil companies, among other regulations. The Ninth Circuit ruled that the statute and regulations were an unconstitutional regulatory taking. The issues before the Supreme Court relate to the standard by which the Ninth Circuit analyzed the statute before holding it to be unconstitutional. Should the Supreme Court uphold the Ninth Circuit's decision, the power of state and local legislative bodies to enact economic measures that seek to benefit the public good would be significantly curtailed.

Background and Evolution of the Case

The Ninth Circuit states in its opinion that, in 1997, the Hawaii legislature enacted Act 257 in response to the high cost of gasoline.[2] According to Hawaii, the act was enacted primarily for the broader purpose of stabilizing "the present structure of the retail market for gasoline, preserving the long-term benefit for consumers of multiple retail vendors and averting the economic harm that would occur if the retail market, like the wholesale market, were to become concentrated in the hands of the few oil companies serving the islands."[3]

While regulating the maximum rent that an oil company can charge dealers for leasing its service stations, Section 3(c) of the act, among other things, caps rent at: (1) 15% of the dealer's profit on gasoline sales; (2) 15% of the dealer's gross sales on other products; and (3) a percentage increase equal to increases the oil company may be required to pay on its ground lease.[4] Absent Act 257, Chevron's rental charge would require lessee-dealers to pay a monthly rent consisting of an escalating percentage of the lessee-dealer's gross margin on actual gasoline sales.[5] In lease agreements, all lessee-dealers are required to submit to a supply contract to provide necessary product demand at the stations.[6] Chevron admitted that it relies on monies earned through its supply contract, and not rents, to make

[1]Lingle v. Chevron USA, Inc., 363 F.3d 846 (9th Cir. 2004), *cert. granted* (U.S. Oct. 12, 2004) (No. 04-163) *sub nom.* Chevron USA, Inc. v. Bronster.

[2]Chevron USA, Inc. v. Bronster, 363 F.3d 846, 848 (9th Cir. 2004).

[3]Petitioners' Petition for a Writ of Certiorari at 2, Lingle v. Chevron USA, Inc. (No. 04-163).

[4]*Lingle*, 363 F.3d at 848.

[5]*Id.*

[6]*Id.*

its profit.[7] Although the lease agreement and the supply contract permit the lessee-dealer to transfer occupancy rights, it requires consent from and a transfer fee to the oil company.[8]

As one of two gasoline refiners and one of six wholesalers in Hawaii, Chevron filed suit against the state opposing the rent caps.[9] Chevron sought declaratory and injunctive relief, basing its claims on the Due Process Clause, Equal Protection Clause and Takings Clause of the Fifth Amendment.[10] The Federal District Court for the District of Hawaii concluded that Hawaii's Act 257 was an unconstitutional regulatory taking and granted Chevron's motion for partial summary judgment, stating that the act failed to "substantially advance a legitimate state interest."[11] In so doing, the district court rejected the state's argument that the deferential standard, used to review economic legislation under the Due Process Clause, should be used.[12] The state's first appeal challenged the standard used to evaluate the takings claim and the court's application of the standards, but the Ninth Circuit (the *Chevron I* court) held that the district court properly applied the "substantially advance" test to the case, stating that "a challenged regulatory action 'substantially advances' its interest if it bears a reliable relationship to that interest."[13] Under that test, the question is whether an act substantially advances the court-assessed purpose of the act—here, that of lowering retail gas prices.[14] The Ninth Circuit vacated the district court's decision and remanded the matter for a factual determination as to whether Chevron would capture a premium based on the increased value of their leased properties and whether oil companies would compensate for the rent caps by increasing wholesale prices.[15]

On remand, the district court found that Act 257 would not reduce retail gasoline prices as anticipated.[16] Therefore, the court determined that the statute would not advance its targeted goal.[17] This determination necessarily discounted the state's arguments that oil companies have been known to raise rents in order constructively to evict lessee-dealers and replace them with more profitable company-operated stations.[18]

After the district court held the act unconstitutional, Hawaii appealed again and argued that the lower court should have deferred to the rational economic judgment of the legislature that the rent cap would benefit consumers.[19] The court summarized the state's arguments as follows:

(1) the district court should have analyzed Chevron's claim under the Due Process Clause rather than the Takings Clause;

(2) the court misapplied the requirement that Act 257 "substantially advance a legitimate state interest"; and

(3) even if the district court's application of the law was correct, it clearly erred in finding that Act 257 does not, in fact, substantially advance Hawaii's interest in reducing retail gasoline prices.[20]

The Ninth Circuit affirmed the district court's second decision over the dissent of Judge William Fletcher and barred the first two arguments under the law of the case doctrine.[21] It reasoned that it had already decided the first two issues, that Hawaii had not met the exceptions to the law of the case doctrine, and that it, thus, would not rule on the questions presented in the second appeal.[22]

Hawaii Argues that the Ninth Circuit Made Clear Errors

The exceptions to the law of the case doctrine hinge on whether: (1) the earlier decision is clearly erroneous and its enforcement would work a manifest injustice; (2) intervening controlling authority makes reconsideration appropriate; or (3) substantially different evidence was adduced at a subsequent trial.[23] Hawaii applied the first exception while arguing its first point, and relied upon *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) to highlight the Supreme Court's unsettled position over the relationship between the Due Process and Takings claims.[24] It then argued that the *Chevron I* decision, on the first point, was clearly erroneous.[25]

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* Chevron did not seek compensation and, according to the state, it stipulated to the fact that the rent cap was actually higher than the rents charged at fifty-three of its sixty-four lessee-dealer stations and that the act allowed the company to recover more rent in the aggregate than it would otherwise charge. Petitioners' Petition for a Writ of Certiorari, *supra* note 3, at 3 n.2.

[11] Chevron USA, Inc. v. Cayetano, 57 F.Supp 2d 1003, 1014 (D. Haw. 1998).

[12] *Id.* at 1007 (relying upon Agins v. City of Tiburon, 447 U.S. 255, 260). Chevron then voluntarily dismissed its Due Process and Equal Protection claims without prejudice.

[13] Lingle, 363 F.3d at 848-49 (discussing its prior decision in Chevron USA, Inc. v. Cayetano, 224 F.3d 1030 (9th Cir. 2000), and its reliance upon Richardson v. City and County of Honolulu, 124 F.3d 1150 (9th cir. 1997)).

[14] *Id.* at 849.

[15] *Id.*

[16] Chevron USA, Inc. v. Cayetano, 198 F.Supp. 2d 1182, 1183 (D. Haw. 2002). The only evidence presented at trial consisted of expert opinions from each side.

[17] *Id.* at 1193.

[18] Petitioners' Petition for a Writ of Certiorari, *supra* note 3, at 5 n.3.

[19] *Id.* at 6.

[20] *Lingle*, 363 F.3d 846, 849.

[21] *Id.* at 848-49.

[22] *Id.* at 849.

[23] *Id.* at 849-50.

[24] *Id.* at 850-52.

[25] *Id.*

The state asserted that the same clearly erroneous exception applied to the decision in *Chevron I*, which applied the "substantially advances" test over the "rational basis" test.[26] But again, the court rejected Hawaii's arguments that the lower court erred and held that the "substantially advances" test requires a "reasonable relationship" between a legislative public purpose and the means used to effectuate that purpose.[27] The court stated that its adoption of the "reasonable relationship" and the "by a preponderance of the evidence" standards were derived from jury instructions approved by the Supreme Court in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999).[28] The court categorized its "reasonable relationship" standard as an intermediate level of review, which is more stringent than the rational basis test, but less stringent than the "rough proportionality" test.[29]

Hawaii Argues that the Court Reviewed the Incorrect Regulatory Purpose

In analyzing the state's third argument, the reviewing court did not find that the lower court had made any clear errors at trial such that it should invalidate its finding that the regulation would not substantially advance its purpose.[30] Here, the state argued that the purpose of the act was to "maintain the existence of an independent body of gas station operators by preventing oil companies from raising rent levels that would drive lessee-dealers out of business."[31] However, the district court found, and the Ninth Circuit agreed, that the ultimate purpose was of lowering gas prices and that that was an unattainable goal.[32]

Dissent Finds No Employable Bases for the Majority's "Substantially Advances" Standard

In his dissent, Judge Fletcher stated that the panel applied the wrong test to Act 257.[33] The dissent distinguished the "reasonableness" test, ordinarily applied to rent and price control statutes, to the "substantially advances" test, ordinarily applied to zoning and land use regulations.[34] It noted that the majority applied the substantially advances test from *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir 1997), but went beyond it when it applied it to *Chevron I* because of the "'stipulated possibility that [a dealer/lessee] will be able to capture the value of the decreased rent in the form of a premium.' That 'possibility,' in the view of the panel, 'separate[d] Act 257 from an ordinary rent control situation' in which the 'reasonableness' test would be applied."[35] In arguing against the use of the more stringent test, Judge Fletcher's dissent pointed out that the only possible basis for the application of the "substantially advances" test, to a rent control statute, is from dictum in *Yee v. City of Escondido,* 503 U.S. 519 (1992), in which the Supreme Court upheld a mobile home rent control ordinance against a physical takings challenge."[36] Judge Fletcher stated that:

> The Court in *Yee* did not say, even in a case where there was an actual premium that the *Nollan [v. California Coastal Comm'n, 483 U.S. 825 (1987),]* "substantially advances" test would apply. Nor did the Court say that the "substantially advances" test would apply in a case where there was only the probability of a premium, instead of an actual premium. But even if the Court meant in *Yee* what it did not say, this case is a far cry from *Yee*. Here the premium is not actual, nor even a mere probability. Rather, [as stated by Hawaii's expert] "[i]n all likelihood," the premium does not exist.[37]

Issues before the Supreme Court

Takings claims are derived from the Fifth Amendment of the Constitution which states, "private property [shall not] be taken for public use, without just compensation."[38] This provision serves as the focus of the case, and the questions presented before the Supreme Court ask: (1) whether a court may review state economic legislation under the Just Compensation Clause of the Fifth Amendment and (2) whether such analysis should use a standard that gives deference to the judgment of the state legislative bodies with regard to social and economic policy.[39]

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[26] *Id.* at 853. The "substantially advances" test is met where the act bears a "reasonable relationship" to that interest. Chevron can rebut such a relationship by showing by a preponderance of the evidence that the regulation will not in fact accomplish its purpose.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 853-54.

[30] *Id.* at 855.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 859.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 860.

[38] U.S. CONST., amend. V.

[39] The Supreme Court framed the issues that it will address as:

1. Whether the Just Compensation Clause authorizes a court to invalidate state economic legislation on its face and enjoin enforcement of the law on the basis that the legislation does not substantially advance a legitimate state interest, without regard to whether the challenged law diminishes the economic value or usefulness of any property.
2. Whether a court, in determining under the Just Compensation Clause whether state economic legislation substantially advances a legitimate state interest, should apply a deferential standard of review equivalent to that traditionally applied to economic legislation under the Due Process and Equal Protection Clauses, or may instead substitute its judgment for that of the legislature by determining *de*

Hawaii argues in its petition for certiorari that the appropriate test requires that the constitutionality of Act 257 be analyzed under a deferential "rational-basis" standard, a Due Process Clause analysis that would examine whether, in the rational economic judgment of the state, the act's rent cap would benefit consumers.[40] The state's petition points out that the Supreme Court's means-ends test in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), under which regulation is a taking "if the ordinance does not substantially advance legitimate state interest," failed to set out the nature of the legal inquiry intended by the language or the relevance of the rationality of government action to a claim brought under the Just Compensation Clause.[41] Hawaii also highlights the fact that *Agins* only relied upon due process decisions,[42] and that *Eastern Enterprises* indicates that a majority of the Supreme Court doubts the validity of the means-ends test.[43]

As stated by Hawaii, the questions presented "implicate fundamental concerns about the proper balance between the judiciary and institutions of democratic governance, and between the national government and the states within our federal system."[44] The Ninth Circuit's use of the means-ends test goes to great length to factually predict the nexus between the intent of legislative acts and their possible, probable or 100% certain results. Such an "ends"-directed test would never be applied under a Due Process Clause analysis, which only determines whether the enacting body rationally could have believed that the regulation would substantially advance a legitimate governmental purpose.

Property Owners Hope for the Expansion of a Ruling in Chevron's Favor

A number of interested groups anxiously await the Supreme Court's decision, which is expected some time next year before the end of the Court's current term.[45] Because this is the first time that the Supreme Court has reviewed rent control laws under the Takings Clause, property owners are hopeful that the Court's decision will affirm the Ninth Circuit decision and possibly affect residential rent control laws.[46] In addition to complaining that rent control laws intrude upon the free market, owners go so far as to say that they, in effect, diminish the supply of inexpensive housing.[47] The State of New York has disputed these arguments through its state attorney general, who not only supports rent control laws but filed an amicus curiae brief in the Hawaii case.[48] New York was joined in its brief by twenty-one other states.[49] However, the extension of an unfavorable ruling by the Supreme Court to the residential rental context may not be as easy as owners might think.[50]

Additional Takings-Related Case Garners Supreme Court's Attention

Lingle v. Chevron will not be the only Takings matter heard by the Supreme Court this term. In an unrelated case, *Kelo v. New London*, the high court granted certiorari and agreed to hear arguments related to a city's ability to exercise its power of eminent domain over home and other property owners.[51] The state trial court found that each of the plaintiffs sought to remain in their homes and on their properties for a variety of personal reasons.[52] The question presented before the Court asks, "[w]hat protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of 'economic development' that will perhaps increase tax revenues and improve the local economy."[53] In ruling, the Supreme Court will determine the breadth and limits of the term "public use," as well as how far municipalities may go in "redeveloping" communities for the sake of economic growth, notwithstanding other community concerns.

In the event the effects of adverse rulings against the governments are extended, the efforts of legislative bodies to impact the welfare of their respective jurisdictions through housing and redevelopment policies or through the designation of property for public use by way of condemnation power, may well be truncated. NHLP will continue to report on these cases and related developments. ■

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novo, by a preponderance of the evidence at trial, whether the legislation will be effective in achieving its goals.

Lingle, No. 04-163, *available at* http://www.supremecourtus.gov/qp/04_00163qp.pdf.

[40]*See* Petitioners' Petition for a Writ of Certiorari, *supra* note 3, at 6.

[41]*Id.* at 8.

[42]*Id.* at 9.

[43]*Id.* at 11.

[44]*Id.* at 8.

[45]Jacob Gershman, *Rent Controls May Feel Impact of Hawaii Case*, The N.Y. Sun, Oct. 15, 2004, *available at*, http://www.knowledgeplex.org/news/49483.html.

[46]*Id.*

[47]*Id.*

[48]*Id.*

[49]*Id.*

[50]Before declaring that Act 257 "goes too far", the *Chevron I* court admitted that "[s]tates have broad power to regulate the landlord-tenant relationship without paying compensation for all economic injuries that such regulations entail. When a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge." *Chevron I*, 224 F.3d 1030, 1033 (internal punctuation and citations omitted).

[51]Kelo v. City of New London, 843 A.2d 500, 507-08 (Conn. March 9, 2004), *cert granted* (U.S. Sept. 28, 2004) (No. 04-108).

[52]*Id.* at 511.

[53]*See Id*.

Recent Cases

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

Fair Housing — Disability

McGary v. City of Portland, 386 F.3d 1259 (2004). Citing, *inter alia*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) and its recent decision in *Giebeler v. M&B Assocs.*, 343 F.3d 1143 (9th Cir.2003), the Ninth Circuit reversed an order by the U.S. District Court for the District of Oregon dismissing under Rule 12(b)(6), Federal Rules of Civil Procedure, claims by Plaintiff disabled homeowner against Defendant city under the Fair Housing Amendments Act, 42 U.S.C. §§ 3601 *et seq.*, and state and local laws. Plaintiff alleged that by refusing to allow him additional time to clean his yard under a municipal nuisance abatement ordinance Defendant had failed to provide legally required reasonable accommodation of his AIDS-related disability.

Housing Choice Voucher Program — Utility Allowances; Federal Courts — Private Right of Action

Johnson v. Hous. Auth. of Jefferson Parish, 2004 WL 2414095 (E.D. La. Oct. 28, 2004). Plaintiff Housing Choice Voucher program participants filed suit against Defendant public housing authority and officers challenging Defendants' failure to adjust voucher utility allowances since 1995 despite increases in utility costs. Defendants moved to dismiss pursuant to Rule 12(b), Federal Rules of Civil Procedure. Distinguishing *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), the district court granted the motion, concluding, *inter alia,* that Plaintiffs had no private right of action to enforce the utility allowance provisions of the voucher statute, 42 U.S.C. § 1437f.

HOPE VI; Federal Courts — Class Actions

Wallace v. Chicago Hous. Auth., 224 F.R.D. 420 (2004). The federal district court granted Plaintiff public housing residents' motion for certification of an injunctive class in this action challenging Defendant public housing authority's HOPE VI relocation plans under the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq, inter alia.*

State Courts — Sovereign Immunity

Evans. v. Hous. Auth. of the City of Raleigh, 602 S.E. 2d 668 (N.C. Sup. Ct. 2004). The Supreme Court of North Carolina reversed an order by the Wake County Superior Court denying Defendant public housing authority's motion to dismiss based on governmental immunity in a lead paint tort action brought by Plaintiff public housing resident. The state supreme court held that public housing authorities are entitled to governmental immunity under state law. The supreme court remanded the matter to the district court to make factual determinations as to whether Defendant had waived immunity in this case. ■

RURAL HOUSING SERVICE PUBLISHES SWEEPING INTERIM HOUSING RULE

On November 26, 2004, the U.S. Department of Agriculture (USDA) released a far-reaching interim rule that will affect the Section 515 Rural Rental Housing, Farm Labor Housing and Rental Assistance programs. Reinvention of the Sections 514, 515, 516, and 521 Multi-Family Housing Programs, 69 Fed. Reg. 69,032 (Nov. 26, 2004) (to be codified at 7 C.F.R. pt. 3560).

The rule makes a number of significant, and adverse, changes related to USDA's implementation of the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA). Noteworthy changes include: (1) limits on the interested organizations eligible to receive notice of prepayment applications; (2) no independent appeal rights during the prepayment process for residents; (3) no analysis of material affect upon minority housing opportunities related to prepayments and (4) no requirement of actual compliance with local and state preservation laws before USDA approval of prepayment.

The rule also includes **drastic** restrictions on the eligibility of persons not admitted for permanent residence to participate in USDA housing programs. Under these amendments, entire households may be barred or evicted from USDA housing because of the presence of one ineligible member.

The deadline for submitting comments to USDA on the interim rule is January 26, 2005. The effective date of the rule is February 24, 2005.

Additional information will appear in the January 2005 issue of the *Housing Law Bulletin.*

[1]www.westlaw.com.

[2]www.lexis.com.

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

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD) and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued in October of 2004. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

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

HUD Federal Register Final Rules

69 Fed. Reg. 62,164 (Oct. 22, 2004)
Participation in HUD's Native American Programs by Religious Organizations; Providing for Equal Treatment of All Program Participants

Summary: This final rule removes barriers to the participation of faith-based organizations in HUD regulations implementing the Indian HOME Program, the Indian Community Development Block Grant Program, the Indian Housing Block Grant Program, the Title VI Loan Guarantee Assistance Program, and the Section 184 Loan Guarantees for Indian Housing Program. HUD has decided to adopt the June 21, 2004, proposed rule without change.

Effective Date: November 22, 2004.

69 Fed. Reg. 59,004 (Oct. 1, 2004)
Fair Market Rents for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program Fiscal Year 2005

Summary: Proposed FY 2005 Fair Market Rents (FMRs) were published in the *Federal Register* on August 6, 2004. The proposed FMRs were calculated for the first time using 2000 Census data and new Office of Management and Budget (OMB) metropolitan area definitions. Both changes in how FMRs were calculated had significant impacts. A number of public comments from public housing agencies and major interest groups raised concerns about the magnitude of FMR changes experienced by many areas. HUD is required by law to utilize the most recent available data in calculating FMRs, and all federal agencies are instructed to use current OMB metropolitan area definitions unless there are strong program reasons to use alternative definitions. As a result of public comments and further consideration of the proposed FMRs, HUD determined that there was sufficient reason to not use the new OMB metropolitan area definitions in calculating the final FY 2005 FMRs. The final FY 2005 FMRs provided in this publication are therefore based on the most recent available data but use the same FMR area definitions used in the FY 2004 FMR publication, which were based on old OMB metropolitan area definitions.

Effective Date: October 1, 2004.

69 Fed. Reg. 61,517 (Oct. 19, 2004)
Homeless Management Information Systems (HMIS) Data and Technical Standards Final Notice; Clarification and Additional Guidance on Special Provisions for Domestic Violence Provider Shelters

Summary: This notice clarifies and provides further guidance on the special provisions for domestic violence provider shelters participating in Homeless Management Information Systems (HMIS). This clarification and additional guidance follows issuance of the HMIS Data and Technical Standards Final Notice published on July 30, 2004, and the HMIS Data and Technical Standards Draft Notice, published on July 22, 2003.

Effective Date: August 30, 2004.

69 Fed. Reg. 62,070 (Oct. 22, 2004)
Delegation of Authority for Multifamily Housing Mortgage and Assistance Restructuring

Summary: Effective October 1, 2004, the Secretary is delegating authority and responsibilities to the Assistant Secretary for Housing-Federal Housing Commissioner that were previously administered by the Director of HUD's Office of Multifamily Housing Assistance Restructuring.

***Effective Date*:** October 1, 2004.

69 Fed. Reg. 62,071 (Oct. 22, 2004)
Revocation and Redelegation of Authority: Office of Affordable Housing Preservation

Summary: Under this notice, the Assistant Secretary is redelegating authority to carry out provisions of MAHRA to the General Deputy Assistant Secretary—Deputy Federal Housing Commissioner (General Deputy Assistant Secretary) and to staff within the Office of Affordable Housing Preservation.

Dates: Effective October 1, 2004.

69 Fed. Reg. 62,281 (Oct. 25, 2004)
Privacy Act of 1974; Notice of Matching Program: Matching Tenant Data in Assisted Housing Programs

Summary: Pursuant to the Computer Matching and

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

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

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

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

Privacy Protection Act of 1988, as amended, and the Office of Management and Budget's (OMB) Guidance on the statute, HUD is updating its notice of a matching program involving comparisons between income data provided by applicants or participants in HUD's assisted housing programs and independent sources of income information. The matching program will be carried out to detect inappropriate (excessive or insufficient) housing assistance under the National Housing Act, the United States Housing Act of 1937, Section 101 of the Housing and Community Development Act of 1965, the Native American Housing Assistance and Self-Determination Act of 1996, and the Quality Housing and Work Responsibility Act of 1998. The program provides for the verification of the matching results and the initiation of appropriate administrative or legal actions. This notice supplements the overview of computer matching for HUD's assisted housing programs published in the *Federal Register* on March 9, 2004. The March notice describes HUD's program for computer matching of its tenant data to: (a) The Social Security Administration's (SSA's) earned income and the Internal Revenue Service's unearned income data; (b) SSA's wage, Social Security, supplemental security income and special veterans benefits data; and (c) State Wage Information Collection Agencies' wage and unemployment benefit claim information.

Effective Date: Computer matching is expected to begin November 24, 2004, unless comments are received which will result in a contrary determination, or forty days from the date a computer matching agreement is signed, whichever is later.

Comments Due Date: November 24, 2004.

69 Fed. Reg. 62,717 (Oct. 27, 2004)
Notice of Planned Closing of Portland, OR; Omaha, NE; Albuquerque, NM; and Birmingham, AL; Post-of-Duty Stations

Summary: This notice advises the public that the HUD Office of Inspector General (OIG) plans to close its Portland, Oregon; Omaha, Nebraska; Albuquerque, New Mexico; and Birmingham, Alabama post-of-duty stations, and also provides a cost-benefit analyses of the impact of these closures.

69 Fed. Reg. 62,992 (Oct. 28, 2004)
Notice of Regulatory Waiver Requests Granted for the First Quarter of Calendar Year 2004

Summary: Section 106 of the Department of Housing and Urban Development Reform Act of 1989 requires HUD to publish quarterly *Federal Register* notices of all regulatory waivers that HUD has approved. This notice contains a list of regulatory waivers granted by HUD during the period beginning on January 1, 2004, and ending on March 31, 2004.

HUD PIH Notices

Notice PIH 2004-20 (HA) (Oct. 4, 2004)
Elimination of the Use of Code "5" in Line 3q of the Form HUD 50058 in Reporting Compliance with Public Housing Community Service and Self-Sufficiency Requirements

Summary: This notice eliminates the use of code "5" in line 3q of the Form HUD 50058 in reporting compliance with Public Housing community service and self-sufficiency requirements. Code "5" was used for public housing agencies to whom the community service requirements did not yet apply. As of October 31, 2003, all public housing agencies should have a policy in effect for the community service or self-sufficiency requirements according to PIH Notice 2003-17 titled "Reinstatement of the Community Service and Self-Sufficiency Requirement." Therefore, public housing agencies should no longer be selecting code "5" (option n/a) for line 3q of Form HUD-50058 since this will be an invalid response that will cause the form to be rejected by the PIC system.

Expires: October 4, 2005.

RHS Federal Register Notice

69 Fed. Reg. 62,639 (Oct. 27, 2004)
Notice of Funds Availability (NOFA) Inviting Applications for the Rural Community Development Initiative (RCDI)

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

Dates: January 25, 2005. ■

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

PUBLICATION	UNIT PRICE	QTY.	TOTAL PRICE
HUD Housing Programs: Tenants' Rights (3d ed. 2004)	$ 355		
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