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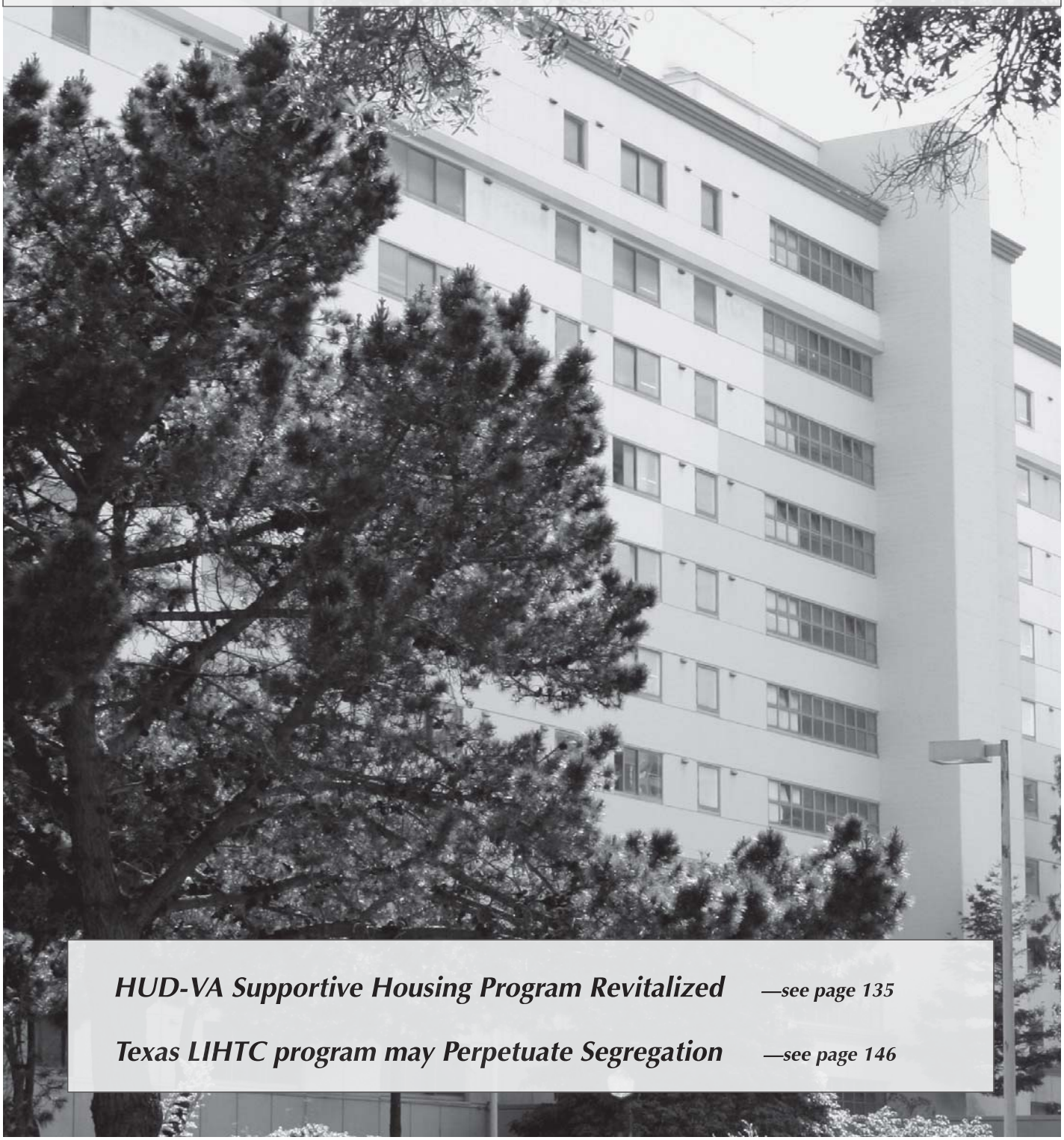

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HUD-VASH: Long-Neglected Program Brought Back To Life

Congress has dramatically invigorated the Department of Housing and Urban Development–Veterans Affairs Supportive Housing (HUD-VASH) program through which the Department of Veterans Affairs (VA) provides case management and clinical services to homeless veterans and HUD provides housing choice vouchers for veteran families. Using $75 million appropriated in the 2008 Consolidated Appropriations Act,[1] HUD-VASH is expected to serve approximately 10,000 of the estimated 154,000 homeless veteran families in the United States during Fiscal Year (FY) 2008.[2]

HUD-VASH has a shadowy history. In an April 2008 speech announcing the program, acting HUD Secretary Bernardi stated that the program provided over 1700 vouchers to homeless veterans when it began in 1990, and that, while some are still in use, no additional vouchers have ever been provided.[3] In fact, in March of 1992, HUD announced the availability of $17.9 million to support both VA services and public housing authorities' (PHAs) costs for 750 VA/HUD supportive services vouchers. The announcement stated that the original program grew out of three demonstration programs that "reinforced the understanding of the need for comprehensive, individually tailored service packages to assist the homeless in achieving self-sufficiency."[4] Section 8(o)(19) of the United States Housing Act of 1937 directs HUD to set aside voucher funds necessary to provide 500 veteran-dedicated vouchers for FY 2003, 1000 for FY 2004, 1500 for FY 2005 and 2000 for FY 2006, with the proviso that any needed amount that exceeded the previous year's set-aside must be provided for in that fiscal year's appropriation act.[5] There is no evidence that such appropriations were ever enacted.

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[1]Public Law 110-161, tit. II., 121 Stat. 1844, 2414, (2007). The program itself is authorized under §8(o)(19) of the United Stated Housing Act of 1937, 42 U.S.C. § 1437f(o)(19) (2007).

[2]Joint HUD/Veterans Affairs webcast (May 8, 2008), *at*: http://www.hud.gov/webcasts/archives/index.cfm. While both Public Law 110-161 and 42 U.S.C. § 1437f(o)(19) use the word "veterans," the HUD Notice (Section 8 Housing Choice Vouchers: Implementing the HUD-VA Supportive Housing Program, Notice, 73 Fed. Reg. 25,026 (May 6, 2008)) repeatedly uses the word "families."

[3]Prepared Remarks of Roy A. Bernardi, Deputy Secretary of Housing and Urban Development, at the HUD-VASH Grant Announcement, Wednesday, April 16, 2008, *at* http://www.hud.gov/news/speeches/2008-04-16.cfm.

[4]57 Fed. Reg. 9956-01 (March 20, 1992), 1992 WL 52345 (F.R.) (Announcement of Funding—Invitation for FY 1992 Section 8 Rental Voucher Set-Aside for Homeless Veterans With Severe Psychiatric or Substance Abuse Disorders).

[5]42 U.S.C. § 1437f(o)(19) (West 2003 & Supp. 2006).

The invigorated program became effective on May 6, 2008.[6] In a webcast, the VA said that 330 outreach workers from 132 VA Medical Centers (VAMCs) located in every state, Puerto Rico and the District of Columbia,[7] were visiting homeless shelters, clinics, welfare offices, continuum of care providers and other homeless advocacy agencies in order to identify prospective applicants.[8] In consultation with the VA, HUD invited housing choice voucher program administrators (primarily PHAs) located in the jurisdiction of the chosen VAMCs to apply for project participation.[9] A list of participating VAMCs and PHAs is available on HUD's website.[10] The workers were expected to start developing relationships with PHA staff by the end of May. Interested housing advocates could take steps to be included in the outreach effort by contacting VAMCs directly and/or by reaching out to the homeless shelters, continuum of care providers, and other homeless advocacy agencies. For example, Southeast Louisiana Legal Services planned to convene a meeting with VA staff, homeless providers, and the responsible PHA, for the purpose of jump starting the program, identifying potential problems and working on eliminating any barriers to full program implementation in its service area.

Waiver of Voucher Statutory and Regulatory Provisions

The Act grants HUD (in consultation with the VA) authority to waive statutory and regulatory provisions otherwise applicable to the voucher program[11] but forbids HUD from waiving "requirements related to fair housing, nondiscrimination, labor standards, and the environment."[12] All provisions of 24 C.F.R. Parts 982 and 983 that have not been waived apply, respectively, to the VASH housing choice voucher holders and project-based vouchers.[13] While not addressed in the Act, the HUD Notice implementing the program states that "a PHA may request additional statutory or regulatory waivers" as the PHA deems necessary.[14]

In announcing the program, HUD has seized the waiver opportunity and waived provisions relating to eligibility, waiting lists, search time, lease terms and portability, and established, for some of these subject areas, new standards. The new and waived rules are discussed below.

Eligibility

Any homeless veteran family that is low-income (i.e. families with income at or below 80% of area median income (AMI))[15] may qualify for VASH.[16] To remove a possible adverse consequence for PHAs, which are under an obligation[17] to ensure that 75% of voucher admissions every year go to extremely low income (ELI) families,[18] a PHA may count VASH families who qualify as ELI toward the PHA's 75% requirement, but need not count VASH families in the total number of assisted families for this calculation.[19] HUD has also waived the statutory requirement that eligible veterans have a chronic mental illness or a chronic substance abuse disorder.[20]

HUD has seized the waiver opportunity and waived provisions relating to eligibility, waiting lists, search time, lease terms and portability, and established, for some of these subject areas, new standards.

Admission into VASH Program

The VAMC case mangers have responsibility for screening applicants, providing for treatment and services if needed, and if and when appropriate, admitting the veterans into the program. VAMCs will refer approved families to their partnering PHAs,[21] which will provide referred families with a VASH dedicated housing choice voucher.[22] For the VASH program, participating PHAs have relinquished any authority to maintain waiting lists, to apply local preferences,[23] or to reject families for violation of any voucher program requirements[24] including

[6]73 Fed. Reg. 25,026 (May 6, 2008)(Section 8 Housing Choice Vouchers: Implementing the HUD-VA Supportive Housing Program, Notice)(hereinafter HUD Implementing Notice).
[7]See joint HUD/Veterans Affairs webcast (May 8, 2008) *at* http://www.hud.gov/webcasts/archives/index.cfm.
[8]The VA has a formal, nationwide case manager training scheduled for August 11. As of the writing of this article, the only reference to HUD-VASH on the VA website is a paragraph describing the original program.
[9]HUD Implementing Notice.
[10]http://www.hud.gov/offices/pih/programs/hcv/vash/docs/vamc.pdf (in alphabetical order by state). The HUD VASH website can be reached at http://www.hud.gov/offices/pih/programs/hcv/vash/.
[11]Public Law 110-161, tit. II., 121 Stat. 1844, 2415 (2007).
[12]*Id.*; *see,* HUD Implementing Notice at 25,027.
[13]*Id.*
[14]*Id.*
[15]24 C.F.R. § 5.603 (2007).
[16]HUD Implementing Notice at 25,027.
[17]24 C.F.R. § 982.201(b)(2) (2007).
[18]*Id.* § 5.603 (2007)(Income below 30% of Area Medium Income).
[19]HUD Implementing Notice (This provision may have been added because veterans' disability pay, for certain jurisdictions, is greater than the income limits for extremely low or very low-income in the same jurisdiction).
[20]42 U.S.C. § 1437f(o)(19) (2007); *See* HUD Implementing Notice (At the May 8 webcast, HUD and VA staff stated that the program does not require, as in its earlier incarnation, that the veteran be literally living on the street to qualify. This, however, is not disclosed in the statute or the notice).
[21]7 HUD Implementing Notice at 25,027.
[22]*Id.*
[23]42 U.S.C. § 1437f(o)(6)(A) (2007) and 24 C.F.R. §§ 982.202, 982.204 & 982.207 (2007); *See,* HUD Implementing Notice at 25,027.
[24]24 C.F.R. § 982.552 (2007); *See,* HUD Implementing Notice at 25,027.

substance abuse or criminal activity.[25] The sole exception is that PHAs are *obligated* to reject veterans if any member of the household is subject to lifetime state sex offender registration.[26]

Case Management

Upon acceptance into the program by the VA, the families will be assigned to one of 290 case managers and receive case management and clinical services from the VA.[27] The case managers will address goals, treatment plans, and therapeutic plans, help the families meet daily needs such as health care, child care, access to legal representation, identifying and visiting potential residences, furnishing new homes and building ties with the community. They will assist applicants in completing voucher registration forms, provide transportation to PHAs and to service providers[28] and interface with PHA staff to help the families acquire and maintain stable long-term housing.[29] Finally, they will maintain and provide to HUD and the VA records and information necessary to evaluate the program.[30] At this time, the only reporting form mentioned in the HUD Notice is the 2004 version of the Family Report, HUD-50058.[31]

Applicant Ability to Use the Voucher

Three HUD waivers increase the chances of placing hard-to-house families. HUD has mandated an initial minimum voucher search term of 120 days rather than the regulatory sixty-day minimum.[32] Both the statutory[33] and the regulatory[34] initial one-year lease term have been waived, giving PHAs discretion to approve a lesser term.[35] Finally, the prohibition of living on the grounds of a public or private institution[36] has also been waived, permitting families to live on VAMC grounds in VA-owned units.[37]

Portability

Because the VAMC determines eligibility, HUD has decided that PHAs may not restrict where a family resides, even during the first twelve months after admission to the program,[38] so long as the VAMC deems the participant's residence close enough so that services may be provided. For families wishing to port to other jurisdictions, if the receiving PHA is close enough for the original VAMC to continue to provide case management, the sending PHA must retain the voucher and will be billed by the receiving PHA.[39] A family may port beyond the initial VAMC service area only if a receiving VAMC is available to serve the veteran and the receiving PHA has both a HUD-VASH program and an available HUD-VASH voucher.[40] The receiving PHA will absorb the family and count it against its HUD-VASH cap.[41] The receiving VAMC will then service the veteran.[42] The sending PHA will return its voucher to its HUD-VASH inventory for use by a new VAMC-referred family.[43]

Termination of the Voucher and Eviction

While the VA controls admission to the program and issuance of the voucher, the vouchers are administered "in accordance with the HCV [(Housing Choice Voucher)] tenant-based…regulations…at 24 C.F.R. part 982."[44] Unless

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[25]42 U.S.C. §§ 1437d(s) and 13661(a), (b) and (c)(West 2003 & Supp. 2007), 24 C.F.R. § 982.553 (2007). *See,* HUD Implementing Notice at 25,027.

[26]24 C.F.R. § 982.553(a)(2)(i) (2007) (the regulations require the PHA to conduct searches to determine sex-offender status in every state in which any household member is known to have resided. This provision is not mentioned in Public Law 110-161, tit. II., 121 Stat. 1844, 2415 (2007) and HUD has chosen not to waive it. 73 Fed. Reg. 25,026, 25,027 (May 6, 2008)(Section 8 Housing Choice Vouchers: Implementing the HUD-VA Supportive Housing Program, Notice).

[27]Joint HUD/Veterans Affairs webcast (May 8, 2008), *available at*: http://www.hud.gov/webcasts/archives/index.cfm. The HUD Notice specifically says "a HUD-VASH eligible *family* must receive the case management services noted above from the VAMC." HUD Implementing Notice at 25,028. This provides a basis for family members, in addition to the individual veteran, to have needed services provided.

[28]Including training in, and resources for, the use of public transportation if appropriate.

[29]Joint HUD/Veterans Affairs webcast (May 8, 2008), *available at* http://www.hud.gov/webcasts/archives/index.cfm.

[30]HUD Implementing Notice; *See also* joint HUD/Veterans Affairs webcast (May 8, 2008), *available at* http://www.hud.gov/webcasts/archives/index.cfm.

[31]HUD Implementing Notice at 25,028 *available at* http://www.hud.gov/offices/pih/systems/pic/50058/pubs/form50058.pdf). The HUD form is available on the HUD website.

[32]24 C.F.R. § 982.303(a) (2007) is waived. *See,* HUD Implementing Notice at 25,027 (Note that under this waiver, PHAs may only apply the extension, suspension and progress report provisions of their administrative plans after the 120 days).

[33]42 U.S.C. § 1437f(o)(7)(A) (West 2003 & Supp 2006).

[34]24 C.F.R. § 982.309(a)(1) (2007).

[35]HUD Implementing Notice at 25,027; 42 U.S.C. § 1437f(o)(7)(A) is waived. Note, the HUD Implementing Notice waives the Housing Choice Voucher program requirement, codified at 24 C.F.R. § 982.309(a)(2)(ii) (2007), which requires leases to have a one-year term unless a shorter term improves housing opportunities for the Voucher holder and the shorter term is the prevailing market practice. The waiver is granted in order to improve housing opportunities for HUD-VASH Voucher holders. Ironically, § 982.309(a)(1) (2007) which establishes the one-year term, is not specifically mentioned.

[36]24 C.F.R. § 982.352(a)(5) (2007).

[37]HUD Implementing Notice at 25,027.

[38]24 C.F.R. §§ 982.353(a), (b) and (c) (2007) and 42 U.S.C. § 1437f(r)(1)(B)(i) (2007) have both been deemed by HUD not to apply. HUD Implementing Notice.

[39]HUD Implementing Notice at 25,028.

[40]73 Fed. Reg. 28,863 (May 19, 2008)(Section 8 Housing Choice Vouchers: Implementation of the HUD-VA Supportive Housing Program, *Correction*)(note that this Correction specifically adds guidance for ports in which a new VAMC provides case management).

[41]*Id.* The receiving PHA does not have the option of absorbing the family into its regular HCV program under 24 C.F.R. § 982.355(d) (2007).

[42]73 Fed. Reg. 28,863 (May 19, 2008)(Section 8 Housing Choice Vouchers: Implementation of the HUD-VA Supportive housing Program, *Correction*).

[43]*Id.*

[44]HUD Implementing Notice.

expressly waived, or a local PHA plan provision conflicts with HUD-VASH requirements, VASH vouchers are administered as any other HCV.[45] PHAs, therefore, have the authority to terminate VASH participants[46] and landlords have the authority to evict the family.[47]

The VA was clear that its case managers would not consider events such as failure to maintain sobriety as grounds for termination of services.

The primary inter-departmental friction discussed in the May 8 HUD-VA webcast related to circumstances that would trigger eviction actions. Evictions asserting causes such as the tenant's failure to maintain sobriety, drug violations, or threatening the property or other tenants or staff while suffering a mental illness relapse, could be common in the supported veteran population. If a tenant is evicted for a serious lease violation, the PHA is required to terminate the voucher.[48] The VA was clear that its case managers would not consider events such as failure to maintain sobriety as grounds for termination of services. The VA hopes that PHAs will consider termination only as a last resort and only after good faith cooperation with the case manager and the family. To avoid problems, PHAs should seek a waiver of 24 C.F.R. § 982.552(b)(2), which requires PHAs to terminate assistance under the program after a resident has been evicted for serious violation of the lease. Alternatively, PHAs could determine that no eviction of a VASH recipient constitutes a serious lease violation. To defend against termination or eviction, advocates could well find case managers to be sympathetic allies and sources of helpful, otherwise hard to come by, information.

The VA will only terminate a veteran from services if she no longer needs services, requires more intensive case management (such as inpatient care), refuses to accept further services without good cause, or has her voucher terminated by the PHA. Loss of housing unrelated to voucher termination will not cause termination of case management. If the VA verifies to the PHA that the family has failed to participate in services without good cause, then the PHA must terminate the voucher.[49] Graduation from services, however, is not grounds for termination of the voucher.[50]

In any event, if voucher assistance is terminated, the HUD-VASH voucher must be returned to the VASH dedicated voucher inventory for issuance to another veteran family referred by the VAMC.[51]

Other Obligations of the PHA

Unless the obligation is waived, PHAs are required to conduct all of the other Housing Choice Voucher functions including such things as setting the payment standard, verifying income, determining tenant share of the rent, inspecting the unit, and determining whether the rent is reasonable.

The VA and HUD will track the families to evaluate results. HUD's May 6, 2008, Notice implies that participants must provide requested information to HUD for this purpose.[52]

For PHAs that are in the Moving to Work program, the PHAs must maintain separate bookkeeping for the VASH vouchers and may not merge the funds into other programs.[53]

PHAs may use VASH vouchers as project based vouchers, but only after requesting and obtaining all necessary statutory and regulatory waivers.[54] Such waivers would include relief from the maximum percentage (20%) of voucher budget authority that may be used by a PHA for project based vouchers.[55]

Conclusion

To date, HUD's sole statement concerning administration of the program vis-à-vis PHAs is that it will operate the program pursuant to 24 C.F.R. Part 982, with the PHAs making monthly rental payments for participants and HUD providing housing assistance and administrative costs to the PHAs.[56]

Advocates who have PHAs that are administering the VASH program in their service area[57] may find ways to help PHAs formulate a family-friendly system by:

- Contacting the VA and the local VAMC to determine what kind of outreach they are performing;
- Setting up a meeting with VAMC, veterans groups, homeless providers and advocates for the purpose of explaining the program and identifying barriers to a prompt implementation;

[45] *Id.* at 25,027.
[46] 24 C.F.R. § 982.552 (2007).
[47] *Id.* § 982.310 (2007).
[48] *Id.* § 982.552(b)(2) (2007).
[49] HUD Implementing Notice at 25,028.
[50] *Id.* Note that the PHA *may* offer the family a voucher from its regular pool and return the HUD-VASH voucher to the HUD-VASH inventory.
[51] Public Law 110-161, tit. II., 121 Stat. 1844, 2414, (2007); HUD Implementing Notice.
[52] 73 Fed. Reg. 25,027, 25,028.
[53] *Id.*
[54] *Id.*
[55] 24 C.F.R. § 983.6 (2007).
[56] HUD Implementing Notice.
[57] The HUD list of PHAs may be found at http://www.hud.gov/offices/pih/programs/hcv/vash/docs/vamc.pdf.

- Reviewing the PHA's Administrative Plan to determine what local rules ought to be changed;
- Drafting or commenting upon an initial draft of the PHA's chapter of the Administrative Plan dealing with the VASH program;
- Offering trainings to PHA staff on the differences between the VASH and the Housing Choice Voucher programs.

On April 16, 2008, acting Secretary Bernardi announced that "the President has requested another $75 million in his new budget for Fiscal Year 2009. If approved, this would allow us to reach up to 20,000 homeless veterans."[58] Mr. Bernardi did not accurately state the situation. The President's FY 2009 budget does request "another $75 million,"[59] but this will, if approved, simply continue the funding at the FY 2008 level and will not support any increase in the number of available VASH vouchers. ■

[58]Prepared Remarks of Roy A. Bernardi, Deputy Secretary of Housing and Urban Development at the HUD-VASH Grant Announcement, Wednesday, April 16, 2008, available at http://www.hud.gov/news/speeches/2008-04-16.cfm; This was repeated in the May 8 HUD/VA webcast, available at http://www.hud.gov/webcasts/archives/index.cfm.

[59]BUDGET OF THE UNITED STATES GOVERNMENT, *Fiscal Year 2009,* APPENDIX, Pg. 541.

HUD Regulatory Waivers Benefit Individual Participants and Public Housing Authorities*

The Department of Housing and Urban Development (HUD) is required to publish quarterly in the Federal Register a description of waivers of federal regulations that it has issued.[1] As of July 2, 2008, HUD had published descriptions of all the waiver requests granted during the last three quarters of 2007 and the first quarter of 2008.[2] Summaries of key waivers are set out in this article.[3]

Most of the waivers granted in the last year have related to the voucher or project-based voucher (PBV) programs, or to situations related to disaster recovery. The majority of the waivers granted affecting the voucher program can be divided into two broad categories: waivers made for disabled individuals who needed a reasonable accommodation in the form of a payment standard increase, and waivers regarding the project-based voucher program. The waivers granted in connection with the HOME program from 1996 through part of 2007 are also available on the HUD website.[4]

This summary is intended to assist advocates in determining whether to urge a public housing authority (PHA)

*This article was written by Antonia Konkoly, a student at the University of California, Berkeley, Law School and a summer intern at the National Housing Law Project.

[1]In 1989, Section 106 of Public Law 101-235 added the provisions regarding the reporting of waivers granted and the delegation of the authority to grant a waiver. The law provides that each notification must cover the period beginning on the day after the last date covered by the prior notification, and shall (A) identify the project, activity, or undertaking involved; (B) describe the nature of the requirement that has been waived and specify the provision involved; (C) specify the name and title of the official who granted the waiver request; (D) include a brief description of the grounds for approval of the waiver; and (E) state how more information about the waiver and a copy of the request and the approval may be obtained. 42 U.S.C.A § 3535(q) (West, Westlaw, Current through P.L.110-260 (excluding P.L. 110-234, 110-246, and 110-252) (approved 7-1-08)).

[2]72 Fed. Reg. 53,294 (Sept. 18, 2007) (second quarter 2007); 72 Fed. Reg. 73,066 (Dec. 26, 2007) (third quarter 2007); 73 Fed. Reg. 15,169 (Mar. 21, 2008) (fourth quarter 2007); 72 Fed. Reg. 38,072 (first quarter 2008).

[3]NHLP previously summarized relevant HUD waivers for 2002 to the first quarter of 2007 in three articles. NHLP, *HUD Regulatory Waivers Benefit Individual Participants and Public Housing Authorities*, 37 Hous L. Bull. 103, 115 (2007); NHLP, *HUD Regulatory Waivers: Summary of Recent Waivers Regarding Voucher and Other Program*, 35 Hous. L. Bull. 223, 238 (2005); NHLP, *HUD Waivers Benefit Individual Program Participants and Facilitate the Use of Project-Based Vouchers*, 33 Hous. L. Bull. 309, 320 (2003).

[4]*See* http://www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm (HOME resources and Waiver). HUD has not updated the waiver list since September 2007. It would be helpful to advocates, PHAs and other recipients of HUD programs if HUD resumed posting waivers online, and if other offices within HUD, especially Public and Indian Housing, Fair Housing and Housing, provided on the web a list of waivers granted by program (e.g., Project-Based Vouchers), year, and subject matter (e.g., reasonable accommodation).

to seek a waiver of HUD regulations to assist families in leasing a unit and in determining whether a PHA would be successful when seeking a waiver to facilitate the placement of project-based vouchers.[5] For each waiver there is a citation to the issue of the Federal Register in which the notice of the waiver was published and in which further detail is provided.

Housing Choice Voucher Program

Waiver of Effective Date of Reduced Payment Standard for Voucher Program

The Housing Choice Voucher program regulations provide that if the payment standard is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.[6] As a result of the voucher funding crisis, which has created problems for many local PHAs, HUD has in recent years urged them to reduce their program costs, in part by reducing their payment standards and implementing the new standards as soon as possible. To facilitate immediate implementation, HUD has advised PHAs to seek a waiver of the rule regarding the effective date.[7]

Four housing authorities were granted waivers of the regulation regarding the effective date of a reduced payment standard.[8] HUD granted these waiver requests because the costs saved from implementing the reduced payment standards earlier would enable the affected PHAs to manage their Housing Choice Voucher programs within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding. Of course, like similar waivers in the past, such action had an immediate and adverse consequence for most voucher participants. Implementation of the reduced payment standards translates into increased rental costs if the payment standard is less than the rent charged for the unit and forces the tenants to make up the difference or relocate.

Renting to Relatives

A PHA may not approve a unit if the owner is the parent, child, grandparent, grandchild, sister, or brother of any member of the household, unless it determines that approving the unit would provide a reasonable accommodation for a family member who is a person with disabilities.[9] In one instance, however, HUD approved a waiver of this requirement so that an eight-member family, with no disabled members, could rent from the head of household's mother. The PHA had sought the waiver because the market area was tight, and without the waiver the family would have been unable to find other adequate housing and utilize its voucher.[10]

Reasonable Accommodation of Disability: Increases in Payment Standards

A PHA may approve a higher payment standard as a reasonable accommodation to a person with a disability if the rent is within the basic range (90% to 110% of Fair Market Rent).[11] Altogether, HUD granted thirteen waiver requests on the cap on a PHA's ability to approve a payment standard above the basic range. Five waivers were granted to participants who owned manufactured homes that were either modified to meet their needs and/or accessible to the resident's doctor's office and social support system.[12] In an additional mobile home case, the waiver was granted after the resident's physician recommended that she remain in her mobile home due to severe emphysema.[13] In all of these instances, exceptions to the payment standard were required so that the participant would not pay more than 40% of adjusted income toward the family share;[14] moreover, five (out of six total) of these mobile home waivers were granted to a single housing authority, in Snohomish County, Washington.

The Housing Authority of the City of Los Angeles was granted three waivers for residents, each of whom was elderly and disabled and therefore unable to move without difficulty, and each of whom, due to recent rent increases, was paying very high proportions (54%, 75% and 84%) of their income towards rent.[15] Additionally, three waivers were granted where the participant needed a wheelchair-accessible unit,[16] and one waiver was granted for the

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[5]There is no limitation on who may request a waiver, but all the published waivers appear to be from PHAs, project owners and other recipients of grant funds, including cities. There does not seem to be a prohibition on waiver requests from program participants, but it is not the practice. If a program participant sought a waiver, it would seem that obtaining the grant recipient's endorsements—such as the PHA—would substantially improve the likelihood of success. If that is true, there are possibly few situations in which a recipient of assistance would make the waiver request independently.

[6]24 C.F.R. § 982.505(c)(3) (2007).

[7]Extension–Notice 2006-32, Public Housing Authority (PHA) Cost-Saving Initiatives in the Housing Choice Voucher (HCV) Program, PIH Notice 2007-25 (Aug. 14, 2007).

[8]72 Fed. Reg. 53,294, 53,309-10 (Sept. 18, 2007) (four waivers) (Westbrook HA, ME; Dauphin County HA, PA; Glens Falls HA, NY; HA of Thurston County, WA).

[9]24 C.F.R. § 982.306(d) (2007).

[10]72 Fed. Reg. 53,294, 53,309 (Sept. 18, 2007) (Northwest Minnesota Multi-County Housing and Redevelopment Authority, MN).

[11]24 C.F.R. § 982.505(d) (2007).

[12]72 Fed. Reg. 53,294, 53,310 (Sept. 18, 2007) (one waiver) (HA of Snohomish County, WA); 72 Fed. Reg. 73,066, 73,086 (Dec. 26, 2007) (two waivers) (both for HA of Snohomish County, WA); 73 Fed. Reg. 15,169, 15,183 (Mar. 21, 2008) (one waiver) (HA of Snohomish County, WA); 73 Fed. Reg. 38,072, 38,090 (July 2, 2008) (one waiver) (HA of Snohomish County, WA).

[13]73 Fed. Reg. 38,072, 38,090 (July 2, 2008) (Lafayette HA, IN).

[14]24 C.F.R. § 982.508 (2007).

[15]73 Fed. Reg. 38,072, 38,090 (July 2, 2008) (three waivers) (all for the HA of the City of Los Angeles).

[16]72 Fed. Reg. 53,294; 53,310 (Sept. 18, 2007) (one waiver) (HA of the City of Las Cruces, NM); 72 Fed. Reg. 73,066, 73,086 (Dec. 26, 2007) (two waivers) (Schenectady Municipal HA, NY; HA of the City of New Haven, CT).

general purpose of allowing the applicant, after an extensive housing search, to live in a unit that met her needs.[17]

Execution of HAP Contract

Ordinarily, a Housing Choice Voucher (HCV) program HAP contract must be executed no later than sixty days from the beginning of the lease term; any contract executed after the sixty-day period is void and the PHA may not pay any HAP to the owner.[18] HUD granted one waiver to this requirement, where due to administrative error, HCV funding had been coded improperly.[19] The reallocation of funds under the correct code caused a delay in the availability of funds to the PHA, which was consequently unable to execute HAP contracts in a timely manner in relation to the previously executed leases.

Project-Based Vouchers

Allowing Rents in Excess of Standards for Low-Income Housing Tax Credit (LIHTC) Units

Prior to a recent rule revision, rent to an owner of an LIHTC development for a PBV unit could not exceed the LIHTC rent as determined in accordance with the requirements of that program.[20] HUD granted one waiver of this rule, allowing rents to be charged in excess of those set by program rules in order for there to be sufficient funding to finance the project.[21] However, since granting this waiver, HUD has permanently revised the rule to permit all PBV units with LIHTC subsidies to have reasonable rents, which may be in excess of LIHTC limits, thus obviating the need for future waivers of the provision.[22]

Competitive Bidding

In awarding PBV assistance, a PHA must use either a competitive selection process, or (since 2006) a non-competitive process that is limited to projects that have been competitively selected for another government housing assistance program within the past three years.[23] HUD granted four waivers of this requirement, three of which were to PHAs located in areas affected by Hurricane Katrina that had sought the waivers with the purpose of maintaining long-term affordable housing in the relief and recovery efforts in the wake of the hurricane. The first of the hurricane-related waivers allowed a PHA in Mississippi to attach PBVs to up to seven public housing developments that have been, or will be, disposed of to a nonprofit subsidiary of the agency.[24] The second allowed several Mississippi PHAs to attach PBVs to their PHA-owned units in order to develop additional affordable housing while leveraging Community Development Block Grant funds allocated by the state government.[25] The third hurricane-related waiver allowed another Mississippi PHA to attach PBVs to PHA-owned units.[26] Additionally, HUD granted a waiver to allow a PHA in St. Louis to attach PBVs to units at a HOPE I development[27] in order to make the development financially viable and to facilitate the closing of the HOPE I grant.[28]

Combining PBV Assistance with Rent Supplements

Ordinarily, a PHA may not attach or pay PBV assistance to units in a Rent Supplement project.[29] HUD granted one waiver of this requirement for a portion of the units in a Rent Supplement project where twenty-three of thirty-nine units that were operating at a loss were receiving a rent supplement. The waiver allowed a PBV contract to assist twenty-five of the 157 unsubsidized units, and prohibited duplicative subsidies for any particular unit.[30]

Housing Opportunities for Persons with HIV/AIDS

Under the project-based voucher assistance program, PHAs may adopt a preference for admission of families that include a person with disabilities, but may not adopt a preference for persons with a specific disability.[31] However, the law requires that only persons with HIV/AIDS may occupy units developed with Housing Opportunities for Persons with AIDS (HOPWA) funds.[32] In one case involving project-based vouchers in a unit that also received HOPWA funds, the PHA perceived a conflict between the two programs and sought and obtained a waiver to pass over persons on their waiting lists in order to select a participant with HIV/AIDS.[33]

Waiver of Housing Quality Standards for Hurricane-Affected Projects

The Housing Authority of New Orleans requested and received a waiver regarding competition of owner proposals, housing quality standards inspections, and the Agreement to enter into a HAP contract, for two properties assisted under the project-based voucher program.[34] HUD waived these requirements due to the critical housing needs of New Orleans after Hurricanes Katrina and

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[17] 72 Fed. Reg. 73,066, 73,087 (Dec. 26, 2007) (one waiver) (Milford HA, MA).
[18] 24 C.F.R. § 982.305(c)(1) and (4) (2007).
[19] 72 Fed. Reg. 53,294, 53,309 (Sept. 18, 2007) (Kelso HA, WA).
[20] 24 C.F.R. § 983.304(c)(2) (2007).
[21] 72 Fed. Reg. 53,294, 53,311 (Sept. 18, 2007) (Somerville HA, MA).
[22] 72 Fed. Reg. 65,207 (Nov. 19, 2007).
[23] 24 C.F.R. § 983.51(b)-(d) (2007).
[24] 72 Fed. Reg. 53,294, 53,310 (Sept. 18, 2007) (Mississippi Regional HA, MS).
[25] *Id.* at 53,311 (Mississippi Regional HA VIII; Biloxi HA; Bay St. Louis/Waveland HA).
[26] 24 C.F.R. § 983.51(b)(1) (2007); 73 Fed. Reg. 38,072, 38,090 (July 2, 2008) (Mississippi Regional HA VI).
[27] 42 U.S.C. 1437aaa *et al.* (West, Westlaw, Current through P.L. 110-260 (excluding P.L. 110-234, 110-246, and 110-252) (approved 07-01-08)).
[28] 73 Fed. Reg. 38,072, 38,090 (July 2, 2008) (St. Louis HA, MO).
[29] 12 U.S.C.A. § 1701s (West 2001); 24 C.F.R. § 983.54(j) (2007).
[30] 72 Fed. Reg. 73,066, 73,085 (Dec. 26, 2007) (Macon HA, GA).
[31] 24 C.F.R. § 982.207(b)(3) (2007).
[32] *Id.* § 574.3 (2007) (definition of "eligible person").
[33] 72 Fed. Reg. 73,066, 73,086 (Dec. 26, 2007) (Contra Costa County HA, CA).
[34] 24 C.F.R. §§ 983.51, 983.152, and 983.204 (2007).

Rita and the continuing re-occupancy efforts since the hurricanes, as well as the willingness of all parties to correct initial contract deficiencies.[35]

Section 202

Projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959 and housing assistance under Section 8 of the U.S. Housing Act of 1937 must limit occupancy to very low-income elderly persons. To qualify, households must include a minimum of one person who is at least sixty-two years of age at the time of initial occupancy.[36] HUD granted sixteen waivers to allow people whose income exceeded area thresholds for "very low" (50% or less of area median) income to reside in Section 202 units. [37] In each instance, the waiver allowed the project to admit residents whose income fell within the "low income" (between 51 and 80% of area median) range, and/or residents who were near elderly.[38] Fourteen, or all but two, of these waivers were granted to projects located in rural areas, where there was insufficient market demand for very low-income elderly tenants and current occupancy levels were not supporting operations. In one additional instance, a management error was made in determining a single resident's eligibility, and the waiver was granted for that tenant only, both to avoid displacing the resident as a result of managerial error, and to help the property achieve 100% occupancy.

HUD also waived the age requirement only for one property in New Orleans that has been inoperable since August 2005 but is currently undergoing rehabilitation.[39] Based on market conditions, the owners were concerned that many elderly tenants that relocated as a result of Hurricane Katrina had not returned to the area, obviating the need for designated elderly housing and undermining the economic feasibility of the project. HUD, therefore, granted the waiver to allow the project to accept residents as young as fifty-five. It is possible that the fifty-five years of age limit was granted to be consistent with the rules governing fair housing.[40]

[35]72 Fed. Reg. 73,066, 73,085 (Dec. 26, 2007) (Flint Goodridge and Redemptorist Apartments).
[36]24 C.F.R. §§ 891.410(c), 891.520 (2007).
[37]72 Fed. Reg. 53,294, 53,306 (Sept. 18, 2007) (one waiver) (Strawberry, AR); 72 FR 73,066, 73,079 (Dec. 26, 2007) (three waivers) (Warden, WA; Winfield, KS; Osceola, IA); 73 Fed. Reg. 15,169, 15,177-79 (Mar. 21, 2008) (six waivers) (Brick Township, NJ; South Sioux City, NE; Carlisle, KY; Fennimore, WI; Stockton, MO; Pella, IA); 73 Fed. Reg. 38,072 (July 2, 2008) (five waivers) (Americus, GA; Ravendon, AR; Spring City, TN; Strong, AR; Red Lake, MN).
[38]The term "near-elderly" includes an individual who is at least fifty years of age but below the age of sixty-two. 24 C.F.R. § 5.403 (2007).
[39]73 Fed. Reg. 38,072, 38,086 (July 2, 2008).
[40]*See* 24 C.F.R. Pt. 100, Subpt. E (2007).

Community Block Development Grants

If at least 51% of the units in multifamily residential structures funded by Community Block Development Grants (CDBG) will not be occupied by low- and moderate-income households, CDBG assistance may only be provided in the following limited circumstances: (a) the assistance is for an eligible activity to reduce the development cost of the new construction of a multifamily, non-elderly rental housing project; (b) not less than 20% of the units will be occupied by low- and moderate-income households at affordable rents; and (c) the proportion of the total cost of developing the project to be borne by CDBG funds is no greater than the proportion of units in the project that will be occupied by low- and moderate-income households.[41] HUD granted one waiver of this provision, where the activity to be undertaken was the rehabilitation and conversion of two structures into multifamily housing, and the CDBG portion of residential development costs would be no greater than the portion of units occupied by low- and moderate-income households.[42]

Flexible Subsidy Repayment

Assistance to project owners provided prior to May 1, 1996, under the Flexible Subsidy Program for Troubled Projects must be repaid at the earlier of the expiration of the term of the mortgage, termination of mortgage insurance, prepayment of the mortgage or at sale of the project.[43] HUD granted three waivers of this requirement. The first was granted in order to prevent the affected property, an affordable owner-cooperative housing project built in 1972, from falling into serious disrepair.[44] This waiver modified the terms of the loan, allowing the amortization of the Flexible Subsidy debt with a new mortgage to refinance the mortgages on the subject property with a non-insured lender. Under the terms of the waiver, the Cooperative obtained permission to prepay the FHA-insured loans, address the physical needs, fully retire the Flexible Subsidy debt by annual payments of $76,000 scheduled over the new thirty-year mortgage, and deposit $100,000 into the Cooperative's Reserve for Replacement account. According to HUD, the Cooperative will continue to operate after prepayment under a new Use Agreement preserving this affordable housing for low- and moderate-income residents until December 1, 2043.

Two additional waivers were granted to allow twin properties to remain as cooperatives.[45] The terms of these

[41]24 C.F.R. § 570.208(a)(3) (2007).
[42]72 Fed. Reg. 53,294, 53,296 (Sept. 18, 2007) (Corpus Christi, TX).
[43]24 C.F.R. § 219.220(b) (2007).
[44]72 Fed. Reg. 53,294, 53,296 (Sept. 18, 2007) (Pittsburgh, PA, Fountain Court Consumer Housing Cooperative).
[45]73 Fed. Reg. 38,072, 38,075-6 (July 2, 2008) (Wayne, MI, Hickory Hollow Cooperatives I & II).

waivers allowed the owner of the subject properties to prepay the existing mortgages, obtain financing to perform rehabilitation of the properties, amortize the flexible subsidy loans with new mortgages, and secure sufficient funds for needed capital improvements. In granting the waivers, HUD noted that both the properties had maintained affordability and consistently received REAC scores above sixty since 2001, and that the waiver would allow them to continue as well-maintained sources of affordable housing, and to remain cooperatives.

HOME Program

Affordability Period

HOME regulations establish a twenty-year affordability period for new construction of rental housing.[46] HUD granted one waiver of this requirement, where severe and prolonged rainfall had caused earth movement and soil erosion, leaving a project uninhabitable.[47] Without the waiver, the participating jurisdiction would have been required to repay $528,000 of HOME funds, as the project failed to meet the established affordability period. In granting the waiver, HUD noted that although the county and the developer had exercised due diligence by developing a viable restoration plan that included refinancing the existing debt and reconfiguring the project by demolishing several buildings and rehabilitating other units, the project's primary lender had rejected the restoration plan and foreclosed on the project.

HOME regulations also state that, except for the twelve months following project completion, additional HOME assistance may not be provided to a previously assisted HOME project during the period of affordability.[48] The State of Nebraska requested and received a waiver of this requirement for three troubled HOME rental projects which were initially under-funded and underwritten to carry unacceptably high debt in relation to potential net operating income.[49] In granting the waiver, HUD stated that it permitted the state to retain eighty-two units of at-risk affordable rental housing.

Hurricane-Related HOME Regulation Waivers

HOME regulations define reconstruction, in part, as the rebuilding on the same lot of housing standing at the time of project commitment,[50] and state that housing owned by an income-eligible individual qualifies as affordable housing only if it is the principal residence of the owner when HOME funds are committed.[51] Because Hurricane Rita moved otherwise qualified homes from their foundations or even off the site, or rendered them unfit for habitation, at the time of HOME commitments, HUD waived these requirements for the State of Texas Department of Housing and Community Affairs in order to facilitate the reconstruction of affordable housing.[52] HUD determined that requiring the state to adhere to the reconstruction definition and principal residence requirements would create a significant hardship for the communities and income-eligible homeowners in need of assistance in areas impacted by the hurricane.

HOME regulations also require that a participating jurisdiction commit its annual allocation of HOME funds within twenty-four months after HUD provides notice of its execution of the jurisdiction's HOME Investment Partnership Agreement.[53] HUD granted the city of Lake Charles, Louisiana, a waiver of its HOME commitment deadline in order to facilitate its continued recovery from the devastation caused by Hurricanes Katrina and Rita.[54]

HUD determined that requiring Texas to adhere to the HOME reconstruction definition and principal residence requirements would create a significant hardship for the communities and income-eligible homeowners in need of assistance in areas impacted by the hurricane.

CDBG and HOME Waivers Granted Following Damage from Severe Weather

A state must allow a minimum of thirty days for public comment following an amendment to its consolidated plan.[55] Additionally, a state must follow its citizen participation plan, under which technical assistance is to be given to groups representative of low- and moderate-income persons that request such assistance in developing proposals for funding assistance under any of the programs covered by the consolidated plan, with the level and type of assistance to be determined by the jurisdiction.[56] HUD granted waivers of these requirements to three states, Georgia, Kansas and Oregon, each of which had experienced significant weather-related damage to commercial and residential buildings within their jurisdictions.[57] In Georgia, storms in March 2007 had caused significant damage in twelve counties (disaster-declared

[46] 24 C.F.R. § 92.252(e) (2007).
[47] 73 Fed. Reg. 15,169, 15,170 (Mar. 21, 2008) (County of Clackamas, OR).
[48] 24 C.F.R. § 92.214(a)(1) (2007).
[49] 73 Fed. Reg. 38,072, 38,073 (July 2, 2008).
[50] 24 C.F.R. § 92.2 (2007).
[51] *Id.* § 92.254 (b)(2) (2007).
[52] 73 Fed. Reg. 15,169, 15,170 (Mar. 21, 2008).
[53] 24 C.F.R. § 92.500(d)(1)(B) (2007).
[54] 73 Fed. Reg. 15,169, 15,170-71 (Mar. 21, 2008).
[55] 24 C.F.R. § 91.115(c)(2) (2007).
[56] *Id.* § 91.115(i) (2007).
[57] 72 Fed. Reg. 53,294, 53,294-95 (Sept. 18, 2007) 73 Fed. Reg. 38,072, 38,073-74 (July 2, 2008).

areas). In Kansas, a tornado on May 5, 2007, had caused significant damage to most of the city of Greensburg. In Oregon, storms in December 2007 caused flooding in a six-county area. In granting these waivers, HUD stated that it was acting to help each state respond more quickly to the needs of affected communities by allowing expedited comment periods (five days in Georgia, three days in Kansas, and unspecified in Oregon) for any amendments needed for the consolidated or action plan.

In granting waivers to Georgia, Kansas and Oregon, HUD stated that it was acting to help each state respond more quickly to the needs of affected communities.

In relation to the same December 2007 storms, Oregon and also Washington additionally received numerous other waivers of various HOME regulations.[58] Shelby County, Tennessee, also requested and received a waiver of HOME property and rehabilitation standards due to damage it sustained in severe storms, tornadoes, straight-line winds and flooding.[59]

Similarly, CDBG regulations require that states provide a minimum thirty-day public comment period for changes to the Method of Distribution,[60] and also that each unit of general local government (UGLG) provide for a minimum of two public hearings at different stages of CDBG-funded activity to ensure local participation.[61] HUD issued waivers of each of these requirements for the state of Oregon, reducing the public comment period to three days and the mandatory number of public hearings for UGLGs to one, in order to facilitate recovery for an unspecified natural disaster, presumably the December 2007 storms named in the HOME regulation waivers granted to the state.[62] ■

[58]73 Fed. Reg. 38,072, 38,073-74 (July 2, 2008).
[59]24 C.F.R. § 92.251(a)(1) (2007); 73 Fed. Reg. 38,072, 38,074 (July 2, 2008).
[60]24 C.F.R. § 91.115(b)(4) (2007).
[61]*Id.* § 570.486(a)(5) (2007).
[62]73 Fed. Reg. 38,072, 38,075 (July 2, 2008).

Acceptance of Voucher May Be Required as a Reasonable Accommodation*

Advocates obtained a recent victory in the ongoing effort to get courts to recognize that landlords may be required to accept a Section 8 voucher as a reasonable accommodation under the Fair Housing Amendments Act (FHAA).[1] The U.S. District Court for the Eastern District of New York denied the defendant landlord's motion to dismiss, holding that Maxine Freeland had alleged facts sufficient to support a discrimination claim based on the landlord's failure to provide reasonable accommodation by accepting her voucher.[2]

Background

According to the allegations in the complaint, Maxine Freeland, a fifty-four-year-old Brooklyn resident, suffers from a heart condition that severely limits her mobility and prevents her from working. In addition, the side effects of her medication further impair her ability to work. Social Security disability, in the amount of $735 per month, is Ms. Freeland's primary source of income, which is insufficient to cover her monthly rent of $793.37.[3]

Freeland has resided in an apartment owned by Sisao LLC since 1992. She applied for a Section 8 voucher from the New York City Housing Authority in 2003, which was granted in February 2006. Shortly thereafter, Freeland requested that Sisao accept the voucher to pay a considerable portion of her rent. Although her landlord knew of her disability, it denied the initial and subsequent requests.[4] Freeland also alleged that Sisao was obligated to accept her voucher because her disability prevented her from searching for another apartment that would accept her voucher.[5] As a result of the landlord's failure to accept the voucher, she has accrued rent arrearages and faces a state court eviction action for nonpayment of rent.

Freeland brought an action in federal court alleging that Sisao failed to reasonably accommodate her disabil-

*The author of this article is Zachary Hedling, a J.D. Candidate at Golden Gate University School of Law and a summer intern at the National Housing Law Project.
[1]Freeland v. Sisao LLC, No. CV-07-3741, 2008 WL 906746 (E.D.N.Y. April 1, 2008) (note that both the slip opinion and the Westlaw caption misspell the Plaintiff's name as "Feeland").
[2]*Id.*, at *5.
[3]*Id.* at *1. In order for a person to receive SSDI, Social Security must determine that the recipient is not capable of working, bolstering Ms. Freeland's claim that her disabilities prevent her from working.
[4]*Id.* at *2.
[5]*Id.* at *5. The court dismissed this claim, finding that the FHAA only protects the equal opportunity to use and enjoy a dwelling and that the accommodation sought in connection with a search for an apartment not owned by the defendant should have been addressed to the housing authority, not the landlord.

ity, as required by FHAA[6] and state and local fair housing laws, when it refused to accept her Section 8 voucher. Sisao moved to dismiss for failure to state a claim upon which relief can be granted, or, in the alternative, judgment on the pleadings.[7]

Discussion

Under federal law, "a reasonable accommodation is a change in a rule, policy, practice, or service that may be necessary to allow a person with a disability the equal opportunity to use and enjoy a dwelling."[8] Failure to provide a necessary reasonable accommodation may constitute discrimination.[9]

To determine whether an accommodation is necessary, the following test is used: (1) plaintiff must have a disability as defined by the FHAA; (2) defendant knew or should have known of the disability; (3) the accommodation must be necessary to afford plaintiff an equal opportunity to use and enjoy the dwelling; and (4) defendant refused to make the accommodation.[10]

In moving to dismiss the case, Sisao did not dispute Ms. Freeland's disability, that her disability was known to them, or that they denied the requested accommodation to accept her Section 8 voucher.[11] Instead, Sisao based its rejection on the third prong of the test, arguing that what Freeland sought is an "economic accommodation rather than an accommodation of her handicap."[12] The term "economic accommodation" has been used to characterize how a requested change in policy accommodates the plaintiff's economic needs, not her disability, and thus would not be protected under the FHAA. If the court had found that what Freeland seeks is an "economic accommodation" rather than an accommodation caused by her disability, it would have been compelled to dismiss the claim under the holding in *Salute v. Stratford Greens Garden Apartments*.[13]

In *Salute*, the plaintiff rental applicants claimed they were the victims of illegal discrimination when a landlord refused to accept their Section 8 vouchers as a reasonable accommodation to their disabilities.[14] The Second Circuit disagreed:

> Plaintiff's claim is a novel one because they do not contend that they require an accommodation that meets and fits their particular handicaps. Rather, they claim an entitlement to an accommodation that remedies their economic status, on the ground that this economic status results from their being handicapped. We think it is fundamental that the law addresses the accommodation of handicaps, not the alleviation of economic disadvantages that may be correlated with having handicaps.[15]

The *Salute* court decided that, in order to enforce a claim for reasonable accommodation, there must be a clear and direct association to the plaintiff's disability and that an inability to pay rent without a Section 8 voucher was not such an association. The court provided examples of what it considered appropriate reasonable accommodations, such as a parking space to accommodate a sufferer of multiple sclerosis, a guide dog, or a sign language interpreter for deaf students.[16] If that reasoning remained valid, it would have been binding on the *Freeland* court, which is in the Second Circuit's jurisdiction.

The court, however, viewed *Salute* in light of a more recent Supreme Court decision, *US Airways, Inc. v. Barnett*.[17] In *Barnett*, plaintiff Robert Barnett was an employee of US Airways. After suffering a disabling injury, Barnett asked the airline to make an exception to its seniority policy in order to allow him to maintain his position in the mailroom. The airline considered the request but ultimately denied it, citing a disability-neutral standard.[18] Barnett lost his job and sued the airline for discrimination under the Americans with Disabilities Act, claiming his position in the mailroom amounted to a reasonable accommodation of his disability.[19] The trial court had held that because a change in policy would cause undue hardship, the airline was justified in denying the claim.[20] The Supreme Court, however, rejected the district court's reasoning.[21] In contrast to the Second Circuit's *Salute* decision, the Supreme Court recognized that "(1) accommodations are not limited to the immediate manifestations of a disability, but may also address the practical needs caused by a disability and (2) preferences may be necessary for the disabled who are otherwise similarly situated to non-disabled individuals."[22]

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[6]42 U.S.C.A. § 3601 *et seq.* (West 2008).
[7]Freeland v. Sisao LLC, No. CV-07-3741, 2008 WL 906746, at *1 (E.D.N.Y. April 1, 2008).
[8]42 U.S.C. § 3604(f) (West 2008).
[9]*Id*., § 3604(f)(3)(B).
[10]Bentley v. Peace and Quiet Realty 2 LLC, 367 F. Supp.2d 341, 345 (E.D.N.Y. 2005); United States v. California Mobile Home Park Mgmt. Co., 107 F.3d 1374, 1380 (9th Cir. 1997).
[11]Freeland v. Sisao LLC, No. CV-07-3741, 2008 WL 906746, at *3 (E.D.N.Y. April 1, 2008).
[12]*Id*.
[13]136 F.3d 293 (2d Cir. 1998).
[14]Freeland v. Sisao LLC, No. CV-07-3741, 2008 WL 906746, at *4 (E.D.N.Y. April 1, 2008).
[15]*Salute*, 136 F.3d at 301.
[16]*Id*.
[17]535 U.S. 391, 397 (2002).
[18]*Id*.
[19]*Id*. at 394.
[20]*Id*. at 395.
[21]*Id*. at 420. (Scalia, J., dissenting: "[T]he Court's opinion leaves the question whether a seniority system must be disregarded in order to accommodate a disabled employee in a state of uncertainty that can be resolved only by constant litigation; and [the majority] adopts an interpretation of the ADA that incorrectly subjects all employer rules and practices to the requirement of reasonable accommodation.").
[22]Freeland v. Sisao LLC, No. CV-07-3741, 2008 WL 906746, at *4 (E.D.N.Y. April 1, 2008).

The *Freeland* court analyzed the situation in light of *Barnett's* rejection of *Salute*'s conclusion, looking to a similar 2003 decision from the Ninth Circuit for guidance on interpreting the current state of the law. In *Giebeler v. M&B Associates*, the Ninth Circuit had held that the FHAA requires a landlord to make reasonable accommodations for disabled tenants where the link between the accommodation and the disability is not physical, but economic.[23]

In *Giebeler*, a tenant's AIDS condition caused him to lose his job and income, making him financially ineligible for a prospective apartment. He requested that the landlord make an exception to a policy forbidding cosigners and allow his financially independent mother to co-sign, but the landlord denied his request. Applying the *Barnett* ruling, the Ninth Circuit ruled in favor of Giebeler, reiterating that a reasonable accommodation need not stem directly from the disability but may "adjust for the practical impact of a disability,"[24] such as the inability to pay the rent from one's own income due to an inability to work.

The District Court in *Freeland* agreed that *Barnett* changed the landscape on economic accommodations after *Salute* and created a plausible argument that Ms. Freeland may pursue a reasonable accommodation claim due to her disability.[25] The fact that her desired accommodation is not an immediate manifestation of her disability does not preclude the judicial discrimination claim.[26] However, the court also distinguished *Salute* by noting that Ms. Freeland was already a tenant at the time of her accommodation request, whereas the plaintiff in *Salute* was not. This distinction may become important as the case proceeds because it might affect the reasonableness of the requested accommodation. That is, accepting a voucher for an existing tenant might differ from accepting a voucher from an applicant, where the landlord is not yet participating in the program.

The order in *Freeland v. Sisao* recognizing the reasonable accommodation claim represents an important step toward ensuring that people with disabilities can use their vouchers. As similar cases arise throughout the country, this order should be a persuasive tool for encouraging landlords to accept vouchers for tenants with disabilities, and for seeking judicial relief where necessary. ■

[23]343 F.3d 1143 (9th Cir. 2003).
[24]*Id*. at 1150.
[25]Freeland v. Sisao LLC, No. CV-07-3741, 2008 WL 906746, at *5 (E.D.N.Y. April 1, 2008). Note that the court only ruled on whether the reasonable accommodation claim may proceed, not whether it has been proven.
[26]*See also* Bentley v. Peace and Quiet Realty 2 LLC, 367 F. Supp.2d 341, 345 (E.D.N.Y. 2005) (explaining that a disability-neutral policy does not automatically preclude an inquiry into the reasonableness of a proposed accommodation).

Texas Group Files Suit Alleging LIHTC Program Perpetuates Segregation*

The Inclusive Communities Project (ICP) has filed a complaint in federal court alleging that Texas' Low-Income Housing Tax Credit (LIHTC) program perpetuates racial segregation.[1] According to the complaint, the Texas Department of Housing and Community Affairs has allowed a disproportionate number of projects financed with tax credits to be built in high-poverty, minority-concentrated areas. The case could test the limits of state housing finance agencies' duty to affirmatively promote racial and ethnic integration in site selection for tax credit developments.

The Low-Income Housing Tax Credit Program

LIHTCs provide the largest existing federal subsidy for the construction and rehabilitation of affordable housing units. The program provides financial incentives for the development of low-income rental housing by lowering its overall cost through the use of tax credits. The credits are distributed to states according to population, and then administered through each state's housing credit agency, which must adopt a Qualified Allocation Plan (QAP).

Legal Background

Federal law imposes on the Department of Treasury and state housing finance agencies (HFAs) an obligation to promote racial and ethnic desegregation.[2] Both the Treasury and state HFAs are required "affirmatively to further" fair housing.[3] In the context of other programs, several courts of appeal have held that the "affirmatively to further" duty prohibits an agency that is funding housing developments from allowing developments that will

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[1]Compl., Inclusive Communities Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, No. 08-546 (N.D. Tex. Mar. 8, 2008), *available at* http://www.prrac.org/pdf/Texas_Filed_Marked_Complaint_3-28-08.pdf.
[2]*See* 42 U.S.C.A. § 3608(d) (West, WESTLAW through P.L. 110-231 approved 5-18-08); 42 U.S.C.A. § 5304(b)(2) (West, WESTLAW through P.L. 110-231 approved 5-18-08); *see also* Poverty & Race Research Action Council, *Civil Rights Mandates in the Low Income Housing Tax Credit (LIHTC) Program* 2 (2004), http://www.prrac.org/pdf/crmandates.pdf; Florence Wagman Roisman, *Poverty, Discrimination, and the Low Income Housing Tax Credit Program* 20 (2000), http://www.nhlp.org/lalshac/roisman.pdf.
[3]42 U.S.C.A. § 3608(d) (West, WESTLAW through P.L. 110-231 approved 5-18-08); 42 U.S.C.A. § 5304(b)(2) (West, WESTLAW through P.L. 110-231 approved 5-18-08); Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 17, 1994).

exacerbate racial concentration.[4] Pursuant to these holdings, Treasury and state HFAs arguably should be obligated to reject tax credit applications that would worsen racial concentration.[5]

Challenges to alleged racial segregation in the LIHTC program have been brought in at least two states. In Connecticut, such a challenge failed in 2006 because the state supreme court held that there was no private right of action to enforce applicable state or federal laws, including the Fair Housing Act's affirmatively furthering requirement.[6] In 2004, several public interest organizations claimed that the New Jersey Housing and Mortgage Finance Agency's (HMFA) QAP encouraged racial segregation because it disproportionately funded the development of LIHTC housing in urban areas with a higher percentage of minority residents.[7] The organizations argued that to satisfy its duty to promote fair housing, HMFA should adopt the restrictions on development of projects in areas of minority or low-income concentration set out in HUD's public housing regulations.[8] The organizations argued that IRS regulations incorporate HUD's siting regulations because the IRS regulations provide that a unit is not eligible for tax credits unless it is rented in a manner consistent with housing policy governing nondiscrimination, as evidenced by HUD regulations.[9]

Although the court agreed that HMFA had a duty to affirmatively further fair housing, the court held that no HUD or IRS regulation made HUD's siting regulation directly applicable to the LIHTC program.[10] Further, the court found that HMFA's duty to further fair housing must be defined congruently with its other statutory obligations.[11] The court noted that in allocating credits, federal law requires that preferences be given to projects serving the lowest-income tenants and projects located in areas "in which 50% or more of the households have an income which is less than 60% of the area median gross income," or in which there exists a poverty rate of 25% or greater.[12] Based on its analysis of the state legislation creating HMFA and the LIHTC statutory requirements, the court found that HMFA's mission was to promote the construction and rehabilitation of housing, particularly affordable housing.[13] Accordingly, the QAP must focus primarily on the economic status of the tenants, housing needs, and sponsor qualifications, not the racial composition of the area or proposed project.[14] Based on these factors, the court concluded that HMFA administered the LIHTC program in a manner "affirmatively to further" the goals of the Fair Housing Act.[15] The court also disposed of the organizations' disparate impact claim because the QAP furthered a legitimate governmental interest, and no alternative would serve that interest with less discriminatory effect.[16] As evidenced by this case, although agencies administering the LIHTC program are bound by the duty to affirmatively further fair housing, there is substantial disagreement as to the scope of that obligation and its importance in comparison with other statutory commands.

Allegations of Segregation in Texas' LIHTC Program

ICP is a Dallas-based fair housing and civil rights organization.[17] ICP assists African-American Section 8 voucher holders in finding housing in Dallas-area suburbs.[18] Because Texas law requires LIHTC owners to accept Section 8 vouchers, it is often easier for ICP to place clients in LIHTC units than in non-LIHTC units.[19]

Defendant TDHCA allocates the state's tax credits using its QAP, which contains eligibility policies as well as the selection criteria used to screen developers' applications for tax credits.[20] Under state law, TDHCA's allocation decisions can take into account numerous factors not included in the QAP's eligibility or selection criteria.[21]

On December 6, 2006, the Texas House of Representatives Committee on Urban Affairs issued a report finding that TDHCA had disproportionately allocated tax credits to developments located in "impacted areas," i.e. areas of above-average minority concentration and below average income levels.[22] The committee found that the vast majority of tax credits funding developments in the Dallas, Fort Worth, Austin and Houston metropolitan areas had been placed in impacted areas.[23] The committee also found that that TDHCA's funding decisions arose directly out of the QAP, which "has continued to place low income individuals

[4]Roisman, *supra* note 2, at 22 (citing Shannon v. HUD, 436 F.2d 809, 814 (3d Cir. 1970); Alschuler v. HUD, 686 F.2d 472, 482 (7th Cir. 1982); Otero v. N.Y. Hous. Auth., 484 F.2d 1122, 1333-34 (2d Cir. 1973); Anderson v. City of Alpharetta, 737 F.2d 1530, 1535 (11th Cir. 1984)).
[5]*Id.*
[6]Asylum Hill Problem Solving Revitalization Ass'n v. King, 890 A.2d 522 (Conn. 2006).
[7]In re Adoption of 2003 LIHTC QAP, 848 A.2d 1 (N.J. Super. Ct. App. Div. 2004); *see also* NHLP, *New Jersey Court Rejects Fair Housing Challenge to LIHTC Allocation*, 34 Hous. L. Bull. 190 (2004).
[8]24 C.F.R. § 941.202 (2007).
[9]26 C.F.R. § 1.42-9(a) (2007).
[10]*In re Adoption of 2003 LIHTC QAP*, 848 A.2d at 23.
[11]*Id.* at 24.
[12]*Id.* (citing 26 U.S.C.A. §§ 42(d)(5)(C)(ii)(I), 42(m)(1)(B) (West, WESTLAW through P.L. 110-243 approved 6-3-08)).
[13]*Id.*
[14]*Id.* at 25.
[15]*Id.* at 26.
[16]*Id.* at 32.
[17]Compl. at 2, Inclusive Communities Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, No. 08-546 (N.D. Tex. Mar. 8, 2008), *available at* http://www.prrac.org/pdf/Texas_Filed_Marked_Complaint_3-28-08.pdf.
[18]*Id.* at 2-3.
[19]*Id.* at 3 (citing Tex. Gov't Code Ann. § 2306.269(b) (Vernon 2007)).
[20]*Id.* at 5.
[21]*Id.*
[22]House Committee on Urban Affairs, Texas House of Representatives, *Interim Report 2006* at 48 (2006), http://www.lrl.state.tx.us/scanned/interim/79/ur1.pdf.
[23]*Id.*

in impacted areas, further adding to the concentration problem in most cities today."[24]

Citing the committee report, ICP alleges that the placement of the vast majority of tax credit housing in minority-concentrated areas results from TDHCA's use of race as a factor in its allocation decisions.[25] Specifically, ICP alleges that TDHCA considers the race and ethnicity of the residents of the area in which the project is to be located, as well as the race and ethnicity of the project's probable residents, causing segregation in the tax credit program.[26] In Dallas, ICP alleges that 85% of tax-credit projects are in predominantly minority census tracts, compared with 51% of all rental units in the city.[27] According to the complaint, only 3% of tax credit projects in Dallas are in predominantly white census tracts, while 14% of all rental units in the city are in predominantly white census tracts.[28]

According to the complaint, TDHCA's use of race as a factor in its allocation decisions has caused LIHTC properties in Dallas to be placed in minority neighborhoods with high poverty and crime rates.

For the state as a whole, ICP claims that TDHCA disproportionately refuses to approve LIHTC funding for non-elderly projects in predominantly white areas.[29] According to the complaint, from 1999 to 2006, TDHCA awarded tax credits for only 32% of the non-elderly units proposed for development in predominantly white areas (census tracts at least 90% white).[30] In contrast, during the same period, ICP alleges that TDHCA awarded tax credits for 47% of the non-elderly units proposed for areas predominantly populated by people of color (tracts less than 10% white).[31] For the Texas program overall, ICP alleges that only approximately 2% of all approved non-elderly units were in 90% or greater white census tracts, while approximately 27% of all approved non-elderly units were in zero to 10% white census tracts.[32]

In cases where TDHCA does approve an LIHTC project in a predominantly white area, the complaint alleges that TDHCA is more likely to approve such a project if the population that will reside in the project is disproportionately white.[33] The complaint asserts that throughout Texas, there are twenty-nine non-elderly LIHTC projects in 90% or greater white census tracts.[34] According to reports issued by TDHCA, the population in these projects is only 8% Hispanic or Latino and 6% African American.[35] All but two of the projects are in small towns with populations of 30,000 or less, and the population in these towns averages 88% white.[36] As an example of TDHCA's practice of awarding tax credits in predominantly white areas where minority individuals are unlikely to reside, the complaint cites the fact that TDHCA has approved two projects in the town of Vidor.[37] According to the complaint, 2000 census figures show that Vidor has a population of 11,440, with only eight African-American residents.[38] The complaint asserts that it is unlikely that African-American families will seek occupancy at either of Vidor's LIHTC projects due to the Ku Klux Klan's history of intimidating and harassing African-American residents of federally subsidized housing in Vidor.[39]

ICP asserts that the use of race as a factor in allocation decisions subjects minority residents in Dallas to blighted conditions.[40] According to the complaint, of Dallas' 115 LIHTC projects, thirty-two are located in tracts with heavy industrial zoning, and twenty-seven are located in tracts with other industrial zoning.[41] Two of the Dallas LIHTC projects are adjacent to an illegal landfill, and five are within a half-mile radius of Texas' largest illegal dumpsite.[42]

According to the complaint, TDHCA's use of race as a factor in its allocation decisions has caused LIHTC properties in Dallas to be placed in minority neighborhoods with high poverty and crime rates.[43] ICP asserts that thirty-six of Dallas' LIHTC projects are in Census tracts with poverty rates equal to or greater than 30%, while the average poverty rate in the Dallas primary metropolitan statistical area (PMSA) is 11%.[44] Further, ICP alleges that fifty-three of Dallas' LIHTC projects are located in census tracts where the median family income is half or less than half of Dallas' PMSA median family income of $55,854.[45] ICP also asserts that in 2004, the average violent crime rate for Dallas census tracts containing LIHTC projects was 137 crimes per 1,000 persons, compared with the citywide rate of thirty-five crimes per 1,000 persons.[46]

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[24] *Id.*
[25] Compl. at 5, Inclusive Communities Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, No. 08-546 (N.D. Tex. Mar. 8, 2008), *available at* http://www.prrac.org/pdf/Texas_Filed_Marked_Complaint_3-28-08.pdf.
[26] *Id.*
[27] *Id.* at 7.
[28] *Id.*
[29] *Id.* at 9.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at 7.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 8.
[37] *Id.*
[38] *Id.*
[39] *Id.* (citing State of Tex. v. Knights of Ku Klux Klan, 58 F.3d 1075, 1077 (5th Cir. 1995)).
[40] *Id.* at 10.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.* at 11.
[45] *Id.*
[46] *Id.*

ICP's Standing

ICP alleges standing on the basis that it has been directly and adversely affected by TDHCA's denial of financial assistance for units located in integrated areas.[47] ICP provides pre-move family counseling and related financial assistance to African-American Section 8 families who want to move to low-poverty, integrated areas.[48] The financial assistance includes payment of application fees, security deposits, moving expenses and incentive bonuses to landlords who agree to participate in the Section 8 program.[49] ICP asserts that TDHCA's allocation decisions have reduced the number of units that ICP can use to help its clients find housing in integrated areas.[50] ICP also alleges that TDHCA's allocations have increased the amount of time that ICP must spend with each client in order to find rental housing in integrated areas.[51] In addition, ICP states that TDHCA's allocations have increased the amount of financial assistance that ICP must provide to families due to the higher rents and other costs of non-LIHTC units located in non-minority concentrated areas.[52]

ICP's Legal Theories and Prayer for Relief

ICP's complaint contains four claims for relief. First, ICP alleges that TDHCA's actions make dwellings unavailable because of race, color and national origin in violation of 42 U.S.C. § 3604(a).[53] Second, ICP asserts that TDHCA has made financial assistance for constructing dwellings unavailable because of race, color, and national origin in violation of 42 U.S.C. § 3605(a).[54] Third, ICP claims that TDHCA's use of race and ethnicity as a factor in tax credit allocation decisions violates the 14th Amendment of the U.S. Constitution.[55] Fourth, ICP alleges that TDHCA'S use of race and ethnicity in making allocation decisions violates 42 U.S.C. § 1982, because TDHCA is required to give all citizens the same right as is enjoyed by white citizens to lease property.[56] These legal claims differ from those unsuccessfully raised in the Connecticut case.[57]

ICP seeks several forms of injunctive relief, including an order requiring TDHCA to allocate tax credits in Dallas in a manner that creates as many LIHTC units in non-minority census tracts as exist in minority census tracts.[58] ICP also seeks to enjoin TDHCA from perpetuating racial segregation in the LIHTC program by denying tax credits to units in the Dallas area on the basis of the race of the residents living in the area of the proposed project or the race of the project's probable residents.[59] Further, ICP seeks to enjoin TDHCA from approving tax credit applications in Dallas unless the proposed project: (1) furthers the goals of Title VI of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968; (2) avoids undue concentration of assisted persons in high-poverty areas; (3) is free from adverse environmental conditions and undesirable elements, such as high crime rates; and (4) is accessible to services that are at least equivalent to those typically found in neighborhoods consisting largely of unassisted housing.[60] Additionally, ICP seeks to enjoin TDHCA from administering the LIHTC program in a manner that causes or perpetuates racial segregation.[61] Finally, ICP seeks an injunction requiring TDHCA to implement reporting and monitoring requirements.[62]

Conclusion

ICP's allegations that Texas' tax credits have been disproportionately allocated to areas of high minority concentration and below-average income levels are not unique. Recent scholarship indicates that many state agencies have overemphasized the LIHTC program's preference for allotting credits to very poor areas by allocating a disproportionate share of credits to areas with high concentrations of minorities and people with low incomes.[63] Regardless of the case's outcome, it illustrates the need for advocacy to establish racial, ethnic, and economic integration and deconcentration as standards for allocating tax credits for affordable housing developments. ■

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[47] *Id.* at 14.
[48] *Id.*
[49] *Id.* at 12-13.
[50] *Id.* at 14.
[51] *Id.* at 15.
[52] *Id.*
[53] *Id.* at 16.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] Note 6, *supra*.
[58] Compl. at 16.
[59] *Id.*
[60] *Id.* at 16-17.
[61] *Id.* at 17.
[62] *Id.*
[63] Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Tax Credit*, 58 VAND. L. REV. 134-137 (2005).

Federal Court Invalidates Immigration-Based Local Rental Restrictions*

In recent years, a growing anti-immigrant sentiment has led to dozens of anti-immigrant ordinances that restrict an individual's ability to rent a private-market unit based on her immigration status. The city of Farmers Branch, Texas, recently passed such an ordinance. However, a group of renters and owners successfully challenged the Farmers Branch ordinance on the basis that it was preempted by federal law and violated the Due Process clause of the Fourteenth Amendment. A federal district court has granted summary judgment and a permanent injunction in their favor.

Background

The City of Farmers Branch passed Ordinance 2903 in 2007, becoming one of roughly 100 cities or counties to consider, pass or reject laws effectively prohibiting certain categories of immigrants from renting apartments.[1] Voters approved the ordinance by a 4058 to 1941 vote on May 12, 2007,[2] despite protests by hundreds of individuals and immigrant rights organizations[3] and outspoken opposition by Farmers Branch Mayor Bob Phelps.[4]

The ordinance amended the section of the City's Code of Ordinances[5] relating to apartment complex rental by adding language[6] and creating a new section titled "Citizenship or Immigration Status Verification."[7] The core immigration verification provisions of the ordinance would have forced owners and property managers to collect evidence of "eligible immigration status" prior to any lease or rental renewal or extension,[8] including by "request[ing] and review[ing] original documents."[9] Furthermore, the ordinance listed three forms of evidence tenants would have been required to submit, including (1) a signed declaration of "eligible immigration status;" (2) a form designated by Immigration and Customs Enforcement (ICE) as evidence of immigration status; and (3) a signed verification consent form.[10] Landlords would have been "prohibited from allowing the occupancy of any unit by any family which has not submitted the required evidence."[11]

The ordinance adopted the Department of Housing and Urban Development's (HUD) regulations at 24 C.F.R. 5.504, in part limiting "eligible immigration status" to non-citizens who are eligible for federal housing subsidies, excluding certain classes of legal resident non-citizens.[12] Landlords violating the ordinance would have been subject to a fine of up to $500 and misdemeanor charges for each day that violations occurred.[13] In an effort to preserve its legality, the ordinance also included a statement that it was not an attempt to interfere with federal immigration law, and a savings clause, which provided that any provisions determined to be invalid or unconstitutional would not affect the remainder of the ordinance.[14]

A group of renters, owners and managers[15] of Farmers Branch apartment complexes filed suit in the District Court for the Northern District of Texas, initially seeking a temporary restraining order enjoining the ordinance, alleging that it was preempted by federal law and that it violated the Due Process clause of the Fourteenth Amendment.[16] On May 21, 2007, one day before the ordinance was to take effect, the court issued a temporary restraining order, preventing it from going into effect and enjoining

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[1] *See* Anabelle Garay, *Judge Strikes Down Farmers Branch Immigration Policy*, Fort Worth Star-Telegram, May 28, 2008, http://www.star-telegram.com. The Farmers Branch City Council had initially adopted the identical Ordinance 2892 on November 13, 2006. Villas at Parkside Partners v. City of Farmers Branch, 2008 WL 2201980, at *1 (N.D. Tex. May 28, 2008). A state court issued a temporary restraining order enjoining that ordinance's implementation because it "may have been approved and adopted in violation of the Texas Open Meetings Act." The City Council repealed 2892 and adopted Farmers Branch Ordinance 2903, the ordinance at issue in *Villas*.

[2] *Villas at Parkside Partners*, 2008 WL 2201980 at *1.

[3] Associated Press, *Dallas Suburb Passes Landmark Anti-Illegal Immigration Laws*, FoxNews.Com, November 14, 2007, *at* http://www.foxnews.com/story/0,2933,229257,00.html.

[4] Associated Press, *Farmers Branch Mayor Opposes Immigration Ordinance*, CBS11TV.Com, *at* http://cbs11tv.com/local/Farmers.Branch.immigration.2.502347.html.

[5] Farmers Branch, Tex., Code of Ordinances, Ordinance 2903, § 3(A)-(B), *amending* Farmers Branch, Tex., Code of Ordinances, Ch. 26, Art. IV. *Villas at Parkside Partners*, 2008 WL 2201980 at *1.

[6] Farmers Branch, Tex., Code of Ordinances, Ordinance 2903, § 3(A)-(B), *amending* Farmers Branch, Tex., Code of Ordinances, Ch. 26, Art. IV, § 26-116(d)(3). *Villas at Parkside Partners*, 2008 WL 2201980 at *1.

[7] Farmers Branch, Tex., Code of Ordinances, Ordinance 2903, § 3(A)-(B) [hereinafter Ord.].

[8] *Villas at Parkside Partners*, 2008 WL 2201980 at *2, *citing* Ord. § 3(B)(f)(2).

[9] *Id.*, *citing* Ord. § 3(B)(f)(4)(i)-(ii).

[10] *Id.*, *citing* Ord. § 3(B)(f)(3)(ii)(a)-(c).

[11] *Id.*, *citing* Ord. § 3(B)(f)(4)(i)-(ii).

[12] *See id.*, at *9. Certain legal residents are statutorily excepted from receiving federal housing assistance, including "alien visitors, tourists, diplomats, and students who enter the United States temporarily." 42 U.S.C. 1436a(a)(1) (2000).

[13] *Villas at Parkside Partners*, 2008 WL 2201980 at *3, *citing* Ord. § 6.

[14] *Id.*, *citing* Ord. § 4.

[15] The Villas plaintiffs were owners and operators of Farmers Branch apartment complexes. The Vasquez plaintiffs were Farmers Branch apartment residents and apartment owners and managers. *Villas at Parkside Partners*, 2008 WL 2201980 at *1, n.1.

[16] The Villas plaintiffs also asserted claims pursuant to 42 U.S.C. § 1981, and for violation of the Equal Protection clause of the Fourteenth Amendment, 42 U.S.C. § 1983, and Section 214.903 of the Texas Local Government Code. The Vasquez plaintiffs also alleged violations of the Equal Protection clause of the Fourteenth Amendment, the Contracts Clause, the First Amendment, and claims under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and 42 U.S.C. § 1981. *Villas at Parkside Partners*, 2008 WL 2201980 at *1.

its enforcement.[17] The court granted the plaintiffs' requests for a preliminary injunction on June 19, 2007. The case then came before the court and was decided on the plaintiffs' motion for summary judgment, based on preemption and due process claims.

Preemption Claim

The renters and landlords asserted that the ordinance was preempted by the Constitution and federal law because it attempted to regulate immigration, a function reserved for the federal government. The city claimed that two recent decisions controlled the issue: *Gray v. City of Valley Park, Missouri* and *Arizona Contractors Association, Inc. v. Candelaria*, which held that anti-immigrant employment ordinances were not preempted by federal law.[18] Although other municipalities may choose to rely on *Gray* and *Arizona Contractors*, the court distinguished them on two points. First, the preemption analysis in those cases focused on 8 U.S.C. § 1324a(h)(2), in which Congress preempted state and local employment laws, except "licensing or similar laws," that impose criminal or civil sanctions on employers who employ non-citizens, not on landlords who rent to non-citizens.[19] Second, whereas the ordinances in *Gray* and *Arizona Contractors* required employers to determine immigration status using federal immigration classifications, the ordinance adopted different classifications defined by HUD regulations.[20]

After dismissing the city's reliance on these cases, the court applied the preemption standard for local immigration laws articulated by the Supreme Court in *De Canas v. Bica*: only the federal government may regulate immigration, defined as determining "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[21] The *De Canas* court noted that in some situations even a state regulation that is harmonious with a federal regulation must be invalidated under the Supremacy Clause, where the subject matter at issue requires such a conclusion, or if Congress has so ordained.[22]

District courts construing *De Canas* have outlined three tests for determining if a state or local immigration law is preempted by federal law.[23] First, a law is preempted if it is a regulation of immigration, a power reserved to the federal government. Second, a law that is not a regulation of immigration may still be preempted if Congress intended to occupy the field the statute regulates. Third, a law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[24]

Regulation of Immigration

The court examined whether the ordinance's requirement that landlords verify applicants' immigration status and its adoption of HUD regulations[25] constituted an impermissible regulation of immigration. While emphasizing the Supreme Court's repeated holdings that immigration regulation is exclusively a federal power,[26] the *Villas* court noted that the Court's jurisprudence does not *per se* preempt every state law regarding immigrants.[27] Rather, under the interpretation of *De Canas* in *Equal Access Education v. Merten*, the question is "whether…policies simply adopt federal standards, in which case they are not invalid under the Supremacy Clause, or instead create and apply state standards to assess the immigration status of applicants, in which case the policies may run afoul of the Supremacy Clause."[28]

Adoption of HUD Regulations

The court first turned to whether Farmers Branch's adoption of HUD definitions was an impermissible regulation of immigration. The plaintiffs argued that the ordinance created a new classification of immigration by adopting the definitions of "eligible immigration status" from 24 C.F.R. § 5.504. These definitions make certain legal residents ineligible for federal housing subsidies, and thus would have excluded them from renting in Farmers Branch.[29] The plaintiffs argued that because restricting an individual's ability to rent an apartment effectively determines whether they are lawfully in the country, the ordinance was itself a regulation of immigration.[30] The city countered that the ordinance would allow any lawful resident to rent an apartment and thus did not violate the first *De Canas* test, pointing out that the ordinance required non-citizens to show evidence of "eligible immigration status" with a "form designated by ICE as acceptable evidence of immigration status."[31] The city also argued that under the Texas Government Code, the court must construe the ordinance under the assumption that the city intended the ordinance to adopt federal immigration standards.[32]

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[17] *Id.*
[18] *Id.*, at *4-5.
[19] *Id.*, at *4.
[20] *Id.*, at *5.
[21] *Id.*, *citing* De Canas v. Bica, 424 U.S. 351, 355 (1976).
[22] *Id.*, at *5, citing *De Canas*, 424 U.S. at 356.
[23] *Villas at Parkside Partners*, 2008 WL 2201980 at *6.
[24] *Id.*
[25] The ordinance incorporated definitions used in 24 C.F.R. 5.504. *Id.*, at *7.
[26] *Id.*, at *6, *citing De Canas*, 424 U.S. at 354 (internal citations omitted).
[27] *Villas at Parkside Partners*, 2008 WL 2201980 at *6, *citing De Canas*, 424 U.S. at 355.
[28] *Id.*, at *7, *citing* Equal Access Education v. Merten, 305 F. Supp. 2d 585, 601-602 (E.D. Va. 2004).
[29] *Villas at Parkside Partners*, 2008 WL 2201980 at *7.
[30] *Id.*, at *8.
[31] *Id.*, *citing* Ord. § 3(B)(f)(3)(ii)(b).
[32] *Villas at Parkside Partners*, 2008 WL 2201980 at *8.

The court rejected both of the city's arguments, finding that the plain language of the ordinance adopted HUD regulations that differ from federal immigration standards and that it was therefore impossible to construe the ordinance as complying with the Constitution. The court cited references to HUD regulations in the ordinance's title and throughout the ordinance, as well as multiple HUD forms mailed to landlords as guiding documents, as evidence that the ordinance did more than simply adopt federal immigration regulations as required by the first *De Canas* test.[33] Because the HUD definition of "eligible immigration status" is more restrictive than federal immigration classifications, the court found that the ordinance affects the "conditions under which a legal entrant may remain," as *De Canas* defines a regulation of immigration.[34]

In response to the city's argument that the ordinance was not a regulation of immigration because it required non-citizens to show a form designated by ICE, the court found it determinative that an ICE-designated form was only one of three pieces of evidence required by the ordinance. Non-citizens would also have to submit a "signed declaration of 'eligible immigration status,'" as defined by HUD regulations, and a signed verification consent form.[35] Because the city relied on HUD regulations and documents, the court held that it had adopted a definition of immigration status that differed from federal standards, and had therefore attempted to regulate immigration in violation of the Constitution and Supremacy Clause.[36]

Verification of Immigration Status

The court then considered whether the ordinance's requirement that landlords verify renters' immigration status constituted an impermissible regulation of immigration. The plaintiffs argued that this verification requirement essentially deputized private citizens as immigration officials, taking a federal function from the federal government.[37] In response, the city made several interrelated arguments in an effort to characterize the ordinance as simply a recordkeeping statute intended to assist federal immigration officials, noting that state collection of immigration documentation occurs legally in many contexts.[38]

Addressing the city's arguments, the court distinguished the city's examples of permissible state collection of immigration documentation, either because they dealt with requirements imposed by federal rather than state law, or because the state requirements wholly adopted federal standards.[39] The court dismissed the city's "thinly-veiled argument" that the ordinance was only a recordkeeping system, citing the ordinance's provisions that prohibited landlords from allowing occupancy by families who did not submit evidence of "eligible immigration status," and that made the provision of such evidence a prerequisite to renting.[40]

The court also rejected the city's argument that the ordinance was intended to support federal immigration enforcement, noting that nothing in the ordinance suggested that Farmers Branch would enter a written agreement with the Attorney General to engage in local enforcement of federal immigration law as sanctioned by § 287(g) of the Immigration and Naturalization Act.[41] Although the ordinance did not include a specific mandate to deny rental units to non-citizens, the court noted that the clear purpose of the ordinance as a whole was to prevent undocumented immigrants from renting.[42]

Because the ordinance required private citizens and city officials to make immigration decisions based on a scheme that differed from federal immigration regulations, the court held that it was preempted as an impermissible regulation of immigration. Since the court had decided the preemption claim under the first *De Canas* test, it did not address the parties' arguments regarding the second and third tests.

Savings Clause

The city alternatively argued that if the ordinance was preempted, the court should sever the offending provisions pursuant to the ordinance's savings clause.[43] The city proposed four alternative versions of the ordinance that it hoped would cure the preemption problem: the first omitted all references to HUD regulations and required non-citizens to provide only a "signed declaration of eligible immigration status;" the second omitted all references to HUD regulations and required non-citizens to provide only a "form designated by ICE as acceptable evidence of immigration status;" the third omitted all references to any federal regulations; and the fourth omitted the term "eligible" from "eligible immigration status."[44]

When trying to save an otherwise unconstitutional statute, a court must follow three principles laid out by the Supreme Court: (1) a court must "try not to nullify more of a legislature's work than is necessary;" (2) a court must "restrain itself from rewriting state law to conform it to constitutional requirements" because of its constitutional mandate and limited institutional competence; and

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[33] *Id.*, at *9.
[34] *See id.*, at *9, *citing De Canas*, 424 U.S. at 355.
[35] *Villas at Parkside Partners*, 2008 WL 2201980 at *10, *citing* Ord. § 3(B)(f)(3)(ii).
[36] *Villas at Parkside Partners*, 2008 WL 2201980 at *10.
[37] *Id.*, at *11-12.
[38] *Id.*, at *11.
[39] *Id.*, at *11-12.
[40] *Id.*, at *12.
[41] *Id.*, at *13.
[42] *Id.*
[43] The savings clause read: "If any section, paragraph, subdivision, clause or phrase of this Ordinance shall be adjudged invalid or held unconstitutional, the same shall not affect the validity of this Ordinance as a whole or any part of any provision thereof other than the part so decided to be invalid or unconstitutional." *Id.*, at *14, *citing* Ord. § 4.
[44] *Villas at Parkside Partners*, 2008 WL 2201980 at *14.

(3) a court "cannot use its remedial powers to circumvent the intent of the legislature."[45] Applying these principles to the alternative ordinances, the court noted that severing the phrase "eligible immigration status" and the HUD regulations incorporated into and referenced by the ordinance, would require a line-by-line revision.[46] Further, the ordinance's legislative history made clear that it was the city's intent to adopt HUD regulations.

Because the city's reliance on HUD regulations in the ordinance was intentional and because severing the necessary provisions would require the court to legislate, the court declined to enforce the ordinance's savings clause.[47] Significantly, the court also stated that any ordinance resulting from the severance of problematic provisions would likely be void for vagueness. Because the ordinance was an impermissible regulation of immigration, and because the offending provisions could not be severed, the court granted the plaintiffs' motion for summary judgment on their preemption claims.

Due Process Claim

The court then turned to the plaintiffs' claims that the ordinance violated the Due Process clause of the Fourteenth Amendment because it was void for vagueness. Under void-for-vagueness doctrine, a penal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, and in a manner that does not encourage arbitrary and discriminatory enforcement."[48] The plaintiffs argued that the ordinance did not provide sufficient enforcement guidance to landlords who would be subject to strict criminal liability, and was therefore void for vagueness. In response, the city argued that the ordinance provided sufficiently clear standards by incorporating the evidence requirements for U.S. citizens and nationals, by adopting ICE standards, by including antidiscrimination provisions, and by calling for the city to provide landlord training.

In its analysis, the court noted that although the city argued in response to the preemption claims that the ordinance did not adopt HUD regulations, the city responded to the due process challenge by arguing that these same regulations provided clear guidance regarding qualified renters. Similarly, although the ordinance referred to "forms designated by ICE as acceptable evidence of immigration status," the landlord training materials were HUD documents that restricted acceptable evidence to documents that establish eligibility for federal housing assistance.[49]

The court concluded that landlords enforcing the ordinance would not know from this inconsistent guidance whether they were criminally liable for renting to legally resident non-citizens. Thus, the court held that the ordinance failed to adequately define the offense that would subject landlords to criminal sanctions, and was unconstitutionally vague.[50] Further, the court held that the city's alternative versions of the ordinance would also be void for vagueness because they strip the ordinance of definitions of key terms.[51] Consequently, the court granted the plaintiffs' motion for summary judgment on the due process claim.

Permanent Injunction

Turning next to the plaintiffs' requested remedy, the court reviewed the four elements typically required for injunctive relief, as adapted to a permanent injunction: (1) actual success on the merits; (2) a substantial threat of immediate and irreparable harm for which there is no adequate remedy at law; (3) balance of hardships; and (4) the public interest.[52]

Because the court granted the plaintiffs' summary judgment on the preemption and due process claims, actual success was clearly established. In addressing the second element, the court noted that where there is a deprivation of a constitutional right, most courts do not require a further showing of injury.[53] Nonetheless, the court held that irreparable harm would result from landlord plaintiffs' vulnerability to penalties and loss of business, as well as from renter plaintiffs' uncertainty with regard to the eligibility of legal resident non-citizens and their potential displacement.[54] The third element was established because the potential harm to tenants and landlords outweighed the theoretical injury that the city claimed would result from their "inability…to protect the health, safety, and welfare of the public."[55] Finally, the court held that under the Fifth Circuit's determination that the public interest does not allow interference with fundamental rights,[56] the unconstitutionality of the ordinance dictated that a permanent injunction was in the public interest. As a result, the court permanently enjoined the effective date and enforcement of the ordinance.

What's Next

Although the court permanently enjoined ordinance 2903, the City of Farmers Branch has signaled its intention to pursue further legislation prohibiting rentals to

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[45] *Id.*, at *15, *citing* Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006).
[46] *Villas at Parkside Partners*, 2008 WL 2201980 at *15.
[47] *Id.*
[48] *Id.*, at *16, *citing* Kolendar v. Lawson, 461 U.S. 352, 357 (1983).
[49] *Villas at Parkside Partners*, 2008 WL 2201980 at *16.
[50] *Id.*, at *17.
[51] *Id.*
[52] *See id.*, at *17, citing other cases.
[53] *Villas at Parkside Partners*, 2008 WL 2201980 at *18.
[54] *Id.*
[55] *Id.*
[56] *Id.*, at *19, *citing* Deerfield Med. Center v. City of Deerfield Beach, 661 F.2d 328, 338-39 (5th Cir. 1981).

non-citizens. In *Villas*, the city requested a declaratory judgment on the constitutionality and validity of its new iteration of the law, Ordinance 2952,[57] which the court in a separate order declined to issue. The city is also conducting an online fundraising campaign to defer the legal costs of defending its anti-immigration ordinances.[58] While the city's continued pursuit of this legislation is cause for concern, the *Villas* court's holding that the city's proposed revisions to Ordinance 2903 would likely be void for vagueness suggests that Ordinance 2952 will also be found unconstitutional.

Moreover, even if a future ordinance fully adopts federal immigration standards, a court may still hold that such a law is preempted under the second and third *De Canas* tests, either because Congress intended to occupy the field which the ordinance attempts to regulate, or because the law stands as an obstacle to the accomplishment and execution of the federal objectives.[59] Nevertheless, the court's permanent injunction of Ordinance 2903 remains an important victory for renters in Farmers Branch and cities throughout the country. ■

[57]*Villas at Parkside Partners*, 2008 WL 2201980 at *1 n.4.
[58]See Online Solicitation from City of Farmers Branch, Legal Defense Fund, *at* http://www.ci.farmersbranch.tx.us/Communication/Legal%20Defense%20Fund%20Donate.html.
[59]See *Id*., at *6, *citing De Canas*, 424 U.S. at 356.

Recent Cases

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

Public Housing: Eviction, Illegal Drug Activity, Failure to Meet Burden of Proof

New York City Housing Authority v. Lipscomb-Arroyo, 2008 WL 2265293 (N.Y.City Civ.Ct., June 2, 2008)(unpublished). The court dismissed the housing authority's action, which sought to evict the public housing resident through a holdover proceeding on the grounds that her apartment was used for illegal commercial narcotics trade. The housing authority's primary claim was that the resident's alleged boyfriend used the apartment as part of his commercial narcotics activities. The friend, who had been the subject of an investigation, was arrested in the apartment where police confiscated substantial amounts of money, drugs and paraphernalia, all in the friend's coat which was on the couch in the apartment. While other funds and a gun were also discovered in the apartment, there was no evidence that the apartment was being used for criminal drug activity, no showing that the friend lived in the apartment, and no evidence that the resident was involved in any way in the illegal activity. The housing authority brought the action pursuant to New York statute that voids a lease if an apartment is used for illegal activity. Under such a claim, the landlord need not show a lease violation or provide an administrative pre-termination hearing. Notwithstanding, the housing authority requested the court to apply the strict liability standard that the Supreme Court had established in *HUD v. Rucker.* The court refused because the action was not brought as a lease violation, but instead on the grounds that the lease was void for illegal use of the apartment. To prevail on such a claim the housing authority had the burden of showing that the apartment was used for an illegal activity and that the resident of the apartment knew, or should have known, that the apartment was so used. Neither showing was made by the housing authority in its case in chief and the court, accordingly, dismissed the case.

Voucher Program: Termination of Voucher without Good Cause During Term

Timothy v. Matison, 2008 WL 2486354 (N.Y.Dist.Ct., June 23, 2008)(unreported). A Section 8 voucher holder entered into a one-year lease that was continually renewable for another year unless terminated prior to the end of the term for good cause. Landlord brought a holdover proceeding seeking to evict the voucher holder after accepting rent from both the tenant and the housing authority after the commencement of a new term. The court dismissed the landlord's claim holding that acceptance of the rent payment constituted a renewal of the lease and a waiver of the right to terminate the lease at the end of the last term. Accordingly, the court dismissed the landlord's holdover proceeding.

Voucher Program: Damages and Attorneys Fees for Improper Termination of Voucher

Evans v. Housing Authority of City of Raleigh, 2008 WL 2550756 (E.D.N.C., June 25, 2008). In an earlier decision the court ruled in favor of the plaintiff who contended that the public housing authority improperly terminated her

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

Section 8 voucher. In this decision, the court awarded the plaintiff $1 in nominal damages $1,975 in court costs and $28,295 in attorneys' fees. The court refused to award the plaintiff's claimed actual damages because she was unable to show that she owed her landlords more than $35 per month rent during time that her voucher had been wrongfully terminated. Although the HAP contract was terminated, the landlord allowed the plaintiff to continue to reside in the unit at the subsidized rent level.

Voucher Program: Discrimination Claim, Right to Discovery

Gaither v. Housing Authority of City of New Haven, 2008 WL 2559445 (D.Conn., June 23, 2008). In a case alleging discrimination against wheelchair-bound persons, the court affirmed its previous discovery order and refused to grant a housing authority's request for relief from the plaintiff's efforts to review all the housing authority's Section 8 files. The housing authority claimed that the plaintiff should only be allowed to review files of persons with disabilities. Plaintiff countered that files may be mislabeled and that it was necessary to review all Section 8 files to determine whether the housing authority staff had a pattern of discrimination. Since plaintiff was able to review files at the housing authority's office, did not require anyone to supervise or review the process, and was willing to give housing authority access to any file when it needed it, the court ruled that discovery order was not overly broad or burdensome. It, therefore, rejected the housing authority's motion.

Voucher Program: Voucher Termination, Reliance of Hearsay Testimony

Ervin v. Housing Authority of Birmingham Dist., 2008 WL 2421799 (11th Cir., June 17, 2008)(unpublished)(*per curium*). The circuit court reversed and remanded the district court decision, which upheld the housing authority's decision to terminate the appellant's Section 8 Voucher assistance on the ground that she violated HUD regulations that prohibited the use of the apartment for drug-related criminal activity. On appeal, the voucher holder argued that the notice of termination was insufficient and that the housing authority decision violated her due process rights as it relied on hearsay evidence. The circuit court rejected the first argument but upheld the second, finding that the hearing officer relied solely on hearsay testimony: a single police report that was not included in the hearing record submitted on appeal, a neighbor's testimony with respect to an arrest at the property, and the housing authority's lawyer's testimony with respect to his conversation with the police department. The court concluded that although hearsay may constitute substantial evidence in administrative proceedings, in the present case, the record presented does not contain the factors that assure the underlying reliability and probative value of the evidence. It, therefore, reversed and remanded the matter to the district court.

Voucher Program: Termination, Reliance on Hearsay Evidence

Williams v. Housing Authority of City of Raleigh, (E.D.N.C., June 9, 2008). The court rejected a Section 8 voucher holder's request for reconsideration and rehearing of the court's decision to uphold the housing authority's hearing officer's decision upholding termination of the voucher. The resident argued that the decision violated her due process rights by relying on hearsay testimony, failing to produce a witness that the resident wanted to cross examine, and by considering evidence that was not in the hearing record. The court conceded that some of the submitted evidence was hearsay, however, it concluded that the court and hearing officer relied on other testimony to reach the final decision. It also concluded that the resident waived her right to cross examine the witness because she rejected an offer of postponement of the hearing to allow her to do so. Lastly, the court rejected her claim that the hearing officer considered evidence outside the record because there was no showing that the hearing officer considered anything relevant that the voucher holder did not have an opportunity to examine.

Voucher Program: Eviction, Remand from Federal Court

MHS-Rossmore, LLC v. Lopez, 2008 WL 2397498 (C.D.Cal., June 5, 2008) (unpublished). The landlord had brought an unlawful detainer action against a Section 8 voucher holder. The resident removed the action to federal court and the landlord filed a motion to remand. The district court granted the landlord's motion because it was not evident from the complaint that the case was subject to federal law even though it involved the Section 8 voucher program. The landlord also sought attorney's fees, which the district court denied because the removal action was not objectively unreasonable.

Eviction from Federally Subsidized Housing: Reasonable Accommodation

Villa Victoria v. Schuler, 2008 WL 2445422 (N.J.Super.A.D., June 19, 2008)(unpublished, *per curium*). The court of appeals reversed and remanded a lower court's decision

granting the landlord the right to evict a mentally disabled resident who on one occasion threw a chair toward a Christmas tree, which caused a window to break. The tenant claimed that the landlord had to reasonably accommodate her disability, which he had not done. The lower court rejected the nexus between the mental disability and the incident on the ground that the tenant had been drinking at the time. Based on certificates and affidavits, and without any testimony, it concluded that the incident occurred due to her drinking and not the mental disability. The appellate court reversed on the ground that there was no clear evidence in the record as to the role of the mental disability in the incident.

Preservation: Damages for HUD's Failure to Authorize Prepayment

City Line Joint Venture v. U.S., 2008 WL 2501233 (Fed.Cl., June 19, 2008). Owner of HUD Section 221(d)(3) development had brought a damage action for HUD's failure, in accordance with the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA), to approve its application to prepay the loan after the expiration of the twenty-year use restriction. The Court of Claims initially ruled that the owner did not have a cause of action because ELIHPA was a sovereign act, which precluded damage act claims against the agency. The Federal Circuit Court reversed that ruling and remanded the case to the Court of Claims. On remand, HUD argued that the owner was not entitled to damages because it did not actually tender an offer to prepay and HUD's failure to respond to the request to prepay was only actionable under the Administrative Procedures Act and not under the damage provisions of the Tucker Act. The court rejected both arguments and agreed to review, in light of the objections filed by the defendant, its prior damage calculations of $640,185.

Fair Housing Act: Discrimination Against Families with Children

U.S. v. Fountainbleau Apartments L.P., 2008 WL 2518711, (E.D.Tenn., June 19, 2008). The court granted the government's motion for summary judgment under the Fair Housing Act against the apartment manager and owner who discriminated in admission practices by excluding families with children. The defendants argued that they operated a senior facility for persons over age fifty-five, however, the government was able to show that the defendants met none of the Fair Housing Act or HUD requirements of operating such a facility.

California Housing Element Law: Statute of Limitations

Urban Habitat Program v. City of Pleasanton, 2008 WL 2486431 (Cal.App. 1 Dist., June 20, 2008)(unpublished). The court of appeals reversed, in part, the lower court decision to dismiss the plaintiffs' challenge to the city's failure to meet its state housing element obligations, which require it to make land available for development of housing affordable to low-income households. The lower court dismissed the plaintiffs' claims on the ground that a short statute of limitations had applied to them. The court of appeals disagreed, holding that the statute containing the short statute of limitations did not apply to all but two of the plaintiffs' claims. Thus, it remanded the case for further proceedings. ■

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD), the Department of Agriculture (USDA—Rural Housing Service/Rural Development (RD)), Federal Housing Finance Board, and the Veterans Administration issued in June of 2008. For the most part, the summaries are taken directly from the summary of the regulation in the Federal Register or each notice's introductory paragraphs.

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

HUD Regulations

73 Fed. Reg. 35,269 (June 20, 2008)
Manufactured Home Installation Program

Summary: This final rule establishes a federal manufactured home installation program, as required by Section 605(c)(2)(A) of the National Manufactured Housing Construction and Safety Standards Act of 1974. States that have their own installation programs that include the elements required by statute are permitted to administer,

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

under their state installation programs, the new requirements established through this final rulemaking. The new elements required by statute to be integrated into an acceptable state manufactured home installation program are the establishment of qualified installation standards; the licensing and training of installers; and the inspection of the installation of manufactured homes.

Effective Date: October 20, 2008.

HUD Proposed Rules

73 Fed. Reg. 32,631 (June 9, 2008)
Federal Housing Administration: Acceptable Payment History for Late Request for Endorsement of Mortgage for Insurance

Summary: HUD's current regulations require that a mortgage show an acceptable payment history when submitted for late endorsement, but they are silent as to what constitutes an acceptable payment history. This proposed rule would provide factors that establish an acceptable payment history when a mortgage is submitted for Federal Housing Administration insurance more than sixty days after closing, and would make one technical amendment pertaining to the submission of documentation for endorsement.

Comment Due Date: August 8, 2008.

HUD Federal Register Notices

73 Fed. Reg. 32,347 (June 6, 2008)
Public Housing Financial Management Template

Summary: HUD has submitted to the Office of Management and Budget an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to the Public Housing Assessment System, which requires public housing agencies to submit financial information annually to HUD. The Uniform Financial Reporting Standards for HUD housing programs requires that this information be submitted electronically, using generally accepted accounting principles, in a prescribed format. HUD will implement a revised financial data schedule to capture property level financial data.

Comments Due Date: July 7, 2008.

73 Fed. Reg. 32,592 (June 9, 2008)
Notice of HUD's Fiscal Year (FY) 2008 Super NOFA for HUD's Discretionary Grant Programs; Correction for Section 202 and Section 811 Programs

Summary: On March 19, 2008, HUD published its Notice of Fiscal Year (FY) 2008 Notice of Funding Availability (NOFA); Policy Requirements and General Section to HUD's FY2008 NOFAs for Discretionary Programs. On May 12, 2008, HUD published its FY2008 Super NOFA, for HUD's Discretionary Grant Programs. This document makes corrections or clarifications to the Section 202 Housing for the Elderly Program, and Section 811 Supportive Housing For Persons With Disabilities Program.

Dates: The application submission dates for the program sections of the Super NOFA remain as published in the Federal Register on May 12, 2008.

73 Fed. Reg. 32,728 (June 10, 2008)
Annual Adjustment Factor (AAF) Rent Increase Requirement

Summary: HUD has submitted to the Office of Management and Budget an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to the AAF Rent Increase Requirement. Owners of project-based Section 8 contracts that utilize the AAF as the method of rent adjustment provide this information which is necessary to determine whether or not the subject properties' rents are to be adjusted and, if so, the amount of the adjustment.

Comments Due Date: July 10, 2008.

73 Fed. Reg. 33,446 (June 12, 2008)
Notice of HUD's Fiscal Year (FY) 2008 General Section and FY2008 Super NOFA for HUD's Discretionary Grant Programs; Correction

Summary: On March 19, 2008, HUD published its Notice of Fiscal Year (FY) 2008 Notice of Funding Availability (NOFA); Policy Requirements and General Section to HUD's FY2008 NOFAs for Discretionary Programs. On May 12, 2008, HUD published its FY2008 Super NOFA, for HUD's discretionary Grant Programs. This document makes several corrections to those notices and moves some of the deadline dates for certain portions of the NOFA.

73 Fed. Reg. 33,529 (June 12, 2008)
Proposed Fair Market Rents for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program Fiscal Year 2009

Summary: This notice proposes FMRs for FY 2009 to be used to determine payment standard amounts for the Housing Choice Voucher program, to determine initial renewal rents for some expiring project-based Section 8 contracts, and to determine initial rents for housing assistance payment contracts in the Moderate Rehabilitation Single Room Occupancy program. Other programs may require use of FMRs for other purposes.

Comment Due Date: August 1, 2008.

73 Fed. Reg. 34,033 (June 16, 2008)
Household Outcomes Survey for FEMA's Alternative Housing Pilot Program

Summary: HUD has submitted to the Office of Management and Budget an information collection requirement for review and is soliciting public comments on the

subject proposal. The information will collect household outcome data from families who have received housing under FEMA's Alternative Housing Pilot Program (AHPP). HUD is conducting an evaluation of AHPP. Four states affected by Hurricanes Katrina and Rita received AHPP grants to test out alternative approaches to providing temporary housing after a disaster. HUD is charged with measuring what benefits and costs are associated with each of the alternatives being implemented by the states. Measuring the program impact on health, satisfaction and general well-being of the occupants is a key part of the evaluation. This household outcomes survey will collect information that will be used to evaluate the impact of various housing alternatives on the quality of life of households who participate in the program.

Comment Due Date: July 16, 2008.

73 Fed. Reg. 34,778 (June 18, 2008)
Capacity Building for Community Development and Affordable Housing Grants: Amendment

Summary: On April 9, 2008, HUD published its Fiscal Year 2008 Capacity Building for Community Development and Affordable Housing Grants notice of funding opportunity. Today's notice amends HUD's requirement to provide a cash or in-kind match as set out in the April 9, 2008, publication.

Dates: The application submission date remains as published in the Federal Register on April 9, 2008.

73 Fed. Reg. 34,779 (June 18, 2008)
Announcement of Funding Awards for the Community Development Technical Assistance Programs Fiscal Year 2007

Summary: This announcement notifies the public of funding decisions made by HUD in a competition for funding under the Notice of Funding Availability (NOFA) for the Community Development Technical Assistance programs. This announcement contains the names of the awardees and the amounts of the awards made available by HUD.

73 Fed. Reg. 34,780 (June 18, 2008)
Privacy Act of 1974; Notice of a Computer Matching Program Between HUD and the Department of Education

Summary: HUD is issuing a public notice of its intent to conduct a recurring computer matching program with ED to utilize a computer information system of HUD, the Credit Alert Interactive Voice Response System, with ED's debtor files. HUD has revised the "records to be matched" section of this notice to reflect the new HUD Privacy Act Systems of Records involved in the matching program. This update does not change the authority or objectives of the existing matching program.

Comments Due Date: July 18, 2008.

73 Fed. Reg. 36,379 (June 26, 2008)
HOPE VI Main Street Grants Notice of Funding Availability

Summary: Through this publication, HUD is making available approximately $4 million in assistance through the FY2008 HOPE VI Main Street Grants program. This publication is in addition to the $1 billion made available through the FY2008 SuperNOFA.

Application Submission Date: The application deadline date is August 15, 2008.

HUD Notices

Notice PIH 2008-25 (June 11, 2008)
Renewable Energy and Green Construction Practices in Public Housing

Summary: This notice strongly encourages public housing agencies to use solar, wind and other renewable energy sources, and other "green" construction and rehab techniques whenever they procure for maintenance, construction or modernization. This notice defines green building principles for construction practices in public housing, identifies the benefits of green construction and rehabilitation practices and products, and identifies expertise that is available to provide valuable assistance for implementing such practices.

Effective Date: June 11, 2008.

Rural Housing Service Regulations

73 Fed. Reg. 36,267 (June 26, 2008)
Housing Preservation Grants

Summary: The Rural Housing Service (RHS) is amending its regulations for the Housing Preservation Grants Program to include faith-based and community organizations. Faith-based and community organizations receiving Housing Preservation Grants (HPG) Program funding for the purpose of repairing and rehabilitating housing will operate within the guidance of the 7 CFR 1944, subpart N, as well as comply with the terms specified in the HPG grant agreement. The intended effect is to improve the delivery and operation of the HPG Program.

Dates: This rule is effective September 9, 2008, unless we receive written adverse comments or written notices of intent to submit adverse comments on or before August 25, 2008, in which case RHS will publish a timely document withdrawing the rule. ■

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