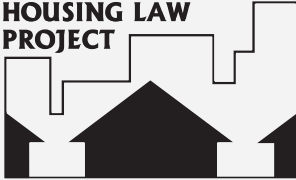


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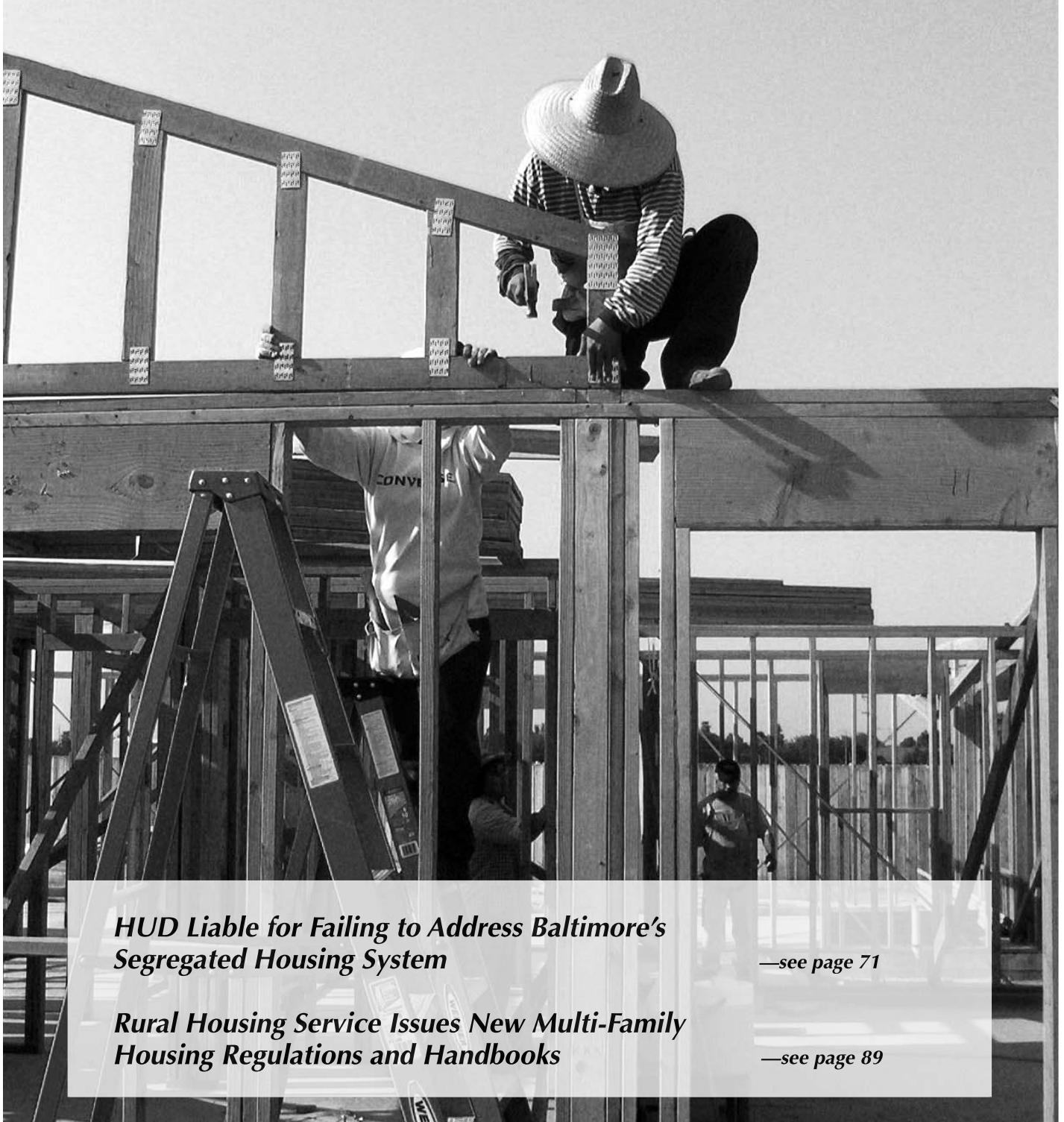


advancing housing justice

Housing Law Bulletin

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HUD Liable for Failing to Address Baltimore's Segregated Housing System

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Rural Housing Service Issues New Multi-Family Housing Regulations and Handbooks

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CUSHING DOLBEARE

1927-2005

We are deeply saddened to report the death of Cushing Dolbeare, a true giant among housing advocates for low-income persons. Cushing died on March 17 at her Mitchellville home in Maryland.

Cushing founded the National Low Income Housing Coalition in 1974 and for several years operated it out of her garage on Capitol Hill. She was its president from 1977 to 1984 and again from 1993 to 1994. She was chairman emeritus of the Coalition until her death. Cushing also served as the executive director of the National Rural Housing Coalition between 1974 and 1977.

Cushing designed and first authored *Out of Reach*, an acclaimed and widely publicized annual NLIHC report that documents the large and ever-increasing gap between housing costs and wages of low-income households throughout the United States. *Out of Reach* perennially serves the vital purpose of keeping low-income housing affordability problems in front of the local media and national policymakers.

In early March, Cushing gave her last public speech at the National Council for State Housing Agencies. She recalled President Franklin Delano Roosevelt's inaugural address in which he stated that one-third of the nation was ill-clothed, one-third ill-fed and one-third ill-housed. Today, she said, only the statement about housing remains true. According to Cushing, one-third of the United States' population—95 million people—have a housing problem.

For years, Cushing decried the fact that our government spends more than four times on homeownership interest and tax deductions, which primarily benefit the wealthy, than what it spends on all housing programs for low-income households. She argued that if we were willing to spend the same amount to meet the housing needs of low-income households, we would solve our nation's housing problems in a matter of years.



Cushing's housing expertise was widely recognized, called upon and honored. She was an advisor to several HUD Secretaries, served on the president's Commission on Housing in 1981 and 1982, chaired a HUD and Environmental Protection Agency joint task force on the hazards of lead paint, and served on the Millennial Housing Commission. She also served on the board of the Housing Assistance Council. In 2002, she received the Heinz Award for the Human Condition from the Heinz Family Foundation. She donated the \$250,000 prize to NLIHC to start its endowment fund.

Cushing's guiding light will be sorely missed by the advocates who have had the

pleasure of knowing and working with her. Beyond her encyclopedic knowledge and masterful communication skills, most memorable were her kindness and persistence in the face of indifference or injustice. Millions of low-income households who have never heard of her benefit daily from the fruits of her tireless and effective efforts to improve our nation's housing conditions.

Cushing is survived by her husband of forty-nine years, Louis P. Dolbeare, and her two children, Niles Dolbeare of San Francisco and Mary Dolbeare O'Kane of Seattle.

Contributions in Cushing's memory may be made to the National Low Income Housing Coalition's Cushing Dolbeare Endowment Fund, 1012 14th Street NW, Suite 610, Washington, D.C. 20005.

A memorial service for Cushing will be held at 2 p.m. on Saturday, April 23, 2005 at the Friends Meeting Housing at Florida Avenue and Decatur Street NW in Washington, D.C. A reception will follow in the meeting house reception hall. ■

Sources: National Low Income Housing Coalition; the Washington Post.

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Cover: Families participating in Rural Housing Service's Self Help Housing Program, constructing their own homes in the San Juaquin Valley, California. Construction supervision provided by Self Help Enterprises, Visalia, CA, the nation's largest producer of self-help homes. Photo courtesy of Self Help Enterprises, Inc.

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HUD Liable for Failing to Address Baltimore's Segregated Housing System

Finally determining liability in a long-running case, a federal court in Baltimore has ruled that the Department of Housing and Urban Development (HUD) violated the Fair Housing Act by failing to take appropriate affirmative action to address the effects of racial discrimination and segregation in Baltimore's public housing and Section 8 voucher programs. *Thompson v. United States Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. Jan. 6, 2005).¹ The ruling is tremendously significant not just for affected Baltimore residents, but also for others residing in jurisdictions where HUD similarly has failed to exercise its powers and funding decisions to address the legacies of segregation. Ahead lies the remedial phase of the litigation, and the remedies ordered will ultimately determine the success of this tremendous advocacy effort led by public housing resident leaders and the American Civil Liberties Union of Maryland, joined by several private law firms.

Summary of the Case

In Baltimore, it was undisputed that prior to the U.S. Supreme Court's 1954 ruling in *Brown v. Board of Education*, both federal and local governments intentionally discriminated against African-American residents of public housing due to their race. The plaintiffs in *Thompson* challenged more recent actions undertaken by the local and federal defendants—actions which constituted new acts of illegal discrimination or which failed to ameliorate effects of the prior *de jure* racial segregation.

Plaintiffs filed the action ten years ago in 1995, asserting both constitutional and statutory claims. They were certified to represent a class consisting of all African-Americans who resided in Baltimore City family public housing units during the eighteen months between filing and the June 25, 1996, class certification order, who presently reside in Baltimore City family public housing units or who will in the future reside in city family public housing units prior to the fulfillment or expiration of

¹Prior rulings have awarded plaintiffs substantial interim attorneys' fees, 2002 WL 31777631 (D. Md. Nov. 21, 2002), and addressed issues concerning the modification of the partial consent decree referenced *infra*, 220 F.3d 241 (4th Cir. 2000) (reversing order permitting modification of consent decree sought by defendants to allow funding application for construction of new public housing in impacted areas as unjustified by changed circumstances), 2004 WL 1058100 (D. Md. Jan. 29, 2004) (permitting extension of term of decree).

defendants' desegregation obligations. Their legal claims included the equal protection clause and various civil rights statutes, including both Title VI of the 1964 Civil Rights Act and the Fair Housing Act, created by Title VIII of the 1968 Civil Rights Act. The local defendants included the Housing Authority of Baltimore City (HABC), its executive director, and the mayor and city council, while the federal defendants were HUD and its secretary.

The court specifically faulted HUD's failure adequately to consider a regional approach to desegregation of public housing.

Although the court ultimately found no proof presented of intentional discrimination by either the local or federal defendants during the relevant period (while reserving the issue of whether federal defendants had such intent), it did find that the federal defendants violated a statutory duty to take legally required affirmative action during that time to ameliorate the effects of prior intentional racial discrimination. The court specifically faulted HUD's failure adequately to consider a regional approach to desegregation of public housing. Remaining open is the additional question of whether HUD has violated either the equal protection clause or the Fair Housing Act by discriminating intentionally. However, the court found no liability for the local defendants under any claims, including the Constitution and the Fair Housing Act.

A more detailed review of the decision follows, covering the legal claims, enforceability issues, and the court's evidentiary findings.

Impact of Statutes of Limitations

One of the first issues addressed by the court was the period during which plaintiffs' legal claims were not time-barred by a statute of limitations. Resolving the limitations period is first a function of what legal claims are found cognizable by the court under various enforceability doctrines (described in further detail below). Each cognizable claim has its own statute of limitations.

For claims brought under Section 1983 in Maryland, the local defendants could be held liable for action or inaction within the three-year period prior to filing, based on the analogous tort claim period.² For claims under the Administrative Procedure Act (APA), HUD could be held liable for action or inaction within the prior six-year

period.³ The court also found the six-year limitations period applicable to plaintiffs' constitutional claims because, seeking only injunctive relief, they could also be enforced via the APA.

Since the case was filed in 1995, the court held that the claim period ran back three years (to January 31, 1992) for the local defendants and six years (to January 31, 1989) for the federal defendants. Claims had to be based on actionable wrongs committed by defendants within those periods, termed the "Open Period." However, because plaintiffs also challenged the defendants' failures to take affirmative action to remedy the continuing effects of previous illegal racial discrimination, the court also had to consider evidence concerning activities prior to the Open Period.

Accordingly, under these limitation periods, the federal defendants might be liable for actions that local defendants would not be, even though both were involved, such as tenant assignment to specific public housing sites. However, either set of defendants could be held liable for action or inaction during the applicable period if they violated an obligation to remedy past discrimination.

Impact of Prior Consent Decree

About a year and a half after the case was filed, the parties negotiated and executed a consent decree purporting to settle certain claims concerning the demolition of specific developments and the provision of alternate housing opportunities for displaced tenants. The court thus had to consider the impact of that partial decree on the remaining claims and evidence proffered to prove them, which might involve the settled claims or actions related to them. The decree covered site selection, demolition and relocation issues for specified properties. The decree did not resolve plaintiffs' discrimination claims relating to other developments, nor claims challenging tenant selection and assignment practices at any developments, nor certain claims against the local defendants concerning a duty to provide equivalent facilities and services on a nondiscriminatory basis. The court held that plaintiffs could introduce evidence relating to settled claims only where relevant to establish: (1) that vestiges of past violations still exist, which in turn creates a duty to diminish those vestiges (since the past discrimination itself is time-barred), and (2) an actionable pattern or practice that includes unsettled matters.

³Since the APA has no specific limitations period, claims against federal agencies are subject to the general federal six-year limitations period of 28 U.S.C. § 2401(a) (2003).

²Applied pursuant to *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985).

The Legal Claims, Enforceability, and the Evidence

The Plaintiffs' claims against both sets of defendants included constitutional claims under equal protection (via the Fifth and Fourteenth Amendments) and statutory claims based on civil rights statutes (Title VIII of the Civil Rights Act of 1968, the Fair Housing Act, and Title VI of the Civil Rights Act of 1964) and on housing laws (the United States Housing Act of 1937 and the Housing and Community Development Act of 1974).

Constitutional Claims

Plaintiffs seeking to prove equal protection violations must show a governmental actor's deliberate racial discrimination in the operation of public policies and programs, or intentionally discriminatory application and administration of neutral laws. This means that a policymaker chose or affirmed a particular course of action at least in part due to its adverse impact on an identifiable racial group, despite other legitimate motives. Disparate racial impact alone is insufficient for constitutional liability, although evidence of actions with foreseeable and anticipated harmful racial impacts may help prove an illegal purpose, especially in the presence of clear patterns, unexplainable on grounds other than race. In evaluating equal protection claims, courts must also consider other available evidence bearing on discriminatory intent, including the historical background and context of a government action or policy and the legislative and administrative records concerning the actions in question.

Once a plaintiff presents proof that a government defendant's decision was motivated in part by a racially discriminatory purpose, the burden shifts to the defendant to establish, by a preponderance of the evidence, that the same decision would have resulted even had the impermissible purpose not been considered. A defendant's failure to do so creates constitutional liability.

Where prior intentional segregation has occurred, as the parties stipulated in this case, the courts have also recognized continuing affirmative duties of governmental actors to disestablish segregated systems and to effectuate a transition to racially nondiscriminatory conditions. This affirmative duty includes an obligation not to take any action that would impede the process of disestablishing the dual system and its effects.⁴ Under this affirmative duty, there is no similar "intent" requirement or time limit; the standard is simply the effectiveness of the defendants' actions in alleviating the burdens previously imposed by illegal intentionally discriminatory behavior.

While the precise contours of this duty might be elusive, formerly discriminating government entities must

act to disestablish segregation in good faith, fairly and equitably, with due consideration of "local conditions" and with "practical flexibility," "reconciling public and private needs" yet acting promptly and reasonably, to eliminate the vestiges of discrimination and segregation.⁵

Under Equal Protection rights guaranteed by the Fifth Amendment (applicable to federal defendants) and the Fourteenth Amendment (applicable to local defendants), the *Thompson* plaintiffs contended that the defendants not only intentionally discriminated against them on the basis of race during the Open Period, but also failed to meet these affirmative obligations to remedy past pervasive intentional discrimination, including *de jure* segregation until 1954.

Plaintiffs' constitutional claims during the Open Period centered on a variety of actions, including construction of fences at certain public housing sites that blocked access to predominantly white adjoining neighborhoods, demolitions without replacement, tenant assignment policies and a city ordinance allowing the city council to veto site selection.

Plaintiffs seeking to prove equal protection violations must show a governmental actor's deliberate racial discrimination in the operation of public policies and programs, or intentionally discriminatory application and administration of neutral laws.

Evaluating the evidence, the court found that construction of the fence was not motivated by any racially discriminatory motive or intent to segregate, but by desires for safety and crime control. The court also noted that, since the property was later demolished and the plaintiffs had blocked the local defendants from constructing additional elderly housing on the site,⁶ the fence now gates no community at all. Nonetheless, one may note that this result—eliminating all African Americans from the site—coincided with the specific objective of certain neighboring racists.

The *Thompson* plaintiffs had also contended that the demolition of three developments without providing replacement housing was intentionally discriminatory

⁴*Thompson*, 348 F. Supp. 2d at 413 (citing *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979)).

⁵*Thompson*, 348 F. Supp. 2d at 414 (citing *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 299-301 (1955)).

⁶Plaintiffs had earlier successfully obtained reversal of the court's order modifying the consent decree as sought by local defendants to permit them to apply for federal funding to build elderly housing on this site. *Thompson*, 220 F.3d 241 (4th Cir. 2000).

because this demolition denied housing to African Americans because of their race. The court found that plaintiffs had failed to establish any denial of housing to anyone, much less on an impermissible racial basis, stating that many of the demolished units were uninhabitable and serving no one. The fact that most affected tenants or prospective tenants were African American was insufficient to create an inference of discriminatory purpose in the PHA's failure to provide replacement units, because HABC, arguably, was allocating scarce resources among various competing policy objectives.

The plaintiffs also claimed that defendants violated their equal protection rights by deciding in 1992 not to build replacement housing on a former school site. When the housing authority had earlier demolished a 300-unit development serving predominantly African-American tenants, HUD had required replacement housing and that one-third of the replacement units be located in a non-impacted area. HABC did not develop replacement housing on the school site, a non-impacted area, but did place some units in a predominantly African-American neighborhood struggling to revitalize. Because the school site was ultimately used for a school playground and parking consistent with its original use, the court found no discriminatory purpose or pattern and practice, despite the racially motivated opposition of some neighbors to low-income housing use.

The plaintiffs also cited HABC's tenant assignment policies as another intentionally discriminatory practice, alleging that these policies promoted racial segregation. There was no question that such discrimination occurred prior to 1954. The court found no fault with defendants' post-1954 efforts to move African-American tenants into formerly white developments, while mounting none to encourage white occupancy of formerly African-American developments. In the late 1960s, HUD promulgated additional tenant assignment policies (one-offer and three-offer plans) designed to promote desegregation in both directions, but many years later, in 1981, HABC instead used a three-offer plan within "regions" that effectively allowed applicants to use racial composition as a factor in their choice and thus produced racially identifiable developments. HUD was unable to get HABC to convert to a pure three-offer system until 1990. Compounding the problem was HABC's inability to maintain an accurate waiting list and to administer it properly to ensure that applicants received only three offers.

Despite the fact that these practices resulted in white applicants' getting a disproportionate share of the openings at predominantly white developments, the court found no illegal denial of housing to African Americans on racial grounds by either HABC or HUD. While HABC might have been incompetent, HUD's prolonged good faith efforts to redress HABC's improper practices were sufficient to avoid liability for intentional racial discrimination.

Citing numerous actions by the city, the plaintiffs also contended that the defendants illegally perpetuated a pattern

and practice of purposeful discrimination. The court found that many of these challenged practices, such as the siting of certain replacement housing, were resolved by the 1996 partial consent decree; others were separately evaluated and found acceptable based on nondiscriminatory motives. The court, heavily influenced by the fact that the mayor during the open period was African American Kurt Schmoke, instead found that the city was acting in a non-discriminatory way to allocate limited resources for the benefit of all city residents, to maximize access to housing, to revitalize neighborhoods in need, or address other civic needs.

The court found no illegal denial of housing to African Americans on racial grounds by either HABC or HUD.

As in other cases,⁷ plaintiffs also sought to invalidate as racially discriminatory a local ordinance, passed in 1950 and still in effect, which gives the City Council a veto over the siting of public housing projects, contending that the power has always been used to concentrate African-American public housing residents in racially concentrated areas. This claim fared no better with the court, primarily because no public housing proposals had come before the council (except those under the partial consent decree) and thus the veto power was not used. Plaintiffs' claim that the ordinance was a harmful vestige of *de jure* segregation added no weight, due to the court's belief that the demographic changes to a majority black city population and legislative representation of various races make invidious racial discrimination extremely unlikely.

In upholding the conduct of local defendants, the court was influenced by the "genuine and reasonable efforts" undertaken in the wake of *Brown* to disestablish the system of *de jure* segregation, influenced by various policy justifications such as revitalization of distressed areas, maximizing available housing within fiscal constraints, and enabling tenant choice. Also given weight by the court were the changes in the city's population and political structure. Because the public housing population is now more than 92% African American, the court found no administrative methods available to internally desegregate public housing in the city.

Another central element of the case concerned defendants' affirmative duties to remedy the undisputed prior purposeful, pervasive and chronic discrimination. Regardless

⁷United States v. Yonkers, 624 F. Supp. 1276 (S.D.N.Y.1985); Gautreaux v. Chicago Hous. Auth., 296 F. Supp. 907 (N.D. Ill.1969).

of the defendants' intent, liability would attach if they failed to fulfill these duties during the Open Period, under both equal protection and the Fair Housing Act (explained below). While finding that both local and federal defendants generally acted in good faith to rectify past inherited inequities, the court ultimately found that the federal defendants failed to take adequate action to disestablish the vestiges of the discrimination they had earlier participated in imposing.

The court evaluated two actions of both sets of defendants that might have illegally impeded desegregation: (1) tenant selection and assignment, and (2) federal defendants' failure to consider regional public housing policies, which would have enabled progress toward desegregation of public housing in the region. As on the constitutional claims requiring a showing of intent, the court here found no substantial harm from defendants' improper tenant assignment policies, as the predominance of African Americans in the tenant population precluded any meaningful desegregation from applicant's choices among existing developments. However, the court found that the federal defendants' failure, under its statutory affirmative fair housing duties, to consider regional public housing policies during the Open Period potentially impeded the disestablishment of *de jure* segregation, and thus could create liability on the constitutional claim. In the forthcoming remedial phase of the case, the court will examine the federal defendant's intent in the context of its affirmative duties to consider fair housing impacts, which in turn will bear upon the ultimate determination of any constitutional liability of the federal defendants.

Enforceability of Statutory Claims

As a threshold matter, the court had to determine whether each of the plaintiffs' asserted legal claims was judicially enforceable. The authorities analyzed included implied rights of action (statutory and constitutional claims against all defendants), Section 1983 (for constitutional and statutory claims against local defendants), and the Administrative Procedure Act (for claims against federal defendants). On the constitutional claims involving the local defendants, the court had found that Section 1983 provided the enforcement vehicle; on those against the federal defendants, the court acknowledged plaintiffs' implied rights to enforce constitutional provisions, especially for injunctive relief, as well as the availability of the APA.

On the statutory claims, including Title VIII and Title VI, based upon an earlier ruling,⁸ the court found the plaintiffs' rights enforceable against the local defendants via Section 1983, at least as to injunctive relief. Thus, the

⁸In its November 26, 2003, decision, the court had held that the provisions of Title VIII and Title VI afforded distinct rights cognizable under § 1983, at least for injunctive relief, and that neither their text nor their legislative history suggest that § 1983 actions should be foreclosed.

court did not have to decide whether these statutes were enforceable under an implied right of action theory.

As to whether the plaintiffs could use the APA to enforce these statutory duties of the federal defendants, the court had to consider whether either of the two statutory exceptions to enforceability applied: (1) where decisions are committed to agency discretion, and (2) where alternative federal remedies are adequate.

As in many other cases, HUD had argued that certain actions, primarily its supervision of HABC operations, are committed to HUD's discretion and thus judicially unreviewable under the APA.⁹ The court rejected this argument:

The court ultimately found that the federal defendants failed to take adequate action to disestablish the vestiges of the discrimination they had earlier participated in imposing.

HUD acts, primarily, not as HABC's investigator or "prosecutor," but as a collaborator in the production and administration of housing policy. HUD's position is not passive. Rather, HUD acts affirmatively, funding and providing operational support for housing initiatives. And if HUD, alone or in collaboration with Local Defendants, acts in violation of Federal civil rights laws, it would indeed threaten individual liberties.¹⁰

Also emphasizing that HUD's discretionary resource allocations are restricted by other federal laws and policies, such as the specific requirements of Title VIII, the court rejected the claim that HUD's actions were unreviewable as committed to agency discretion.

Again as in many other cases, HUD had contended that Titles VIII and VI themselves provide adequate alternative enforcement schemes, thus precluding judicial enforcement under the APA. On Title VIII, the court sided with the narrow majority of courts¹¹ that have found its remedial provisions insufficient (e.g., its authorization of discretionary enforcement and its shorter limitations periods for administrative claims) to displace judicial enforcement. It also approvingly noted that plaintiffs' claims seeking review of HUD's affirmative duties under

⁹HUD relied primarily on *Heckler v. Chaney*, 470 U.S. 821 (1985), for this argument.

¹⁰*Thompson*, 348 F. Supp. 2d at 422.

¹¹*See, e.g.,* *Latinos Unidos De Chelsea En Accion (Lucha) v. Sec'y of HUD*, 799 F.2d 774, 791 (1st Cir.1986); *Alschuler v. HUD*, 686 F.2d 472, 477-78 (7th Cir.1982); *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 339 F.3d 702, 713 (8th Cir.2003). *But see* *Am. Disabled for Attendant Programs Today (ADAPT) v. Dep't of HUD*, 170 F.3d 381, 390 (3d

§ 3608 appear more appropriate for independent judicial review. Because it found an APA claim, the court did have to decide whether Title VIII directly provides an implied right of action to sue HUD.

The alleged Title VI violations presented a different and more difficult question, because the Fourth Circuit had previously ruled that plaintiffs must pursue a direct remedy against the funding recipient, not an APA claim against the federal agency involved.¹² The court also declined to find an implied right of action against federal agencies under Title VI, finding no showing of congressional intent.

Even assuming that some of the defendants' actions had a racially discriminatory impact, the court found it inappropriate to impose liability after considering the four-factor test.

Fair Housing Act Claims

Title VIII prohibits public and private actors from engaging in certain discriminatory practices; it also requires public agencies to administer the law to fulfill its goals. To establish liability, plaintiffs must show that defendants' intentionally discriminatory actions caused them harm or that defendants' actions had a discriminatory or segregatory impact. Unlike the equal protection claim, Title VIII may impose liability on a government defendant even without discriminatory intent. However, a public defendant may avoid Title VIII liability by demonstrating that its conduct served a public interest unattainable by alternate means.

The *Thompson* plaintiffs contended that defendants, during the Open Period, violated Title VIII by denying them housing, by discriminating in housing conditions and services, and by failing to affirmatively further fair housing. The court accepted plaintiffs' contention that the denial of housing opportunities, not just actual dwellings, can be actionable under § 3604(a): "[i]n indeed, in an era where housing authorities are transitioning from the provision of 'hard units' to the administration of more intangible housing programs involving vouchers etc., a broad reading of § 3604(a) is appropriate to continue to

hold government entities accountable under the subsection."¹³ Similarly, the court ratified a broad interpretation of what services are covered by § 3604(b).

In deciding the plaintiffs' discriminatory effects claims under §§ 3604(a) and 3604(b), the court applied the Fourth Circuit's four-factor test,¹⁴ which considers the strength of the discriminatory or segregatory effect, any evidence of discriminatory intent, the legitimacy of defendants' interest in the conduct, and the burden of liability on defendants. If a plaintiff satisfies this four-factor test and establishes a *prima facie* case of discriminatory impact, the burden shifts to a Title VIII defendant to prove that its conduct was justified by a legitimate, *bona fide* interest, with no alternative action available to serve that interest with less discriminatory impact. Where a defendant does show that lack of alternatives, the plaintiff must counter this by showing that other practices are indeed available.

Discriminatory intent claims under § 3604 liability are evaluated under the Equal Protection standard, but racial animus or hatred is not required.

Evaluating the evidence on these Fair Housing Act claims, the court found no violations, except as to federal defendants' violation of their affirmative duties. The court found that none of the defendants acted with a racially discriminatory purpose. Even assuming that some of the defendants' actions had a racially discriminatory impact, the court found it inappropriate to impose liability after considering the four-factor test.

On segregative effect, the court found little, if any, segregative effect from the fencing and siting decisions, the city ordinance governing siting, the administration of the Section 8 voucher programs, and HABC's tenant assignment practices. The court credited local defendants' efforts to site some properties and to use vouchers outside of predominantly African-American neighborhoods; the fact that these actions resulted in some progress on desegregation was clearly influential. The court's earlier findings of no evidence of discriminatory intent and the legitimacy of reasons for their conduct obviously negate those elements of the four-factor test. Finally, they found that the impact of any remedy would be burdensome because it would necessarily constrict the discretion of the local defendants in allocating resources. Since this might be said for any fair housing claim involving local government defendants, the only possible justification for this

Cir.1999); *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 (D.C.Cir.1990).

¹²*Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180 (4th Cir.1999).

¹³*Id.* at 415-416.

¹⁴For more on the different rules of decision employed by the courts in discriminatory effect cases, see NHLP, *Fair Housing Litigation to Prevent the Loss of Federally Assisted Housing*, 31 HOUS. L. BULL. 73, 73 (2001) (part one).

line of reasoning is that here the local government is theoretically already politically accountable to the voters, who are themselves predominantly members of the same race as the plaintiffs harmed.

Plaintiffs' affirmatively furthering claim was based on § 3608(e)(5) of the Fair Housing Act, which requires federal defendants, and possibly others, to "administer [housing] programs... in a manner affirmatively to further [fair housing] policies," including the provision of housing free from discrimination. Section 3608's affirmative duty is enforceable through the Administrative Procedure Act, which authorizes courts to hold unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. However, HUD has wide discretion, so that actions can be sustained if supported by a rational basis in the administrative record. When evaluating HUD's public housing siting decisions and how it has used its resources under the APA standard, HUD must offer a satisfactory explanation for its actions. Judicial review of this explanation must focus on whether HUD's actions have "furthered the statutory goals."

This affirmative duty requires a commitment to desegregation and actions consistent with that duty. Following the First Circuit's ruling, the court stated that this duty requires defendants to do something "more than simply refrain from discriminating themselves or from purposely aiding discrimination by others... Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation."¹⁵ Quoting liberally from then Judge Breyer's opinion in *NAACP v. Secretary of Housing and Urban Development*, the court stated:

This standard, like many, may be difficult to apply to borderline instances, yet a court should be able to ascertain a clear failure to live up to the instruction over time." A court must engage in a "straightforward evaluation of whether agency activity over time has furthered the statutory goal, and, if not, for an explanation of why not and a determination of whether a given explanation, in light of the statute, is satisfactory"¹⁶

To meet the statutory goal, HUD has an affirmative duty to refrain from any discriminatory action, including the "failure to consider [the] effect [of a HUD grant] on the racial and socio-economic composition of the surrounding area."¹⁷

¹⁵*Id.* at 416 (quoting *NAACP v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 155 (1st Cir.1987), in turn quoting *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir.1973)).

¹⁶Thompson, 348 F.Supp. 2d at 458 (quoting *NAACP*, 817 F.2d at 156).

¹⁷*Id.* at 458.

Because it found that HUD's fair housing responsibilities extended beyond the city borders, central to the court's analysis was defining the neighboring region within which the operation of HUD's policies and programs might affect the housing opportunities of the plaintiff class. The court defined the region as almost all of the contiguous counties included in the Baltimore Metropolitan Statistical Area. The regional approach requires HUD to at least "assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course

The court stated that "action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation."

of action that would increase the supply."¹⁸

Reviewing the evidence on this claim, the court began by recognizing that through 1954, Baltimore was a majority white, *de jure* racially segregated city in every aspect of city life, including schools, housing, restaurants, stores and recreation. *Brown* provided the catalyst for change, and the city commenced the process of redressing the effects of prior segregation in schools as well as housing and other aspects of civic life. Public housing desegregation efforts consisted of placing African Americans in units located within the city, but, over time, economic constraints and population shifts limited the capacity of federal defendants to reduce the vestiges of segregation and fulfill the affirmative duty.

Because of shifting demographics and economic factors, the court found wholly inadequate these efforts to desegregate public housing by redistributing the affected population within the city limits, except for the limited relief provided through the leasing by housing choice voucher recipients of private housing units in the counties. Although the city only contains approximately 30% of the region's households, over the last half of the twentieth century, the proportion of African-American city residents has grown dramatically, from 19% to 64%. The population of the surrounding region remains only 15% African American.

Based on HUD's statutory duties and the fact that its jurisdiction and ability to exert practical leverage extend throughout the region, "it was, and continues to be unreasonable for the agency not to consider housing programs that include the placement of a more than insubstantial

¹⁸*Id.* (citing and quoting *NAACP*, 817 F.2d at 156).

portion of the Plaintiff class in non-impacted areas outside the Baltimore City limits... [R]egionalization [is] integral to desegregation in the Baltimore Region and... an important alternative course of action available" to HUD.¹⁹

In the court's view, only HUD, not the local defendants, could have employed the necessary regional approach:

It was manifestly within the jurisdictional authority of HUD to site public housing—the residents of which in the Baltimore MSA are overwhelmingly African-American—outside the boundaries of Baltimore City—where African-Americans compose a smaller proportion of the residential population than in Baltimore City. Through regionalization, HUD had the practical power and leverage to accomplish desegregation through a course of action that Local Defendants could not implement on their own, given their own jurisdictional limitations.²⁰

The court rejected plaintiffs' contention that the local defendants should also have directed their efforts beyond Baltimore City, finding their parochialism reasonable in light of "limited resources" and "political realities."²¹

While finding that both local and federal defendants generally acted in good faith to rectify past inherited inequities, the court found that HUD had failed to take adequate action to disestablish the vestiges of the discrimination they had earlier participated in imposing:

Specifically, in administering its housing policies during the Open Period, HUD failed adequately to consider policy options whereby low-income African-American families from Baltimore City might be afforded housing opportunities beyond the City limits. Indeed, Federal Defendants did not improve, and may have worsened, the racially discriminatory situation by making no more than token efforts to take a regional, rather than merely a city limited, approach to the siting of housing for members of the Plaintiff class. [T]he failure adequately to take a regional approach to the desegregation of public housing in the region that included Baltimore City violated the Fair Housing

Act and requires consideration of appropriate remedial action by the Court.²²

The record provided virtually no evidence of HUD's consideration of a regional approach during the Open Period:

HUD failed to consider regionally-oriented desegregation and integration policies, despite the fact that Baltimore City is virtually surrounded by Baltimore County and there is public transportation between the two. In effectively wearing blinders that limited their vision beyond Baltimore City, Federal Defendants, at best, abused their discretion and failed to meet their obligations under the Fair Housing Act to promote fair housing affirmatively... [I]t [is] no longer appropriate for HUD, as an institution with national jurisdiction, essentially to limit its consideration of desegregative programs for the Baltimore Region to methods of rearranging Baltimore's public housing residents within the Baltimore City limits.²³

The court therefore believed that HUD would not act upon regional approaches absent judicial intervention, adding that any further evidence concerning HUD's consideration of regionalization in the upcoming remedial phase of the trial might affect the remedies ordered.

While acknowledging the literal puzzle of "setting aside" agency *inaction* under the APA, the court set aside HUD's practice of ignoring regionalization as an abuse of HUD's discretion to administer its housing programs affirmatively to further the Fair Housing Act's goals.

Title VI Claim

Plaintiffs' Title VI claims, based on discrimination in activities receiving federal financial assistance, including federal housing programs, potentially lay only against the local defendants, because the court found no Title VI implied right of action against federal funders and the Fourth Circuit has found the APA unavailable to enforce Title VI because another remedy (direct action against the funding recipient) is available and preferable. In the Fourth Circuit, Title VI liability requires a showing of discriminatory intent, just like equal protection; disparate impact does not suffice. Accordingly, because the court had found the local defendants had no discriminatory intent under the equal protection claim, it found no violation of Title VI as well.

¹⁹*Id.* at 408.

²⁰*Id.* at 462.

²¹While it is certainly true that regionalization fits better within the scope of HUD's powers, duties and resources, absolving local defendants without a more searching inquiry comparing their chosen actions to those available appears far too easy. Concluding that the city had "no realistic options" to use its federally provided resources for programs or properties outside the city appears incorrect, without a more searching inquiry into funding sources, program rules, and governing federal and local laws concerning authority for extra-jurisdictional operation or inter-jurisdictional co-operation agreements.

²²*Thompson*, 348 F. Supp. 2d at 443.

²³*Id.* at 462-463.

Housing Act Claims

Plaintiffs had sought to enforce provisions in the United States Housing Act whereby the local defendants certified their compliance with civil rights obligations, but the court had earlier found no implied right of action to enforce those provisions against either the local or federal defendants. Similarly, plaintiffs had sought to enforce § 5304(b)(2) of the Housing and Community Development Act, which sets a standard for federal funding of state and local government activities. Because in other cases the Supreme Court has found that program funding conditions beyond civil rights obligations are not judicially enforceable directly against the noncompliant entity²⁴—for the reason that the main “penalty” contemplated by Congress is the withdrawal of federal funds—the court also declined to infer a private enforcement right or allow enforcement via § 1983.

What’s Next

Now that the court has decided that HUD is liable, the remedial phase of the trial will primarily involve evidence regarding the appropriate actions whereby HUD will adequately consider a regional approach to the desegregation of public housing. Further evidence of any previous consideration of regional approaches by HUD, or its failure to do so, will also influence the court’s ultimate decision on whether HUD’s actions have been motivated by an intent to discriminate based upon race, creating constitutional liability and potentially more expansive remedies.

Conclusion

Fully half of the Thompson opinion is devoted to supplemental findings based on the evidence presented at the trial. Although obviously differing on particulars, these findings might well describe many other urban jurisdictions in America. This further judicial recognition of HUD’s affirmative fair housing duty in the face of such a record is a tremendously important step in focusing the powers and resources of both federal and local governments to address the legacies of segregation. But, the situation in Baltimore is similar to that of many other cities, and it is no secret that HUD’s actions to affirmatively further fair housing in other segregated metropolitan areas were usually no more thoughtful than those the court found wanting in Thompson. HUD’s widespread and longstanding abdication of its fair housing obligations has left the agency especially vulnerable to similar litigation in the future.²⁵ ■

²⁴E.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002).

²⁵See generally NHLP, *HUD’s Fair Housing Duties and the Loss of Public and Assisted Housing*, 29 HOUS. L. BULL. 1, 1 (1999).

Proposed 2006 Budget Would Slash Federal Housing Programs and Freeze Spending

On February 7, the president revealed his proposed budget for Fiscal Year (FY) 2006.¹ The \$2.57 trillion budget calls for sweeping changes to many domestic programs, including a substantial reduction in the Department of Housing and Urban Development (HUD) budget. Under the proposal, HUD’s budget would be slashed from \$32.2 billion to \$28.5 billion, an 11.5% cut.² Such drastic cuts are part of a larger scheme by the Administration to limit spending on all programs that are not related to homeland security or defense. One of the most dangerous aspects of the president’s plan is the proposal to institute a long-term spending cap on certain programs such as housing through 2010.³ According to the Center on Budget and Policy Priorities, this “hard freeze” on spending in discretionary programs would result in a \$66 billion cut to these programs by the end of the five-year freeze.⁴ Such caps in housing could push to the limit already struggling housing agencies which will undoubtedly result either in fewer families being served or benefit cuts.

The Center estimates that such diminished funding levels could result in as many as 370,000 fewer vouchers by 2010, constituting a nearly 20% cut.⁵

CDBG and Other Community Development Programs Eliminated

Another major element of the president’s proposed budget is the radical shake up of many HUD and other departmental programs. The largest part of the administration’s proposed changes in housing would come from dismantling eighteen grant programs, including many of HUD’s community and development programs, as well as the well-known Community Development Block Grant

¹A complete copy of the budget and appendix are available at <http://www.whitehouse.gov/omb/budget/fy2006/>.

²HUD, FISCAL YEAR 2006 BUDGET SUMMARY 13 (2005), at <http://www.hud.gov/about/budget/fy06/fy06budget.pdf>. It should be noted that some of this money will reappear in the president’s new Strengthening America’s Communities program, which will be funded through the Department of Commerce.

³OMB, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2006, 247 (2005), at <http://www.whitehouse.gov/omb/budget/fy2006/>.

⁴GREENSTEIN, HORNEY AND SHAPIRO, ASSESSING PRESIDENT BUSH’S NEW BUDGET PROPOSAL (2005), at <http://www.cbpp.org/2-7-05bud2htm>.

⁵CBPP, PRESIDENT’S BUDGET WOULD RESTORE SOME RENTAL VOUCHERS CUT IN 2005 BUT REDUCE THE PROGRAM SUBSTANTIALLY IN FUTURE YEARS (2005), at <http://www.cbpp.org/2-18-05hou.pdf>.

program,⁶ which, along with several others from HHS and Agriculture would then be reconstituted into a new initiative called “Strengthening America’s Communities” to be administered by the Department of Commerce.⁷ With a reduction from \$5.31 billion in 2005 to a proposed \$3.71 billion under the president’s plan,⁸ this new initiative would amount to a 30% cut in these programs. According to the National Association of Housing and Redevelopment Officials (NAHRO), a trade association for housing and redevelopment officials, “[r]egardless of how funds are distributed, it appears that states and communities currently receiving CDBG funding would not be guaranteed an allocation under the new initiative. Indeed the administration argues that many CDBG grantees are ‘no longer in need of assistance...’”⁹ While little has been revealed by the administration about the specifics of how the new initiative would work, there is much speculation that “Strengthening America’s Communities” will, in fact, weaken local budgets, devastate local resources and result in decreases in housing and economic development and other local programs which currently benefit communities.

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Many Programs Would Be Significantly Slashed or Moved to Other Agencies

Section 811 Cut by 50%

As if eliminating major programs such as CDBG were not bad enough, the president’s budget proposes substantial cuts to other existing programs. One of the more drastic

⁶Other HUD programs that would be eliminated include CDBG Set-Asides, Brownfields Economic Development Initiative, Section 108 Loan Guarantees, Rural Housing and Economic Development, Urban Empowerment Zones and the National Community Development Initiative.

⁷See BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2006 app. for Department of Commerce 210 (2005), at <http://www.whitehouse.gov/omb/budget/fy2006/appendix.html>.

⁸*Id.*

⁹NAHRO, *President’s Budget Would Eliminate CDBG*, NAHRO MONITOR, vol. XXV, no. 3 (Feb. 15, 2005). The NAHRO Monitor is a semi-monthly publication published by the National Association of Redevelopment and Housing Officials for their members to keep them apprised of housing and community development issues.

program cuts would come in the Section 811 program for the disabled, which would receive a more than 50% cut from \$249 million in FY 2004 to \$120 million in 2006.¹⁰ This program provides permanent housing for persons with disabilities and would receive the greatest percentage cut in funding of any of the other programs.

HOPWA Cut: 11,000 Fewer Families Served

Under the president’s proposal, the Housing Opportunities for Persons with AIDS (HOPWA) program would be reduced from \$282 million in FY 2005 to \$268 million.¹¹ The HOPWA program provides permanent housing, along with coordinated supportive services, to low-income persons living with HIV/AIDS and their families through short-term rent, mortgage or utility payments which help maintain the current residence of the individual living with HIV/AIDS.¹² While the administration projects that approximately 67,000 housing units for persons with HIV/AIDS will be supported with this funding,¹³ this number is 11,000 units short of the approximately 78,000 families HUD claims to have served in 2004.¹⁴

SHOP

The Self-Help Homeownership Opportunity Program (SHOP), a program that assists low-income home buyers willing to contribute “sweat equity” toward the construction of their homes, would be funded at \$30 million.¹⁵ SHOP, which was previously funded as a set-aside within the Community Development Fund, would become a separate fund.¹⁶

HOME

The Home Investment Partnership Program, HUD’s primary program to finance the development of affordable housing and assist first-time home buyers, would be funded at \$1.941 billion.¹⁷ This amount would constitute

¹⁰See BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2006, app. for Department of Housing and Urban Development 549 (2005), at <http://www.whitehouse.gov/omb/budget/fy2006/appendix.html>.

¹¹*Id.* at 538.

¹²HUD, PERFORMANCE AND ACCOUNTABILITY REPORT: FY 2004, 2-38 (2004), available at <http://www.hud.gov/utilities/intercept.cfm?/offices/cfo/pafinal.pdf>.

¹³See BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2006 app. for Department of Housing and Urban Development 539 (2005), at <http://www.whitehouse.gov/omb/budget/fy2006/appendix.html>.

¹⁴HUD, PERFORMANCE AND ACCOUNTABILITY REPORT FY 2004, 2-39, 2-41 (2004), available at <http://www.hud.gov/utilities/intercept.cfm?/offices/cfo/pafinal.pdf>.

¹⁵BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2006 app. for Department of Housing and Urban Development 541 (2005), at <http://www.whitehouse.gov/omb/budget/fy2006/appendix.html>.

¹⁶*Id.*

¹⁷*Id.* at 542.

a decrease from \$2.006 billion in FY 2004.¹⁸ HUD had received a failing report card in its own 2004 *Performance and Accountability Report* which indicated that the number of homeowners assisted under the HOME program between 2003 and 2004 dropped by an astounding 25,185.¹⁹ Under the HOME program, states and localities can build or rehabilitate housing for rent or ownership, provide home purchase or rehabilitation financing assistance to existing homeowners or new home buyers, and provide tenant-based rental assistance to low- and moderate-income households. The \$1.941 billion in the proposed budget includes a set-aside of \$200 million toward the American Dream Downpayment Initiative.²⁰ The Housing Counseling Assistance Program, previously funded through a set-aside under the HOME Program, would become a stand-alone account and funded at \$40 million.²¹ This program provides counseling services to eligible homeowners and tenants, including home purchase, financial management and rental counseling.²²

Lead Based Paint and Fair Housing

The Lead Based Paint Hazard Reduction Program would receive a \$55 million reduction under the plan compared to only two years ago, and would be funded at \$119 million.²³ Even in the face of existing widespread inaction on the part of the current administration to administer the Fair Housing Amendments Act, the Fair Housing Activity fund would receive an additional cut from \$46 million in 2005 to \$38.8 million in 2006.²⁴

Other Programs Transferred or Consolidated

Other programs would either face consolidation or a transfer to other agencies. The Youthbuild Program, for example, would be transferred to the Department of Labor under the president's plan and would be funded at \$58.9 million.²⁵ The administration revealed that it would also pursue its goal through legislation of combining the Shelter Plus Care, Supportive Housing and Section 8 Moderate Rehabilitation Single Room Occupancy programs into a

single program.²⁶ The new program would then be given greater flexibility to "better meet community needs."²⁷

Public Housing Programs Would Again Suffer Cuts Under the President's Plan

Operating Fund

While the administration's budget proposal would leave intact many of the current regulations and statutes governing the public housing program, it would sharply cut the funds that public housing agencies (PHAs) need to administer these programs effectively. The operating subsidy, used by agencies for their day-to-day operations would be funded at \$3.407 billion, a \$252 million decrease over 2004 enacted levels.²⁸ According to NAHRO, under this formula, PHAs would only receive 80% of the funding needed to fully support their basic operations.²⁹ NAHRO further anticipates that because of the funding crisis in 2003, during which time many PHAs were forced to lay off staff, curtail their programs and use up existing financial resources, agencies may have no reserves left to fill the void left by these cuts.³⁰

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Capital Fund

The public housing capital fund would also be reduced under the president's budget from \$2.7 billion in 2004 to \$2.3 billion, a two-year reduction of \$368 million.³¹ Such reductions will mean housing agencies will be forced to endure further delays in their planning and execution of much-needed rehabilitation of their properties.

HOPE VI Slated for Elimination Yet Again

Just as in the president's proposed budget over the past several years, the administration once again proposes

¹⁸*Id.*

¹⁹HUD, PERFORMANCE AND ACCOUNTABILITY REPORT: FY 2004, 2-9 (2004), available at <http://www.hud.gov/utilities/intercept.cfm?/offices/cfo/pafinal.pdf>.

²⁰BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2006 app. for Department of Housing and Urban Development 542 (2005), at <http://www.whitehouse.gov/omb/budget/fy2006/appendix.html>.

²¹*Id.* at 549.

²²*Id.* at 550.

²³*Id.* at 570.

²⁴*Id.* at 569.

²⁵*Id.* at 542.

²⁶*Id.* at 544.

²⁷*Id.*

²⁸*Id.* at 531-532.

²⁹NAHRO, *President's Budget Would Eliminate CDBG*, NAHRO MONITOR, vol. XXV, no. 3 (Feb. 15, 2005).

³⁰*Id.*

³¹See BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2006 app. for Department of Housing and Urban Development 530-531 (2005), at <http://www.whitehouse.gov/omb/budget/fy2006/appendix.html>.

to eliminate the HOPE VI program in 2006. However, a new diabolical twist added to the mix is that, unlike in years past, the budget request also recommends to Congress that they “rescind” the funds appropriated in 2005 for that program.³² The justification put forth by the administration for this is that “HOPE VI has surpassed its primary goal to demolish 100,000 severely distressed public housing units by 2003.”³³

Voucher Program Left in a Precarious Situation in Spite of More Money

Housing Choice Vouchers

While the nation’s largest low-income housing assistance program, the Housing Choice Voucher Program, would fare somewhat better under the president’s proposed budget than many other programs with \$15.85 billion,³⁴ the cuts over the past few years would continue to place the program in a precarious position. The amount requested in the president’s budget, a \$1.2 billion increase in the funding for tenant-based rental assistance above 2005 levels, would include a small increase in administrative fees, family self sufficiency coordinators, and voucher contract renewals, along with the revival of HUD’s central fund which was eliminated in last year’s final budget. Unfortunately, the newly revived central fund, previously used to replenish an agency’s reserves, could only be used for cost increases resulting from unforeseen exigencies, including natural disasters, at the Secretary’s discretion.³⁵ The budget proposal makes no mention of the reserve funds for public agencies which were cut in the 2005 Appropriations Act from one month of reserves down to one week of funding.³⁶

Slight Increase Will Restore Only Half of the 80,000 Vouchers Lost in 2005

While at first glance these numbers seem promising, the proposed increases will only partially offset the losses from last year’s failure to fully fund the program according to the Center on Budget and Policy Priorities, which predicts that the increased funding will restore only half of 80,000 vouchers lost in 2005.³⁷ The Center projects that

with the administration’s proposed funding cuts to housing programs, the number of families served by vouchers could drop by as many as 370,000 in five years.³⁸

Funding Scheme for Housing Vouchers Would Continue to Be Budget Based

One of the most devastating changes made to the program by Congress in 2005 was the shift from an actual dollar-based system to a strict budget-based system for the allocation of funds.³⁹ This type of system, which has been likened to a block grant, destroys the link between the actual cost of the program and the amount of funding received. In addition to the change in funding scheme, Congress also failed to appropriate enough funds for the program, resulting in an additional 4% across the board pro rata cut in 2005. In 2006, the administration proposes that Congress continue the strict budget-based system of funding and further pro-rate agencies’ funding if Congress fails to appropriate sufficient funds.⁴⁰

One of the most devastating changes made to the program by Congress in 2005 was the shift from an actual dollar-based system to a strict budget-based system for the allocation of funds.

Increase in Section 8 Project-Based Rental Assistance

Under the Section 8 project-based rental assistance program, HUD subsidizes rents for approximately 1.3 million families in over 19,000 projects.⁴¹ The president’s budget requests \$4.923 billion for the renewal of Section 8 project-based expiring contracts, including Section 8 Moderate

³²*Id.* at 532.

³³*Id.* at 533.

³⁴*Id.* at 527-528.

³⁵*Id.* at 528.

³⁶NHLP, *Section 8 Narrowly Escapes Funding Cuts in 2005 HUD Budget* 35 Hous. L. Bull. 3, 6 (2005).

³⁷CBPP, *PRESIDENT’S BUDGET WOULD RESTORE SOME RENTAL VOUCHERS CUT IN 2005 BUT REDUCE THE PROGRAM SUBSTANTIALLY IN FUTURE YEARS 1* (2005), at <http://www.cbpp.org/2-18-05hous.pdf>.

³⁸*Id.* See also CBPP, *Local Effects of Voucher Funding Shortfalls*, at <http://www.cbpp.org/2-18-05hous-statelist.htm> (Feb. 18, 2005) (a state-by-state breakdown of voucher funding shortfalls for 2005, 2006 and 2010). The Center notes that it did not use the baseline projections set forth by the Office of Management and Budget in calculating the effect that these funding shortfalls will have on families since those baselines did not accurately reflect the cost of maintaining the current level of activity. See CBPP, *The Basis for the Estimate That the Budget Would Support 370,000 Fewer Vouchers in 2010*, at <http://www.cbpp.org/2-18-05hous-app.htm> (Feb. 22, 2005).

³⁹NHLP, *Section 8 Narrowly Escapes Funding Cuts in 2005 HUD Budget*, 35 Hous. L. Bull. 1, 3 (2005); NHLP, *FY 2005 Appropriations Update*, 34 Hous. L. Bull. 219, 219 (2004).

⁴⁰See BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2006, 527 (2005) (HUD appendix).

⁴¹*Id.* at 529.

Rehabilitation contracts.⁴² While at first glance, this appears to be a reduction over the \$5.3 billion requested in FY 2005, unlike last year, the new amount would also include an additional \$800 million in 2005, bringing the total amount proposed for these funds to \$5.9 billion, a \$600 million increase. The administration proposes that the additional \$800 million in recaptured funds could be used for renewals of or amendments to Section 8 project based subsidy contracts or for performance based contract administrators.⁴³ In Section 8 contract amendments, which are required to maintain projects until their contract expiration date (when actual costs exceed the amount of budget authority originally set for the project), the administration proposes that these new costs be “entirely” funded in 2006 through the use of excess balances remaining on expired Section 8 contracts that utilized less resources than what was anticipated in completing their contracts.⁴⁴

President Requests an Increase of Over 100% in Tenant Protection Vouchers

It is unclear why the president’s proposed budget includes a request for a substantial increase in tenant protection vouchers of \$354 million.⁴⁵ This amount would constitute over a 100% increase from the \$162 million appropriated in FY 2005.⁴⁶ According to the Center on Budget and Policy Priorities, this amount of increase would fund approximately 50,000 tenant protection vouchers, which is double the amount funded in 2005.⁴⁷ These funds are typically used to provide vouchers to tenants who are facing displacement due to public housing demolitions or conversions, or those being displaced when project owners opt out of the program or are terminated by HUD for failed inspections. Interestingly, the president’s own budget proposal reveals that for 2006 only about \$112 million will be required to assist an estimated 16,000 families facing dislocation from privately owned projects.⁴⁸ The budget also alludes to additional vouchers required under the *Walker* consent decree in the Dallas segregation case but that decree, according to the Center, only requires

1,100 vouchers.⁴⁹ That leaves over 32,000 unexplained tenant protection vouchers for which there appears to be no explanation for providing. The Center believes that these additional vouchers could be required by the anticipated conversion of public housing units to vouchers by the Administration.⁵⁰

Some Rural Housing Programs Slashed While Others Survive Funding Cuts

While in years past, most rural housing programs have managed to escape the major cuts that HUD programs could not, this year, the president’s 2006 budget makes substantial funding changes to the multi-family programs as well.

While in years past, most rural housing programs have managed to escape the major cuts that HUD programs could not, this year, the president’s 2006 budget makes substantial funding changes to the multi-family programs as well.

The largest proposed cut in rural housing funding under the new budget would come from a 73% reduction in the Section 515 Rural Rental Housing (Direct Loan) Program, reducing it from \$100 million in FY 2005, to a mere \$27 million in FY 2006.⁵¹ None of these funds would cover new construction toward the dwindling multi-family housing supply but would instead be limited to use for repairs and rehabilitation of existing stock only.⁵² One of the biggest surprises related to this cut is the president’s proposal to begin funding the Rural Housing Voucher program, which has not been funded in years past. Under the program, proposed to be budgeted at \$214 million, four-year rental vouchers would be given to tenants in instances in which owners pre-pay their 515 loans and withdraw from the program.⁵³ The budget request appears consistent with recommendations made by ICF Consulting, a group which conducted a study in 2004 of

⁴²*Id.*

⁴³*Id.*

⁴⁴*Id.*

⁴⁵See BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2006 app. for Department of Housing and Urban Development 528 (2005).

⁴⁶*Id.*

⁴⁷NHLP, *Section 8 Narrowly Escapes Funding Cuts in 2005 HUD Budget*, 35 HOUS. L. BULL. 1, 3 (2005).

⁴⁸BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2006 app. for Department of Housing and Urban Development 530 (2005) (HUD appendix).

⁴⁹NHLP, *Section 8 Narrowly Escapes Funding Cuts in 2005 HUD Budget*, 35 HOUS. L. BULL. 1, 3 (2005).

⁵⁰*Id.*

⁵¹See Press Release, Housing Assistance Council, 2006 Budget Overlooks Serious Housing Needs, Says Housing Assistance Council (Feb. 7, 2005), available at <http://www.ruralhome.org/pressreleasesview.php?id=150>.

⁵²See BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2006 app. for Department of Agriculture 141 (2005), available at <http://www.whitehouse.gov/omb/budget/fy2006/appendix.html>.

⁵³*Id.*

the capital and operating needs of the Section 515 stock for the agency.⁵⁴ The study recommended that owners be given the unrestricted right to prepay and withdraw from the program. This worries many housing advocates since permitting pre-payment will mean the loss of these units permanently. The study and the budget request also presume that only 10% of all qualifying owners (those who entered into loan agreements prior to 1989) will seek to prepay, which would equal the displacement of 46,000 tenants.⁵⁵ Housing advocates believe that this presumption is an overly conservative figure which is entirely unsupported by any data. The \$214 million request by the administration is to establish a tenant protection program.⁵⁶ The administration also intends to seek an amendment to current law in order to allow the number of vouchers issued to exceed 5,000 and allow the vouchers to be used in places other than 515 projects.⁵⁷

Under the Rural Housing Insurance Fund Program Account, the president requests \$4.681 billion of which amount the Section 502 Single Family Direct loan program would receive \$1 billion, a reduction from the \$1.15 billion the program received in 2005.⁵⁸ Consistent with the president's focus on home ownership, certain other rural programs under this account would receive significant increases. For example, the Section 502 Single Family Guaranteed loan program would receive \$3.68 billion compared with only \$3.3 billion in 2005.⁵⁹ While guaranteed loans are helpful to rural homebuyers, this program cannot and should not replace the direct loan program. The Section 538 Rental Housing Guaranteed loan program, which tends to benefit tenants with incomes above those of most Section 515 tenants,⁶⁰ would receive a 100% increase with \$200 million compared with only \$100 million in 2005.⁶¹

Also on a positive note, the Rural Rental Housing's Section 521 Rental Assistance program, which helps keep tenant rents below 30% of the AMI through subsidies, would receive an increase in the president's 2006 budget with \$650 million compared to \$592 million in 2005.⁶² Under the president's plan, Farm Labor Housing Grants (the Section 516 program) would be cut from \$34 million in 2005 to \$32.7 million in 2006.⁶³

NHLP will continue to report developments related to the federal housing budget as they occur. ■

⁵⁴*Id.* at 137.

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷*Id.*

⁵⁸*Id.*; see also Housing Assistance Council, *FY 2006 Budget Proposes Drastic Cuts*, at http://www.ruralhome.org/infoAnnouncements_proposedbudget_2006.php (Feb. 7, 2005).

⁵⁹See BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2006 app. for Department of Agriculture 139 (2005), available at <http://www.whitehouse.gov/omb/budget/fy2006/appendix.html>.

⁶⁰See USDA, Rural Development, South Dakota, *Fact Sheet: Section 538 Rural Rental Housing Guaranteed Loans*, at http://www.rurdev.usda.gov/sd/section_538_rural_rental_housing_guaranteed_loans.htm (undated).

⁶¹BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2006 app. for Department of Agriculture 139 (2005), available at <http://www.whitehouse.gov/omb/budget/fy2006/appendix.html>.

⁶²See Housing Assistance Council, *FY 2006 Budget Proposes Drastic Cuts*, at http://www.ruralhome.org/infoAnnouncements_proposedbudget_2006.php (Feb. 7, 2005).

⁶³BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2006 app. for Department of Agriculture 135 (2005), available at <http://www.whitehouse.gov/omb/budget/fy2006/appendix.html>.

Chart: Proposed FY 2006 HUD Budget

HUD Program (set-asides indented)	FY04 Enacted (in millions)	FY05* Enacted (in millions)	FY06 Request (in millions)
Tenant-based rental assistance	14,186	14,766	15,845
Project-based rental assistance	4,792	5,298	5,072
Public Housing Capital Fund	2,695	2,579	2,327
Resident Opportunity & Self Sufficiency	55	52.5	24
Public Housing Operating Fund	3,579	2,438	3,407
HOPE VI	149	143	0
Native American Housing Block Grants	650	621	583
Elderly Housing (Section 202)	774	741	741
Disabled Housing (Section 811)	249	238	120
HOME Investment Partnership Program	2,006	1,900	1,941
HOME formula grants	1,859	1,789	1,730
American Dream Downpayment Assistance	87	50	200
Housing Counseling Assistance	40	42	40
Community Development Block Grants	4,921	4,671	0
Self-Help Homeownership Opportunity	27	25	30
Youthbuild	65	62	0
Economic Development Initiative	276	262	0
Native Hawaiian Housing Block Grant	9	9	9
Homeless Assistance Grants	1,260	1,240	1,440
Housing for Persons with AIDS	295	281	268
Rural Housing and Economic Development	25	24	0
Empowerment Zones/Enterprise Communities	15	10	0
Brownfields Redevelopment	25	24	0
Fair Housing Assistance Program	28	26	16
Fair Housing Initiatives Program	20	20	16
Lead-Based Paint Hazard Reduction	174	167	119
Salaries and Expenses	1,116	1,030	1,153
Homeland Security – Emergency Food and Shelter Grants	153	151	153
USDA – Section 515	116.5	99	27
USDA – Rural Rental Assistance	584	587	650
USDA – Housing Preservation Grants	10	9	10
USDA – Housing Preservation Demonstration	0	3	0
Treasury – CDFI	61	54	8
Commerce – Strengthening America’s Communities Grant Program (includes CDBG and 18 other grant programs)	N/A	N/A	3,710
Community Services Block Grant	642	631	0

*FY2005 numbers reflect an across-the-board cut of 0.8%.

Source: National Low Income Housing Coalition

Court Enforces One-for-One Replacement in Public Housing Settlement Agreement

On January 21, 2005, Legal Services of New Jersey successfully obtained an order from a federal district court in New Jersey that prohibits the Newark Housing Authority (NHA) from counting homeownership units as replacement units for units in two Newark developments that the agency previously demolished.¹ The decision followed the Newark Coalition for Low Income Housing's (NCLIH) letter brief, which sought to enforce regulations and the settlement agreements between the plaintiffs, NHA and the Department of Housing and Urban Development (HUD).²

Brief Background of the Case

In 1989, public housing residents, public housing applicants, homeless persons and the Newark Coalition for Low Income Housing filed suit against NHA and HUD to, among other things, prevent NHA from demolishing over 1,800 public housing units without providing one-for-one replacement units.³ NHA's HUD-approved demolition plans came about in the face of an increasing homeless population and a public housing waiting list of over 13,000 persons.⁴ Later during 1989, the parties entered into a settlement agreement that provided for certification of a plaintiff class including: (1) occupants of Kretchmer Homes between April 1, 1985, and the date of court-approved agreement; (2) occupants of Columbus Homes between June 1, 1988, and the date of court approval; and (3) individuals or families who applied to NHA for admission as of the agreement date and were on NHA's waiting list for public housing at any time after April 1, 1985.⁵

The settlement agreement, as amended in 1995, 1996 and 1999,⁶ included a number of immediate and long-

range components and set a framework for addressing public housing developments that were in desperate need of repair and rehabilitation.⁷ Significantly, the agreement stopped demolition of all NHA projects except Columbus Homes (1,506 units) and certain units in Kretchmer Homes (372 units).⁸ For Columbus Homes, demolition was to be coordinated with the development of one-for-one replacement units plus an additional 271 units.⁹ At least 300 of the replacement units were to be built at Columbus Homes' site.¹⁰ Original provisions, regarding Kretchmer Homes, were less concrete but included a one-year waiting period before demolition and \$600,000 of HUD funds for repair and rehabilitation of the development's buildings that were not slated for demolition.¹¹ Additional provisions included a HUD-funded study, an NHA modernization plan as well as prospective policy requirements.¹²

Newark Housing Authority's HUD-approved demolition plans came about in the face of an increasing homeless population and a public housing waiting list of over 13,000 persons.

Schedule C of the 1999 amendment detailed deadlines for completion of the 1,777 new units that were to replace those lost at Columbus Homes.¹³ The 1999 schedule showed that Mount Pleasant Estates, a forty-two-unit townhouse complex, had already been completed.¹⁴ However in October 2000, NHA submitted an application to HUD seeking permission to sell Mount Pleasant Estates units through the HUD homeownership program.¹⁵ HUD approved the application the following year.¹⁶ Sale of the units was open to not only the existing occupants, but other NHA tenants or Section 8 voucher recipients who could afford to purchase.¹⁷ With unit appraisals between \$80,000

¹Newark Coalition for Low Income Hous. v. Newark Redev. & Hous. Auth., No. 89-1303 (D.N.J. Jan. 21, 2005) (unpublished order granting plaintiffs' motion to order compliance with settlement agreements). The plaintiff-coalition is represented by Jon Dubin and Harris David of Legal Services of New Jersey.

²*Id.*

³*Id.* at 2; NHLP, *Newark Demolition Case Settled*, 19 HOUS. L. BULL. 73, 91 (1989).

⁴NHLP, *Newark Demolition Case Settled*, 19 HOUS. L. BULL. 73, 92 (1989).

⁵*Newark Coalition*, slip op. at 2-3.

⁶*Id.* at 3.

⁷NHLP, *Newark Demolition Case Settled*, 19 HOUS. L. BULL. 73, 92 (1989).

⁸*Id.*

⁹*Id.*

¹⁰*Id.*

¹¹*Id.*

¹²*Id.*

¹³*Newark Coalition*, slip op. at 3.

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.* at 4.

to \$90,000 and sale prices at 60% of these appraised values, the program would exclude many, if not most, tenants.¹⁸ At a November 12, 2004, hearing, plaintiffs objected to the sales of Mount Pleasant Estates units that had already taken place and those that were pending.¹⁹

Regulatory and Statutory Amendments

HUD has addressed the one-for-one requirement in various ways over the years. Prior to 1998, HUD approval of public housing authorities' use of homeownership plans were conditioned upon their abilities to obtain funding commitments from HUD or other sources for the replacement of each unit that was to be sold under the plan.²⁰ Replacement housing could be provided by way of a number of methods, including development of additional public housing through new construction or acquisition by the housing authority, or rehabilitation of vacant housing within the housing authorities stock.²¹

In 1998, Congress permanently repealed the public housing one-for-one replacement requirement through the passage of the Quality Housing and Work Responsibility Act of 1998 (QHWRA).²² Although HUD proposed a new regulation to reflect this change in September 1999,²³ HUD guidance directed the agency to continue administration of the homeownership program under the pre-1999 regulations until the proposed rule was made final.²⁴ The provision that included the one-for-one replacement requirement was retained in the 2002 regulations. HUD finalized the 1999 proposed rule in 2003.²⁵ Although the final rule (which is still current) omits the original one-for-one replacement language, it states that "[a]n existing section 5(h) or Turnkey III homeownership program continues to be governed by the requirements of part 906 or part 904 of this title, respectively, contained in the April 1, 2002, edition of 24 C.F.R., parts 700 to 1699. . . ."²⁶

¹⁸*Id.*

¹⁹*Id.* at 6.

²⁰24 C.F.R. § 906.16(a) (1997) (Replacement Housing).

²¹*Id.*

²²Quality Housing and Work Responsibility Act of 1998 Pub. L. No. 105-276, tit. V, § 536, 112 Stat. 2586 (1998)(effective Oct. 1, 1999) (codified at 42 U.S.C.A. § 1437z-4 (West, WESTLAW through P.L. 108-498 (excluding P.L. 108-447, 108-458) approved 12-23-04)).

²³Public Housing Homeownership Programs, Proposed Rule, 64 Fed. Reg. 49,931 (Sept. 14, 1999).

²⁴*Newark Coalition*, slip op. at 5 (noting that agency guidance was provided December 22, 1999).

²⁵24 C.F.R. § 906.16(a) (2002) (Replacement Housing).

²⁶Public Housing Homeownership Programs, Final Rule, 68 Fed. Reg. 11,713, 11,722 (March 11, 2003), codified at 24 C.F.R. § 906.3(a) (Requirements Applicable to Homeownership Programs Previously Approved by HUD) (2004).

Plaintiffs' Arguments

The Newark Coalition for Low Income Housing argued that NHA's actions: (1) breach the 1989 settlement agreement (as amended)²⁷ and (2) violate HUD regulations that require a one-for one replacement plan.²⁸ Arguing under case law that requires settlement agreements to be construed as contracts, the coalition first argued that the counting of the Mount Pleasant Estates' units would reduce the 1,777 public housing unit replacement requirement that is contained in the agreement.²⁹ Its second and most fundamental argument stated that the demolished units were "unquestionably *public* housing units" that were only available to low-income families and remained both public and only available to low-income families for the entirety of their existence.³⁰ Its final two arguments, under the settlement agreement, spoke to the purpose of the agreement and its surrounding circumstances.³¹ Both pointed to the need to "provide housing for as many low-income families as possible with the limited resources available for such housing in the city of Newark."³²

The plaintiffs also argued that the agency violated its own regulations because NHA applied and was approved for a homeownership program without including a one-for-one replacement plan in its application at a time when HUD regulations required such, as they continue to require.³³ The plaintiffs concluded their brief by stating the relief that they sought.³⁴ The plaintiffs requested an order:

- requiring compliance with the settlement agreements;
- barring the counting of homeownership units;
- requiring a one-for-one replacement for each of the twenty-six units that have been sold or are currently under a contract for purchase; and
- barring any further homeownership sales activity at the Mount Pleasant Estates or at any other of the 1,777 public housing units that comprise the replacement plan under the settlement agreements.³⁵

²⁷Letter Brief from Jon C. Durbin and Harris David, Legal Services of New Jersey (on behalf of the Newark Coalition for Low Income Housing), to the Honorable Dickinson Debevoise, Jr., United States District Judge 3 (Dec. 23, 2004) (on file with NHLP).

²⁸*Id.* at 7.

²⁹*Id.* at 4.

³⁰*Id.* at 4 (emphasis in original).

³¹*Id.* at 4-5.

³²*Id.*

³³*Id.* at 9.

³⁴*Id.* at 10.

³⁵*Id.*

Defendants' Arguments

HUD's arguments primarily focused on the settlement agreement without fully addressing its regulatory provisions. HUD argued that the homeownership program does not violate the settlement agreement because the agreement fails to expressly prohibit the homeownership program.³⁶ Absent an express prohibition, HUD argued that NHA should retain its discretion to propose a homeownership program pursuant to authorizing statutes.³⁷ In anticipating arguments from the plaintiffs, the government argued that settlement agreements do not have "a purpose," such as to provide low-income housing.³⁸ HUD then concluded that NHA received HUD approval of the program and that the homeownership program has many benefits to the participants and is relatively small considering the size of the NHA.³⁹

The opinion states that, "[i]t is inconceivable that units that could be removed from the public housing stock and sold into private hands could qualify as 'replacement units.'"

Similar to the government's approach, NHA's letter brief stopped short of fully attempting to address HUD's approval of its plan in light of the agency's regulatory provisions. NHA argued that a ruling disallowing the counting of Mount Pleasant Estates units would reach beyond the settlement agreements and contradict QHWRA and agency policies.⁴⁰ It went on to say that HUD policy is to promote homeownership and that repeal of the replacement requirement serves as incentive for housing authorities to help further this policy.⁴¹ NHA also argued that the settlement agreement did not require replacement of homeownership units with new construction.⁴²

³⁶Brief of the United States Dept. of Housing and Urban Development Regarding the NHA's Homeownership Plan by Neil R. Gallagher, Assistant United States Attorney 4 (filed Dec. 23, 2004) (on file with NHLP).

³⁷*Id.* at 4.

³⁸*Id.* at 5.

³⁹*Id.* at 6.

⁴⁰Letter Brief from Oliver Lofton, General Counsel, Housing Authority of the City of Newark, to the Honorable Dickinson R. Debevoise, United States District Judge 3 (Dec. 29, 2004) (on file with NHLP).

⁴¹*Id.*

⁴²*Id.*

The Court's Decision

Without deciding the issue of whether NHA's actions violated applicable statutes or regulations, the court determined that NHA's obligation under the settlement agreement precluded it from counting the sales of Mount Pleasant Estates' units as replacement housing.⁴³ The court's opinion focused on the settlement agreement's repeated descriptions of "replacement" housing units and the recitation about the desperate need for low-income housing in Newark.⁴⁴ These factors overcame the fact that the agreement does not expressly prohibit the use of a homeownership plan.⁴⁵ The opinion states that, "[i]t is inconceivable that units that could be removed from the public housing stock and sold into private hands could qualify as 'replacement units.'"⁴⁶ Recognizing that the sale of a number of the Mount Pleasant Estates units were at or near closing, the court ultimately ordered NHA to construct forty-two additional units that will qualify under the agreement.⁴⁷

However, the court also briefly discussed the question of when the elimination of the one-for-one replacement requirement went into effect and whether agency regulations and guidance retained it, after its statutory repeal, when NHA's plan was approved.⁴⁸ After providing the background of the relevant statutory authorities, agency guidance and regulations, including the current regulations, the court commented, "[t]hus it would appear that HUD's February 8, 2001 approval of NHA's Homeownership Plan, which did not contain a one-for-one replacement provision, was not in accordance with HUD's administrative guidance and regulations."⁴⁹ The court went on to note HUD's inability to reconcile the fact that HUD guidance and regulations require one-for-one replacement units although the Mount Pleasant Estates homeownership plan failed to include such replacement.⁵⁰

Conclusion

Although the court's decision was based primarily on the language of the settlement agreement, the court's recognition of the conflict between HUD guidance and regulations regarding one-for-one replacement and the agency's actual practices may be cited by advocates to support similar claims in other cases in the future. ■

⁴³*Newark Coalition*, slip op. at 2.

⁴⁴*Id.* at 7.

⁴⁵*Id.*

⁴⁶*Id.* at 8.

⁴⁷*Id.* at 9.

⁴⁸*Id.* at 6.

⁴⁹*Id.* at 5.

⁵⁰*Id.* at 6.

New RHS Multi-Family Housing Regulations and Handbooks

New regulations governing the Rural Housing Service (RHS) Rural Rental Housing (Section 515) and Farm Labor Housing (Section 514/516) programs went into effect on February 24, 2005. The regulations, which were published as interim final rules with a request for comments on November 26, 2004,¹ replace multiple sets of separate regulations that previously governed most aspects of these programs, including loan making, operations, servicing and prepayment. Because one of the RHS objectives in publishing the regulations was to streamline and reduce the volume of regulations that are published in the *Code of Federal Regulations* (CFR), the new regulations are much shorter than the regulations they replaced and are accompanied by three handbooks that detail many of the issues that are only covered more generally in the regulations. The handbooks are available on the RHS Web site.²

The new regulations establish few if any new rights for residents of and applicants to RHS housing. For the most part, they reorganize, omit or generalize preexisting rights. Therefore, this article critically reviews some of the changes instituted by the new regulations that are applicable to residents of and applicants to RHS multifamily housing. It is by no means a detailed discussion of the regulations. Because the new RHS handbooks now clarify the RHS regulations, this article begins with a brief discussion of the legal status of the RHS handbooks and residents' and applicants' capacity to enforce them.

The RHS Multi-Family Handbooks

RHS, unlike the Department of Housing and Urban Development (HUD), has historically not relied on separate handbooks to supplement its regulations. The one notable exception was the RHS Multiple Housing Management Handbook,³ which the agency incorporated into its multiple housing regulations as an exhibit, thus allowing residents to enforce its provisions against both RHS and landlords.

In the 1990s RHS began to author handbooks to supplement its regulations for the single family home loan programs.

It did so in order to reduce the volume of regulations that were published in the CFR and enable the agency to make changes in program operations, particularly internal agency procedure, without having to go through the prior notice and comment procedures mandated by the Administrative Procedure Act. With respect to the single family home loan programs, RHS' publication of handbooks that elaborated on or substituted for preexisting regulations was not a major issue. This is because the single family home loan programs are administered by RHS and most of the regulations simply clarify or elaborate on agency staff obligations. Significantly, although handbooks are not typically considered to have the force and effect of law, at least some courts have allowed for the enforcement of handbook provisions against the agency that publishes them.⁴

The new regulations establish few if any new rights for residents of and applicants to RHS housing. For the most part, they reorganize, omit or generalize preexisting rights.

The publication of the multi-family housing handbooks present different circumstances. While multi-family housing loans, which finance housing constructed under the programs, are administered by RHS, the housing developments themselves are managed and administered by borrower-landlords. And, agency handbooks are not always enforceable by residents against landlords because they were not published in the *Federal Register* and subjected to the notice and comment rule-making process. Hence, ideally, the RHS regulations and handbooks should have been drafted very carefully to ensure that all provisions that are intended to confer rights on residents or obligations on landlords are included in the regulations, and that only clarifications or supplemental information should be included in the handbooks.

Unfortunately, either RHS staff or the consultants that they used in drafting the handbooks were not fully aware of the legal distinctions between handbooks and regulations or did not intend to confer enforceable rights on residents. Consequently, in many instances provisions that heretofore had been included in RHS regulations are no longer in the regulations and are instead only in the handbooks.

¹Reinvention of the Sections 514, 515, 516 and 521 Multi-Family Housing Programs, Interim Rule, 69 Fed. Reg. 69,032 (Nov. 26, 2004). Members of the Housing Justice Network submitted extensive comments to the regulations in January of 2005. Advocates who would like to receive a copy of those comments may request them by e-mailing the National Housing Law Project at nhlp@nhlp.org.

²<http://www.rurdev.usda.gov/regs/hblist.html>.

³7 C.F.R. pt. 1930, subpt. C, ex. B (2004).

⁴See, e.g., *Brown v. Lynn*, 385 F. Supp 986 (N.D. Ill. 1974), *Estrada v. Hils*, 401 F. Supp. 429 (N.D. Ill. 1975).

For example, RHS residents have previously had an explicit regulatory right to participate in landlord appeals of decisions denying the landlord the right to prepay their loans. That right has been deleted from the regulations and now only appears in one of the RHS handbooks. As a consequence, other provisions that purportedly confer rights on tenants through the RHS handbook may no longer be enforceable against the landlords if the only place that they are enumerated are the RHS handbooks.⁵ This is exacerbated by the fact that RHS can now unilaterally change provisions of its multi-family handbooks without giving prior notice to anyone and without having to consider resident comments.

Provisions that purportedly confer rights on tenants through the RHS handbook may no longer be enforceable against the landlords if the only place that they are enumerated are the RHS handbooks.

Significantly, the RHS regulations do not even require landlords to let residents know that the handbooks exist or to make them readily available for review. The only places they can be accessed is in Rural Development (RD) offices, which may be tens or hundreds of miles from a development, or on the Internet, which is generally not readily available to low- and very low-income households in general and more specifically to persons with disabilities, farmworkers, or the elderly. Thus, residents of RHS housing may not even be able to use the handbooks to persuade their landlords that their practices or procedures are inconsistent with them.

Advocates who are representing residents should consider challenging the RHS regulations whenever substantive resident rights have been omitted from the regulations and only incorporated in the handbooks.⁶ This is particularly true when the tenant right has been omitted from the regulations without justification after RHS received comments on the issue.

Overview

The new RHS regulations provide residents with few, if any, new rights and place few new obligations on landlords with respect to their dealings with residents. This is

because the primary purpose of the new interim regulations was to streamline the prior regulations. One of the ways in which the agency accomplished this objective was to eliminate or reduce detailed provisions of the former regulations and to replace them with shorter and more generalized provisions in the new regulations. In effect, this has resulted in RHS granting landlords greater discretion in the administration of the multi-family housing programs and removing or generalizing tenants' rights.

Moreover, the regulations are frequently poorly drafted and organized, making it difficult to find related provisions. For example, the lease section of the regulations specifies that leases must address the amount and due date of the monthly tenant contribution, any late payment, penalties and security deposit amounts.⁷ The fact that there are limitations on when and how much the landlord may charge for late payments does not appear in the same section of the regulations, but rather in a completely different section dealing with rent collections. There, RHS states that late fees for residents receiving RHS benefits may not be charged until the expiration of a ten-day grace period and that they may not exceed \$10 or 5% of the tenants' gross contribution, whichever is higher. Residents receiving benefits under other programs, such as project-based Section 8 assistance or Vouchers, may be assessed late fees in accordance with those programs' requirements.⁸

Evictions

Under prior regulations, notices of lease violations were required to provide a resident with information describing the nature and frequency of the underlying lease violations so that the resident could understand and correct the problem; provide a specific date by which the residents would be expected to correct the problem; inform residents of their right to informally meet with the borrower to attempt to resolve the problem; and advise the tenant that if he or she did not correct the problem, the landlords might seek to terminate the lease by bringing a judicial action, at which time the tenant may present a defense. If borrowers decided to proceed with an eviction, they were also required to inform the tenant that they could review and copy any information in the tenant's file to aid them in preparing their defense.⁹ The new regulations simply require the landlord to provide the resident

⁵Residents of HUD housing have been successful in enforcing HUD Handbooks against public housing authorities and landlords under a variety of theories. See NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS §16.5.5 (3d ed. 2004).

⁶See *id.*

⁷Reinvention of the Sections 514, 515, 516 and 521 Multi-Family Housing Programs, Interim Rule, 69 Fed. Reg. 69,032 (Nov. 26, 2004) (to be codified at 7 C.F.R. §3560.156(b)(18)) (All citations to the new regulations will omit the *Federal Register* reference).

⁸7 C.F.R. § 3560.209(b).

⁹7 C.F.R. pt. 1930, subpt C, ex. B, ¶ XIV.

with a notice of the violation and an opportunity to correct it.¹⁰ When actually terminating the lease, the new regulations only require that the landlord specify the specific lease or occupancy rules provisions that were violated and the date upon which the lease is terminated.¹¹

Under prior regulations, landlords were also required to send copies of eviction notices to the local RHS office, which was required to review them to ensure that they complied with the RHS regulations.¹² The new regulations have eliminated that requirement. This is unfortunate because under the prior regulations residents were frequently successful in reversing the landlord's actions by contacting RHS staff and persuading them that the notices did not comply with RHS requirements or the matters asserted did not constitute good cause or material violations of the lease. Such opportunities are no longer available under the new regulations and thus will force more residents to challenge their evictions in court.

Significantly, the old regulations required landlords to use state judicial proceedings to undertake evictions.¹³ Indeed, in 1993, the agency relied on this provision to justify its exclusion of evictions from the tenant grievance and appeals process. The new regulations have no such requirement. Arguably, landlords need not use state judicial eviction procedures to remove residents and there is no requirement that the state judicial procedure meet minimum due process requirements as established by statute.¹⁴

Tenant Eligibility Requirements

As originally published in the *Federal Register*, the new RHS regulations require that residents of RHS rental housing be citizens or persons admitted for permanent residency. The implementation of those provisions has been delayed by a notice published in the *Federal Register* on February 22, 2005.¹⁵ A more complete discussion of these requirements and RHS postponement of their implementation appears in the February 2005 issue of the *Bulletin*.¹⁶

¹⁰7 C.F.R. § 3560.159(a).

¹¹*Id.* §3560.159(b).

¹²7 C.F.R. Part 1930, Subpart C, Ex. B, ¶ XIV (2004). It should be noted that under Department of Agriculture reorganization, RHS no longer has any field offices. All of its programs are now administered by Rural Development field staff.

¹³7 C.F.R. Part 1930, Subpart C, Ex. B, ¶ XIV (2004).

¹⁴*See* 42 U.S.C. § 1480(g) (2003).

¹⁵Reinvention of the Sections 514, 515, 516 and 521 Multi-Family Housing Programs, Interim Final Rule, Delay of Effective Date, 70 Fed. Reg. 8503 (Feb. 22, 2005).

¹⁶NHLP, *Implementation of Citizenship or Permanent Residency Requirement for Rural Rental Housing Program Delayed*, 35 HOUS. L. BULL 33 (2005).

RHS Leases

The new regulations no longer authorize Rural Development (RD) state offices to draft model leases that conform to RHS regulations and state law. Instead, the task of drafting leases is now left to borrowers and their attorneys, who must certify that the lease complies with RHS regulations and state and local law.¹⁷ Unfortunately, practitioners have found that such certifications are frequently erroneous. Moreover, because, with few exceptions, leases are drafted by landlord attorneys within general and broad guidelines, they tend to favor the landlords and disfavor residents.

Moreover, specific provisions that previously were required to be included in the regulations to protect residents against arbitrary landlord actions have been omitted from the new regulations. Most significant is a provision regarding guests and their possible consideration as household members, a frequently litigated issue. Under the old regulations, residents were specifically authorized to have guests in their units for at least two weeks without their being considered household members. Moreover, while landlords were authorized to question the status of guests who stayed more than two weeks, the old regulations prescribed that the status of the guest must be determined based on the guest's place of domicile.¹⁸ The new regulations delete all of these provisions and simply require the landlord to specify when a guest will be considered a household member.¹⁹

Specific provisions that previously were required to be included in the regulations to protect residents against arbitrary landlord actions have been omitted from the new regulations.

In developments that are assisted by the HUD project-based Section 8 or voucher programs, the regulations authorize the landlords to use a standard HUD approved lease, a HUD approved leased with modifications—presumably to accommodate RHS requirements—or an RD approved lease if it is acceptable to HUD or the local housing authority.²⁰ The regulations also state that when HUD model leases are used, their provisions will prevail unless they conflict with RHS lease requirements, in which case the provision most favorable to the resident will prevail.²¹

¹⁷7 C.F.R. § 3560.156.

¹⁸*Id.* at pt. 1930, subpt. C, ex. B, ¶ VII, G, 9(2204).

¹⁹*Id.* at § 3560.156(c)(8).

²⁰*Id.* at § 3560.156 (e)(2).

²¹*Id.*

Unfortunately, because RHS does not require landlords to add an addendum to the HUD approved leases that discusses the RHS requirements or even advises residents of how conflicts are to be resolved, the regulatory provision is effectively meaningless because most residents will simply not know of its existence.

The interim regulations also fail to include a discussion of the civil rights implications of denying housing to or evicting a victim of domestic violence.

Tenant Grievance and Appeals Process

The new regulations establish a requirement that all applicant or tenant appeals must be presented in writing.²² This requirement is contrary to the Fair Housing Act and Section 504 of the Rehabilitation Act of 1973 in that it fails to take into consideration a tenant's need for reasonable accommodation or alternative formats of communication. Moreover, this section appears to violate Title VI's requirements that both oral and written translation be provided to tenants in order to ensure fair and equal treatment of those populations with limited English proficiency.

The new regulations also maintain an inconsistency with respect to landlords' and residents' right to confront witnesses at grievance hearings. Section 3560.160(h) grants landlords the right to confront all resident witnesses but does not grant residents the same right with respect to landlord witnesses. For basic due process considerations, the rights of a party at a hearing should be identical to any other party.

The new regulations are also inconsistent with respect to the time by which a resident must request a grievance and appeal hearing after receiving a landlord notice of adverse action. One section requires landlords to advise residents that they have a right to respond to the notice within ten calendar days after date of the notice²³ while another section provides that the tenant must communicate any response to a notice within ten calendar days after receipt of the notice.²⁴

Prior RHS regulations required hearing officers to be "impartial and disinterested."²⁵ The new regulations have no similar provision.

²²*Id.* at § 3560.160(f)(1).

²³*Id.* at §3560.160(e).

²⁴*Id.* at 3560.160(f)(1).

²⁵*Id.* at pt. 1944.556.

Civil Rights

In several instances, the interim regulations are superficial and incomplete with respect to civil rights obligations designed to protect applicants to and residents of RHS housing. For example, the RHS restatement of Section 504 of the Rehabilitation Act of 1973 is an incomplete statement of the law²⁶ in that it only addresses borrowers' intentional acts. It omits to clarify that facially neutral rules, regulations or policies may in fact violate the civil rights laws where there is an adverse impact upon a protected class household. It also fails to inform landlords and residents that it is illegal to retaliate or threaten to retaliate against or interfere with anyone asserting their right to be free from housing discrimination, or anyone assisting another in doing so.²⁷

The civil rights sections of the regulations are also insufficient to provide notice of borrowers' obligations and the applicant/recipients' right to receive oral or written translation of notices, leases and other materials. The regulations fail to clearly state that Title VI places an affirmative obligation on landlords to provide written and oral translations for persons of limited English proficiency (LEP). The failure to include a specific description of the borrower's LEP obligations will lead many landlords to believe they do not have an obligation to communicate to applicants in any other language in the absence of a disability. The regulations make no reference to the model LEP guidance developed by the Department of Justice.²⁸

The interim regulations also fail to include a discussion of the civil rights implications of denying housing to or evicting a victim of domestic violence.²⁹ In other words, they fail to inform borrowers that they must distinguish between victims and perpetrators of domestic violence in their applications and evictions screenings. Indeed, some states have adopted laws prohibiting landlords from denying admission to or evicting an individual because of their status as a victim of domestic violence.³⁰

²⁶*Id.* at § 3560.2(a).

²⁷42 U.S.C.A. § 3617 (West 2003).

²⁸*See* Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 18, 2002).

²⁹*See* Alvera v. Creekside Village Apts., HUD ALJ 10-99-0538-8 (1999) (finding that denying housing to a victim of domestic violence has disparate impact on women in violation of prohibition against sex discrimination under the Fair Housing Act).

³⁰*See, e.g.,* RCW 59.18.575 to 580 (Revised Code of Washington State).

Conclusion

The new RHS regulations were published as interim regulations with request for additional comments. It is expected that RHS will revise and finalize the regulations within a reasonable time frame, although it is not known when that may be. In the meantime, advocates are urged to carefully review the RHS regulations and new handbooks, to seek to enforce clear provisions, and to request modification of provisions that have been deleted, generalized or relegated to the RHS handbooks. ■

Oakland's Predatory Lending Ordinance Preempted by California State Law

The Supreme Court of California recently issued a decision that is having a ripple effect across the state. The decision, *American Financial Services Association v. City of Oakland*, concerns the validity of the City of Oakland's predatory lending ordinance. Passed in 2001, Oakland's ordinance represented one of only a handful of local laws in the country addressing predatory practices in home mortgage lending.¹ The court found that California's state predatory mortgage lending law preempts the local ordinance based on an implied intent by the legislature to occupy the subject area completely. For now, this ruling prevents other California cities from pursuing local regulation of predatory mortgage lending practices.

¹Other cities and counties with a predatory mortgage lending law are Chicago, New York City, DeKalb County, Philadelphia, and Sacramento.

Oakland Ordinance and State Law Compared

Several years ago, the City of Oakland recognized that predatory mortgage lending is a significant and growing problem in its jurisdiction. Oakland's woes, in fact, are reflective of a national phenomenon whereby vulnerable populations are targeted for unscrupulous or abusive mortgage lending practices. Studies over the past decade have shown that the elderly, people of color, women and immigrants are among those most affected. Despite critically important federal consumer protection laws, such as the Truth in Lending Act, Equal Credit Opportunity Act, and Real Estate Settlement Procedures Act, abusive mortgage lending practices are multiplying at a terrible cost to the public. Oakland took a proactive stance by gathering information about how these problems manifest in local neighborhoods and adopting a local ordinance to protect Oakland consumers against certain mortgage lending abuses.²

Within days of the Oakland ordinance's enactment, the State of California enacted its own predatory mortgage lending law.³ The state law is considerably weaker than the Oakland ordinance. For example, thresholds triggering state law protections are set higher; the state's interest rate threshold is 8 points over comparable Treasury securities and its points and fees trigger level is 6 points over.⁴ A further limitation of the state law's reach is in its failure to cover loans greater than \$250,000. In other words, a predatory mortgage loan of \$250,000 or more is not regulated by the state's predatory mortgage law. In such high-cost areas as the Bay Area, most mortgage loans are not covered, therefore, by this state law.

Oakland's ordinance, on the other hand, set the trigger on interest rate at 4-6 points above comparable Treasury securities; its points and fees trigger level was set at 5 points over. Oakland's ordinance also set a more expansive total loan amount threshold that included far more loans under its protections. Oakland's ordinance took a much tougher stance than the state law by completely banning pre-payment penalties on loans falling under its protection. That provision constituted a tremendous boon for consumers by permitting those who had fallen prey to a predatory mortgage to refinance out of that loan without having to pay an often prohibitively large penalty fee to the lender. The Oakland ordinance's requirement that consumers seeking a covered loan first receive face-to-face counseling was also in sharp contrast to the state law.

²OAKLAND MUNICIPAL ORDINANCE ch. 5.33 (2001).

³CAL. FIN. CODE §§ 4970 *et seq.* (2001); *See also* Assembly Bill No. 489 (2001-2002 Reg. Sess.) (2001).

⁴CAL. FIN. CODE § 4970(b)(1) (2001).

Such counseling has been proven to be an effective tool in helping borrowers protect themselves against abuses. Another key provision of the Oakland ordinance was its imposition of liability on purchasers of predatory loans covered by the ordinance; this provision does not exist in the state's law.

Industry Challenge to Oakland Ordinance and the State Supreme Court's Decision

Shortly after enactment of Oakland's ordinance, an association of lenders, the American Financial Services Association (AFSA), filed suit to prevent implementation. AFSA argued that California's weaker predatory lending law preempted Oakland's stronger, more consumer-friendly predatory lending ordinance. At the trial level, the court found that the ordinance was not preempted, except as to the exemption it made for federal lenders. The Court of Appeals for the First Appellate District ruled that there was no preemption of the ordinance whatsoever, either as to its federal bank exemption or due to the enactment of a California predatory lending law. AFSA then appealed the court's decision to the Supreme Court of California, which reversed the Court of Appeals decision, concluding that Oakland's ordinance was preempted based on California's predatory lending law.

The state supreme court's preemption analysis began with a comparison of the Oakland and California state predatory lending laws. While noting differences between the ordinance and state law, the court concluded that they are similar in their regulation of the same subject area, i.e. predatory mortgage lending practices.

The court examined preemption arguments one by one, beginning with the power of charter cities like Oakland to "adopt and enforce ordinances that conflict with general state laws, provided the subject of the regulation is a 'municipal affair' rather than one of 'statewide concern'".⁵ As the City of Oakland had apparently conceded that regulation of predatory mortgage practices is a matter of statewide concern, the local ordinance could only stand if it was not in conflict with the state's law. The state supreme court concluded that Oakland's predatory lending ordinance does, indeed, conflict with state law by setting tighter parameters around lending practices than the state. Echoing the AFSA argument, the court found that these tighter parameters would result in reduced mortgage lending in the state, which would clearly conflict with the state's homeownership goals. The court quoted from a Department

of Real Estate (DRE) comment to the state's predatory lending law, in which the DRE stated that "[s]evere regulation of subprime lending might cause lenders to cease making such loans in California, or preclude borrowers from obtaining a loan based on equity in their home even though such loans can serve a legitimate need."⁶ The court stated further that increased regulation would increase costs and further limit the availability of subprime loans.

AFSA then appealed the court's decision to the Supreme Court of California, which reversed the Court of Appeals decision, concluding that Oakland's ordinance was preempted based on California's predatory lending law.

Unfortunately, the court's opinion adopts financial services industry arguments that are still merely speculative. In North Carolina, where the financial services industry insisted that that state's tough predatory lending law would hamper consumers' access to home loans, quite the opposite appears to have occurred. Subprime *refinance* originations (where most abuses occur) dropped from 1999-2000, while subprime *purchase* originations increased. Consumers, thus, had increased access to subprime loans to become homeowners while fewer potentially abusive refinance loans were available.⁷ While the industry disputes the methodology behind these findings, other studies by the Center for Responsible Lending highlight the flaws in financial services industry analyses of this issue. It is apparent that, at best, the industry's claim that strong regulation of subprime lending will reduce access to needed capital is misleading. Nevertheless, the court in its evaluation of the Oakland ordinance was clearly swayed by this particular industry argument.

Especially important to the court's reasoning about the preemption of the Oakland ordinance was its inference of an intention by the state to completely "occupy the field" of predatory lending regulation in mortgage lending.⁸ The factor that seemed to carry particular weight

⁶*Id.* at 1257-1258.

⁷ROBERTO QUERCIA, MICHAEL STEGMAN & WALTER DAVIS, CENTER FOR RESPONSIBLE LENDING, THE IMPACT OF NORTH CAROLINA'S ANTI-PREDATORY LENDING LAW: A DESCRIPTIVE ASSESSMENT 2 (2003). See also Keith Harvey & Peter Nigro, *Do Predatory Lending Laws Influence Mortgage Lending? An Analysis of the North Carolina Predatory Lending Law*, J. REAL EST. FIN. & ECON., vol. 29, issue 4 (2002).

⁸Am. Fin. Services Assoc. v. City of Oakland, 34 Cal. 4th 1239, 1251-1252 (Cal. 2005) (George, C.J., Kennard, J., Moreno, J., dissenting) (citing Tolman v. Underhill, 39 Cal. 2d 708,712 (1952)).

⁵Am. Fin. Services Assoc. v. City of Oakland, 34 Cal. 4th 1239, 1251-1252 (Cal. 2005) (George, C.J., Kennard, J., Moreno, J., dissenting) (citing Sherwin-Williams Co. v. City of Los Angeles, 4 Cal. 4th 893, 897 (1993)).

with the court in its analysis of the state's intent is that regulation of mortgage lenders has historically occurred at the state rather than municipal level. "In determining whether the Legislature intended to occupy the field of regulation of predatory home mortgage lending, we consider this historical role, and view Division 1.6 [the state's predatory mortgage lending law] not in isolation, but as part of an overall legislative scheme addressing mortgage lending."⁹

Perhaps what is most troubling about the court's analysis is that it appears to be grounded in assumptions towards how financial markets ought to be regulated rather than simply an analysis of the legislative history of the state law, or other factors properly within the court's scope of review. The court concluded that regulation of mortgage lending requires uniform treatment throughout the state. The court based this conclusion on its view that the state's housing market is "one of its most critical." The court also cited to the manner in which mortgage dollars are generated through securitization (the purchasing of mortgages on the national level), finding that "[c]ommercial reality today would confound any effective regulation of mortgage lending based on potentially hundreds of competing and inconsistent measures at the local level."¹⁰

Oakland's ordinance, by the court's analysis, "is not supplementary legislation that in other contexts might be allowed, but a line item veto of those policy decisions by the Legislature with which the City disagrees."¹¹ Citing once again to an AFSA argument that to have different, stricter regulation at the local level could stop the flow of capital into California for subprime mortgages, the court found that Oakland's ordinance would impede execution of the state law.¹² The fact that Oakland may experience a larger amount of subprime lending and predatory mortgage lending tactics did not justify the city's intrusion into a state regulated arena.¹³ The court found that the state had already created what it believed to be the optimal balance between regulation and freedom to transact business, and that to permit Oakland's ordinance to stand would substitute the City of Oakland's judgment for that of the state.¹⁴

With regard to whether or not the state intended to preempt all local laws, the state supreme court disagreed with the court of appeal's conclusion that legislative silence

on preemption implies no intent to preempt. Rather, such factors as the history behind the law and history of regulation in the area should be part of the consideration. After recounting at length its understanding of whether and to what extent express preemption was or was not discussed as part of the negotiations surrounding the state's proposed predatory mortgage lending law, the court found no evidence in the legislative history to indicate that the legislature consciously omitted express preemption language from the state law.¹⁵

Perhaps what is most troubling about the court's analysis is that it appears to be grounded in assumptions towards how financial markets ought to be regulated.

Last, but not least, the court did not rule on several other AFSA arguments—specifically on the issue of whether there is preemption because of duplication and contradiction of the state law by the Oakland ordinance, and whether the ordinance is preempted by Civil Code Section 1916.12.

California Supreme Court Dissent

In a strongly worded sixteen-page dissent, Chief Justice George and Justices Kennard and Moreno stated that, contrary to the opinion of the majority, the legislative history shows that the California legislature did consciously consider and decide against including express preemption language to the state's predatory lending law.¹⁶ The justices noted that AFSA itself acknowledged discussions between industry and consumer groups regarding preemption, with the "subprime lending industry lobb[ing] vigorously for express preemption language," which, ultimately, was not included in the state's predatory mortgage lending law. In fact, "the party arguing in support of preemption explicitly has admitted that there were insufficient votes in the Legislature to enact the bill with an express preemption provision."¹⁷ In other words, this was not a case of mere

⁹*Id.* at 1255.

¹⁰*Id.* at 1256-1257.

¹¹*Id.* at 1257.

¹²*Id.* at 1258-1259.

¹³*Id.* at 1259.

¹⁴*Id.* at 1258.

¹⁵*Id.* at 1264 n.13.

¹⁶*Id.* at 1265-1266.

¹⁷*Id.* at 1267.

silence on the part of the legislature on this issue. This was a case in which two sides argued for their position, and one side lost—and as a consequence of that loss, preemption language was not included in the final law.

The dissent elaborated further on numerous pieces of legislative history that the majority opinion does not even reference. These additional pieces of history indicate that preemption was, indeed, discussed and argued over at length by the parties involved in the legislative discussions. It was not a peripheral issue. In fact, the dissenting justices noted that “[t]his is a case where passage of the bill hinged on the inclusion or exclusion of the express preemption language,” and, as such, “the majority’s concern about the demise of the doctrine of implied preemption is unwarranted.”¹⁸

The dissent also discussed the history of deference to localities on issues with a “unique local impact.”¹⁹ The justices did not believe that statewide concerns about predatory lending leave no room for local concerns and local regulation of the issue. Oakland’s unique concerns were well-documented, and having differing local standards could be reasonable. Furthermore, had the legislature found that local legislation would subvert the state law, it could have provided expressly for preemption; it chose not to, however.²⁰

Furthermore, had the legislature found that local legislation would subvert the state law, it could have provided expressly for preemption; it chose not to, however.

Regarding the majority’s concern with the fact that no municipality has attempted to regulate mortgage lending in the state’s history, the dissent noted that the court has never “required a locality to provide a historical practice of regulation to establish the validity of a local regulation. Rather, as outlined above, the proper inquiry requires a clear indication of legislative intent and a studied balance between the need for state uniformity and the particular interest of the locality.”²¹ The justices note that local regulation

may be reasonable in light of the recent growth of the subprime mortgage industry and ensuing impact on low-income and minority homeowners and communities. In fact, the justices in their dissent argued that “Oakland’s own interest in preventing predatory lending provides ample justification for that locality’s enactment of stricter and more protective regulations designed to ensure that its residents receive adequate information before saddling themselves with financial obligations that could prove devastating.”²²

Impact on Local Predatory Lending Laws and The Future

Despite the State Supreme Court’s 4-3 split on this case, the decision will have a negative impact on other California cities besides Oakland. Advocates in San Jose had organized for months around the possibility of implementation of a similar local ordinance. The possibility of such an ordinance may have been thwarted. Los Angeles, which had deferred litigation of the industry’s attack on its local ordinance until the Oakland case was decided, must undoubtedly now repeal or sharply modify its local ordinance.

Still, the dissenting voices of the State Supreme Court, led by the Chief Justice, send a message to the subprime lending industry and to consumer advocates that the door is not closed on the issue of local anti-predatory lending legislation. For now, to ensure meaningful protections for consumers, advocates and consumers will be forced by the court’s decision to press for a stronger state law and to make sure that the issue of preemption is explicitly addressed in legislative language.

The financial services industry may well find that its efforts to stop the imposition of regulatory protections at the local level have backfired as cities experiencing the ravages of predatory lending are forced to join forces to strengthen state law. The trend towards state legislation in this arena continues to gain strength nationally, even in the shadow of claimed and/or threatened federal preemption. Fifteen states are considering predatory mortgage lending regulation, while another sixteen states have already adopted regulation. California advocates are beginning to prepare for engagement on the state level once again.²³ ■

¹⁸*Id.* at 1267.

¹⁹*Id.* at 1268 (citing *Fisher v. City of Berkeley*, 37 Cal.3d 644, 707 (1984), and *Gluck v. County of Los Angeles*, 93 Cal. App. 3d 121, 133 (1979)).

²⁰*Id.* at 1272-1274.

²¹*Id.* at 1275.

²²*Id.* at 1275-1276.

²³Advocates interested in participating in statewide advocacy to strengthen California’s predatory mortgage lending law should contact Norma Garcia at Consumer’s Union in San Francisco.



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Recent Cases

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

Equal Credit Opportunity Act; Fair Housing — Source of Income; Housing Choice Voucher Program

Laramore v. Ritchie Realty Mgmt. Co., 397 F.3d 544 (7th Cir. 2005). Plaintiff-Appellant housing choice voucher holder filed suit against Defendant-Appellee management company alleging that Defendant-Appellee's refusal to accept Plaintiff-Appellant's housing choice voucher violated the source of income discrimination restrictions of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691. The federal district court dismissed the complaint pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. Plaintiff-Appellant appealed. The Seventh Circuit affirmed the district court's decision, holding that a residential lease is not a "credit transaction" for the purposes of the ECOA.

Federal Courts — Federal Question Jurisdiction; Housing Choice Voucher Program

Sackett v. Hansen, 2005 WL 425307 (S.D. Iowa Feb. 10, 2005). Plaintiff housing choice voucher holder filed a petition for a writ of certiorari in state court seeking review of Defendant public housing authority (PHA) and PHA director's decision to terminate Plaintiff's voucher assistance based on Plaintiff's alleged failure to cooperate with a random "quality control" inspection. Defendants removed the case to federal district court asserting federal question jurisdiction. In resolving various motions and arguments made by the parties, the federal district court remanded the case to state court pursuant to 28 U.S.C. § 1447(c). The federal district court concluded that the fact

that the Housing Choice Voucher Program was a federal program and that Plaintiff's petition may be based on the Americans with Disabilities Act are an insufficient basis for federal question jurisdiction.

Federal Courts — Federal Question Jurisdiction; Low Income Housing Tax Credit Program

Pendleton Pines Assocs., L.L.C. v. Ledic Mgmt. Co., L.L.C., 354 F. Supp. 2d 775 (W.D. Tenn. 2005). Plaintiff Low-Income Housing Tax Credit (LIHTC) Program property owner filed suit against Defendant property managers based on alleged false representations by Defendant in violation of the Low Income Housing Tax Credit Act (LHCA), 26 U.S.C. § 42, and HUD regulations. Defendants moved to dismiss, *inter alia*, for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure. The federal district court denied the motion, concluding although the LHCA and Department of Housing and Urban Development regulations did not provide Plaintiff a private right of action, various state law claims related to Defendants' alleged misrepresentations "are dependent upon the Court's determination of whether or not Defendants breached their duty under federal law... As such, the federal question is an essential element of the state law allegations." ■

¹<http://www.westlaw.com>.

²<http://www.lexis.com>.

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

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD) and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued in February of 2005. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

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

HUD Federal Register Final Rule

70 Fed. Reg. 8,706 (Feb. 22, 2005) Community Development Block Grant Program; Small Cities and Insular Areas Programs

Summary: This rule makes final a June 10, 2004, interim rule that established regulations to implement a statutory change moving Community Development Block Grant program assistance for insular areas from Section 107 (Special Purpose Grants) to Section 106 (Allocation and Distribution of Funds) of the Housing and Community Development Act of 1974. This final rule adopts the interim rule without change.

Effective Date: March 24, 2005.

HUD Federal Register Proposed Rules

70 Fed. Reg. 8,674 (Feb. 22, 2005) Indian Housing Block Grant Program; Advance Notice of Intent to Establish a Negotiated Rulemaking Committee and Request for Nominations for Committee Membership

Summary: This notice announces HUD's intent to establish a negotiated rulemaking committee. The purpose

of the committee will be to provide advice and recommendations on developing a rule for effectuating changes to the Indian Housing Block Grant Program in response to statutory amendments to the Native American Housing Assistance and Self-Determination Act of 1996.

Comments Due Date: March 24, 2005.

70 Fed. Reg. 9,490 (Feb. 25, 2005) Native American Housing Assistance and Self-Determination Act; Revisions to the Indian Housing Block Grant Program Formula

Summary: This proposed rule would make several revisions to the Indian Housing Block Grant Program allocation formula authorized under Section 302 of the Native American Housing Assistance and Self-Determination Act of 1996.

Comment Due Date: April 26, 2005.

HUD Federal Register Notices

70 Fed. Reg. 6,900 (Feb. 9, 2005) Announcement of Funding Awards for the Rural Housing and Economic Development Program Fiscal Year 2004

Summary: In accordance with Section 102 (a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding decisions made by the Department in a competition for funding under the Notice of Funding Availability for the Rural Housing and Economic Development Program.

70 Fed. Reg. 7,293 (Feb. 11, 2005) Conference Call Meeting of the Manufactured Housing Consensus Committee

Summary: This notice sets forth the schedule and proposed agenda of an upcoming meeting of the Manufactured Housing Consensus Committee to be held via telephone conference.

Dates: The conference call meeting was held on Tuesday, February 22, 2005.

70 Fed. Reg. 8,107 (Feb. 17, 2005) Notice of Proposed Information Collection for Public Comment; Demolition/Disposition Application on Reporting

Summary: HUD will be submitting a proposed information collection to the Office of Management and Budget for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal. The information collection relates to information public housing authorities are required to submit to HUD in order to obtain permission to demolish or dispose of public housing units under Section 18 of the U.S. Housing Act.

Comments Due Date: April 18, 2005.

¹http://www.access.gpo.gov/su_docs.

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

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

⁴<http://www.rdinit.usda.gov/regs>.

70 Fed. Reg. 9,738 (Feb. 28, 2005)
Final Report of HUD Review of the Fair Housing Accessibility Requirements in the 2003 International Building Code

Summary: The purpose of this notice is to present a final report of the Department of Housing and Urban Development's review of certain accessibility provisions of the International Building Code, 2003 edition, published by the International Code Council.

70 Fed. Reg. 9,778 (Feb. 28, 2005)
Fair Market Rents for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program; Fiscal Year 2005

Summary: This notice revises the final FY 2005 Fair Market Rents that were published on October 1, 2004, for a limited number of areas.

Effective date: The FMRs published in this notice are effective February 28, 2005.

HUD PIH Notices

Notice PIH 2005-5 (HA) (February 1, 2005)
New Freedom Initiative, Executive Order 13217: "Community-Based Alternatives for Individuals with Disabilities," and the Housing Choice Voucher Program

Summary: This notice explains President Bush's New Freedom Initiative and Executive Order 13217 and provides guidance to public housing agencies and HUD field staff on initiatives that can be implemented to assist families with a person with disabilities (which may include an individual person with disabilities) in their search for housing under the Housing Choice Voucher program. In addition, this notice clarifies issues related to issuance and preservation of certain types of special purpose vouchers for disabled families (where the head, spouse or sole member is a person with disabilities).

Expires: February 28, 2006.

Notice PIH 2005-06 (HA) (February 1, 2005)
Reinstatement-Notice PIH 2003-24 (HA), Procurement of Legal Services by Public Housing Agencies

Summary: This notice reinstates Notice PIH 2003-24 (HA), same subject, for another year until January 31, 2005. The notice expired September 30, 2004.

Expires: February 28, 2006.

Notice PIH 2005-07 (HA) (February 22, 2005)
Rental Integrity Monitoring (RIM) Disallowed Costs and Sanctions Under the Rental Housing Integrity Improvement Project Initiative

Summary: This notice replaces Notice PIH 2003-34 and highlights the importance of timely and accurate income and rent determinations by public housing agencies (PHAs) and the consequences for failure to identify and correct income and rent determination deficiencies.

Over the past year, HUD has worked closely with PHAs nationwide in identifying the root causes of such deficiencies and developing corrective action plans to reduce the level of errors in subsidy calculations through the use of RIM reviews, reviews conducted by the newly established Quality Assurance (QA) teams and other related reviews. This notice addresses: incentives, disallowed costs and collection of excess subsidies paid; sanctions for failure to timely respond to RIM, QA or other related review reports and failure to implement a Corrective Action Plan when required; adjustment of Section 8 Management Assessment Program scores when inconsistent with the findings of RIM, QA or other related reviews; and Self-Assessment Reviews.

Expires: February 28, 2006.

Notice PIH 2005-08 (TDHEs) (February 25, 2005)
Limiting Housing to Indian Families or Tribal Members when using Indian Housing Block Grant (IHBG) Funds

Summary: This notice explains when tribes or tribally designated housing entities may limit housing assistance to Indian families or tribal members. This notice outlines how the requirements are different if only IHBG funds are used or if IHBG funds are leveraged or combined with funds from other sources.

Expires: February 28, 2006.

Notice PIH 2005-9 (HA) (February 25, 2005)
Public Housing Agency Flexibility to Manage the Housing Choice Voucher Program in 2005

Summary: This notice provides guidance on administrative flexibility and actions PHAs may take to reduce costs in the Housing Choice Voucher Program in accordance with the Consolidated Appropriations Act, 2005.

Expires: February 28, 2006.

RHS Federal Register Interim Rule

70 Fed. Reg. 8,503 (Feb. 22, 2005)
Reinvention of the Sections 514, 515, 516 and 521 Multi-Family Housing Programs

Summary: The Rural Housing Service is delaying implementation of selected sections of the interim final rule published on November 26, 2004 (69 FR 69032-69176). The interim final rule contains requirements regarding citizenship eligibility about which the Agency received several comments. The comments suggested that Agency procedures unnecessarily imposed more requirements than those required under the Department of Housing and Urban Development procedures for similar programs. As a result the Agency has decided to delay implementation of the sections listed below in order to harmonize its procedures with HUD under 42 U.S.C. 1436a.

Dates: The effective date for §§ 3560.152(a)(1), 3560.154(a)(7), 3560.156(c)(12), and 3560.254(c)(3) are

delayed indefinitely from February 24, 2005, until the Agency publishes an effective date in a future Federal Register.

RHS Federal Register Notice

70 Fed. Reg. 7,228 (Feb. 11, 2005)

Notice of Funds Availability Inviting Applications for the Rural Community Development Initiative

Summary: The Rural Housing Service is correcting a notice published October 27, 2004. This action is taken to correct the program requirement and eligibility criteria for the location of the low-income rural community office that will be receiving the financial and technical assistance. This correction provides clarification to applicants on how to determine 80% of the median household income for a low-income community location. This correction also extends the application deadline date from January 25, 2005, to February 25, 2005.

RHS Administrative Notices

RD AN No. 4051 (1980-D)(February 28, 2005)

Single Family Housing Guaranteed Loan Program (SFHGLP) Approved Lender Underwriting Guidelines

Summary: The purpose of this Administrative Notice (AN) is to reiterate Agency methodology for evaluating “payment shock” (increase in housing expenses experienced by the borrower). This AN provides underwriting guidance to SFHGLP lenders. It is the Agency’s expectation that lenders will act responsibly when originating and underwriting loans under RD Instruction 1980-D.

Expiration Date: (February 28, 2006).

RD AN No. 4053 (1980-D)(February 28, 2005)

Single Family Housing Guaranteed Loan Program (SFHGLP) Debt Ratios Waivers

Summary: The purpose of this Administrative Notice (AN) is to elaborate upon the use of debt ratio waivers when approving loan guarantees under the SFHGLP and RD Instruction 1980-D, section 1980.345. This AN provides information on potential compensating factors, including credit scores, to be used by the Agency when evaluating a lender’s request for a debt ratio waiver.

Expiration Date: February 28, 2006. ■

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