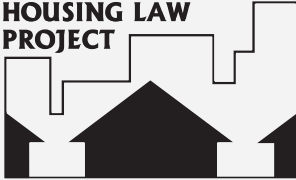


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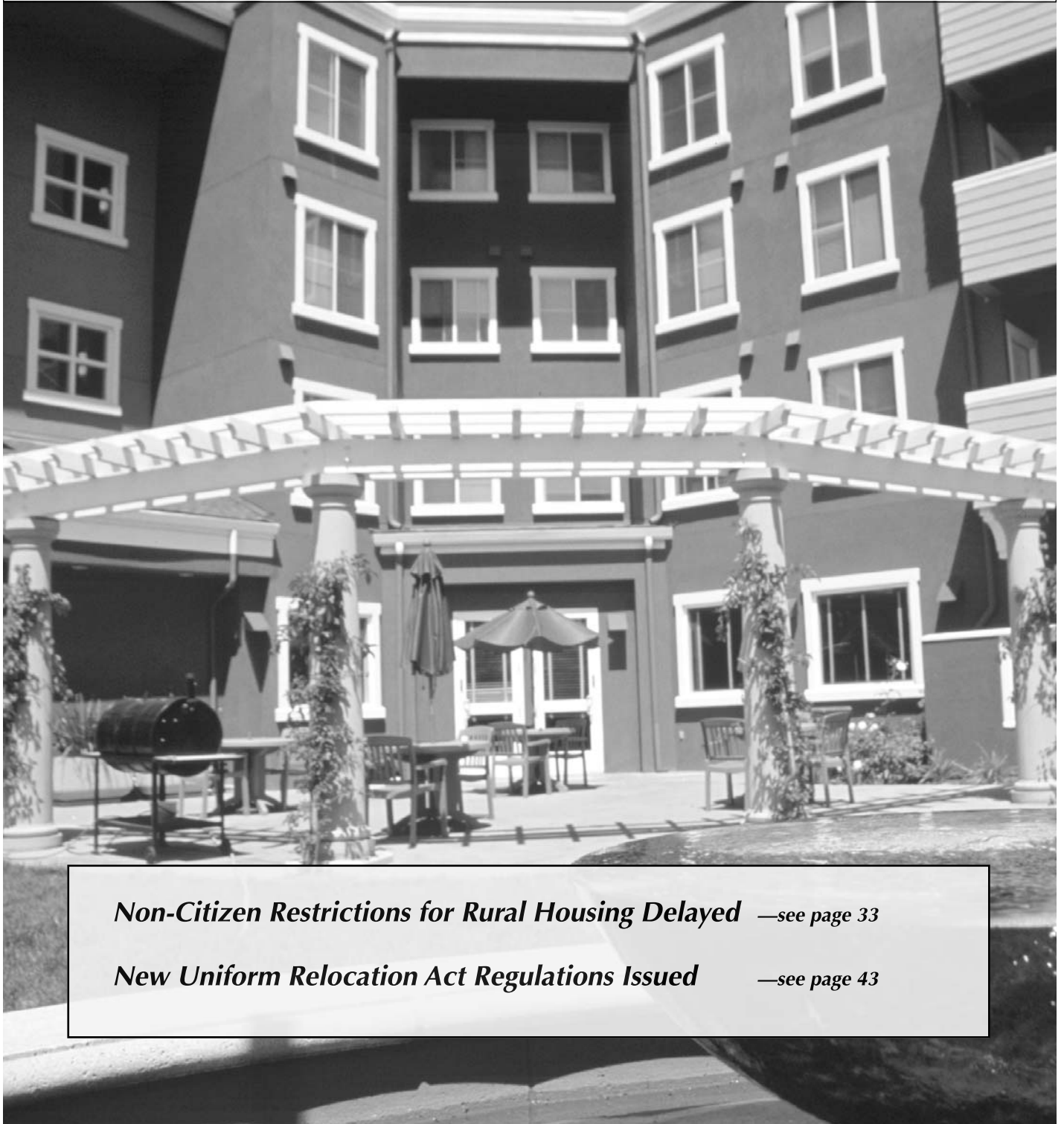


advancing housing justice

# Housing Law Bulletin

Volume 35 • February 2005

Published by the National Housing Law Project



***Non-Citizen Restrictions for Rural Housing Delayed*** —see page 33


***New Uniform Relocation Act Regulations Issued*** —see page 43


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**Cover:** Sylvester Rutledge Manor, a 65-unit affordable senior housing development in Oakland, CA, was a joint venture between Oakland Community Housing, Inc. and North Oakland Missionary Baptist Church. Photo courtesy of Amy Layne.

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## Implementation of Citizenship or Permanent Residency Requirement for Rural Rental Housing Program Delayed

The Rural Housing Service (RHS) published a notice in the Federal Register stating that it is delaying implementation of those provisions of its new Section 515 Rental Housing regulations that require that lease signers be United States citizens or persons legally admitted to the United States for permanent residency.<sup>1</sup> Effectively, the notice precludes owners of Section 515 housing from requiring residents of, and applicants to, RHS financed Section 515 rental housing from having to prove their citizenship or residency status in order to reside in the housing. The notice, which was published only two days before the new regulations were to go into effect, avoids the illegal eviction of potentially thousands of households that are eligible to reside in RHS rural rental housing.

### Background

In 1980, Congress enacted Section 214 of the Housing and Community Development Act of 1980, which precludes the Department of Housing and Urban Development (HUD) from extending financial assistance under its housing programs to persons that are not citizens of the United States or who are not legally admitted to the United States under one of six enumerated categories of permanent residents.<sup>2</sup> In 1988, Congress amended the Housing Act of 1949 to preclude RHS from denying financial assistance under any of its housing programs to persons that could not be denied assistance under Section 214.<sup>3</sup> Lastly, in 1996, Congress amended Section 214 to specifically preclude RHS from extending financial assistance under the RHS housing programs to persons who are not either United States citizens or among the six categories of legally admitted permanent residents. In so doing, Congress defined "financial assistance" with respect to the RHS rental housing programs as assistance provided under Section 521 of the Housing Act of 1949,<sup>4</sup> which authorizes RHS to extend a deep subsidy, commonly called Rental Assistance, to residents of Section

<sup>1</sup>Reinvention 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).

<sup>2</sup>42 U.S.C.A. § 1436a (West 2003).

<sup>3</sup>*Id.* at § 1471(h).

<sup>4</sup>*Id.* at § 1490a(a)(2).

515 rental and 514/516 farm labor housing.<sup>5</sup> Significantly, Section 214 does not condition residency in RHS rental housing programs on the residency status of any member of household. Instead, it requires RHS to prorate financial assistance provided to any household based upon the number of residents eligible to receive financial assistance that are in the household.<sup>6</sup>

### RHS Regulations

Because RHS began to draft revisions to the regulations that govern its rental housing programs in 1997, the agency decided not to implement the 1988 or 1996 legislation until it published the overall revisions to its rental housing program regulations, which it finally did on November 26, 2004.<sup>7</sup> Those regulations, which were published on an interim final basis, were not scheduled to go into effect until February 24, 2005. For reasons that are not known, the RHS regulations did not follow Section 214 or Section 501(h). Instead, the regulations required that the lease executor in RHS rental housing be a citizen or a legally admitted resident regardless of whether the household was receiving any RHS subsidy. Moreover, once the lease signer was qualified for the housing, the regulations allowed for extension of deep and shallow financial subsidies, including rental assistance, to all members of the household regardless of their residency status.

Unfortunately, the RHS regulations would have required owners of RHS rental housing to evict all households whose head may not have been a citizen or a legally admitted permanent resident regardless of whether they were receiving rental assistance or other members of the household were eligible to receive rental assistance under Section 214. For example, if a household whose head did not meet the residency requirement lived in an unsubsidized Section 515 development or in a development or unit that was only receiving a shallow RHS subsidy, commonly known as interest credit, the regulations would have required the owner to evict the household even though the household was not receiving financial assistance as defined in Section 214. Moreover, if a mixed household (one composed of persons with an eligible and ineligible residency status) lived in a unit assisted with Rental Assistance, the entire household would have had to have been evicted if the lease signer was not a person with the appropriate residency status. This was despite the fact that under Section 214 the household would have been eligible to continue to reside in the housing but to

have its rental assistance reduced based on the ratio of eligible to ineligible persons in the household.

The RHS regulations violated Section 214 in other ways. For example, the RHS regulations provide no guidelines for owners to determine whether a resident is eligible to receive financial assistance. Section 214 states that individuals who are citizens or persons legally admitted for permanent residency must establish their eligibility through a written declaration and only authorizes RHS to request verification of that status through the provision of appropriate documentation.<sup>8</sup> Second, if the individual is not a citizen or a legally admitted person, Section 214 requires verification of the status through the United States Citizenship and Immigration Service (USCIS),<sup>9</sup> unless the person is over sixty-one years old, in which case the written declaration of status is sufficient.<sup>10</sup>

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*Significantly, Section 214 does not condition residency in RHS rental housing programs on the residency status of any member of household.*

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Section 214 also provides residents with a fair hearing process both within the agency and within the USCIS, neither of which was set out in RHS regulations.<sup>11</sup> Lastly, Section 214 also has several special transition provisions and other protections that are not included or referenced by the RHS regulations.<sup>12</sup>

### NHLP Action

When the National Housing Law Project (NHLP) analyzed the RHS regulations and discovered these discrepancies, it wrote to RHS Administrator Russell Davis, advised him of the inconsistencies between the regulations and the statutes, and asked that he rescind or postpone implementation of the residency restrictions before they went into effect on February 24, 2005. In support of its arguments, NHLP cited to the HUD regulations implementing Section 214 with respect to the HUD housing programs and pointed out that the RHS regulations were in complete conflict with the HUD regulations. After a meeting between NHLP staff, the RHS Administrator, and representatives of the Office of General Counsel, and after

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<sup>5</sup>*Id.* at § 1436a(b).

<sup>6</sup>*See id.* at § 1436(b)(2).

<sup>7</sup>Reinvention of the Sections 514, 515, 516, and 521 Multi-Family Housing Programs; Interim Rule, 69 Fed. Reg. 69,032 (Nov. 26, 2004) [hereinafter Interim Rule].

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<sup>8</sup>42 U.S.C.A. § 1436a(d) (West 2003).

<sup>9</sup>Formerly the Immigration and Naturalization Service.

<sup>10</sup>42 U.S.C.A. § 1436a(d)(1)(A) (West 2003).

<sup>11</sup>*Id.* at § 1436a(d)(4).

<sup>12</sup>*See e.g. id.* at § 1436a(d)(4)(B).

several additional verbal exchanges, RHS advised NHLP that it would postpone implementation of the regulations prior to their becoming effective. The February 22 Federal Register Notice formally advised the public of the RHS decision.

### Effects of the Postponement

The delay in implementation of the residency requirement should preclude RHS Rural Rental housing landlords from requiring residents in or applicants for the housing to verify their residency status. It follows that RHS Section 515 housing landlords should also not be able to evict residents for either failing to establish their status or for not having the appropriate status.

While RHS, through a series of phone calls, has advised the Rural Development<sup>13</sup> field staff that the residency status provisions of the regulations would not go into effect as of February 24, it has not officially directed its staff to advise owners of Section 515 housing of the delay. Consequently, it is possible that owners who do not follow the Federal Register closely are not aware that implementation of the regulations has been delayed. Advocates are therefore urged to advise owners and residents of Section 515 housing that implementation of the regulation has been postponed.

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*The delay in implementation of the residency requirement should preclude RHS Rural Rental housing landlords from requiring residents in or applicants for the housing to verify their residency status.*

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### Inapplicability of Postponement on Farm Labor Housing

At first blush it appears that the delay in implementation of the residency requirement applies to both the Rural Rental and Farm Labor housing programs. This is because the Federal Register notice postpones implementation of the citizenship and residency requirement under the Occupancy section of the RHS regulations, which applies to both the Rural Rental and Farm Labor Housing programs.<sup>14</sup> However, upon a closer review, it becomes clear that the notice did not delay implementation of the Domestic Farm Laborer definition, which appears in another part

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<sup>13</sup>RHS does not have staff in the field. All of its programs are administered in the field by Rural Development, a division of the Department of Agriculture.

<sup>14</sup>Interim Rule, *supra* note 7, at 69,133 (§ 3560.152).

of the regulations.<sup>15</sup> It defines a domestic farm laborer as a person whose income is derived from farm labor and who is a citizen or a person legally admitted for permanent residence to the United States. Since eligibility for residence in farm labor housing is dependent upon a person meeting the farm labor definition, the restrictive residency requirements continue to be in effect for the farm labor housing programs.<sup>16</sup>

This farm labor residency restriction is not consistent with either Section 214 or Section 501(h). This is because Section 501(h) precludes RHS from denying assistance to anyone who may not be denied assistance under Section 214. Thus, it appears that Section 501(h) supersedes the more restrictive provisions found in the farm labor housing law, which restricts occupancy in farm labor housing to persons who are citizens or permanent residents.<sup>17</sup> Probably because it is reviewing the entire residency status issue, RHS has decided not to expand eligibility for occupancy in farm labor housing at this time. It is hoped, however, that it will do so at the time that it implements the new residency restrictions. In the meantime, the agency's failure to enlarge the occupancy pool for farm labor housing should only affect applicants for farm labor housing and should not result in the eviction of any current farm labor housing occupants. This is because RHS has historically limited occupancy in farm labor housing developments based upon the statutory restrictions contained in Section 514 of the Housing Act of 1949.

### Conclusion

RHS has not given any indication as to when it intends to publish new regulations implementing Section 214. It is possible that it may do so in a relatively short period of time, or that it may wait until it considers broader revisions to the rental housing regulations. If it waits, it is likely that new regulations will not be published for another year or more. In the meantime, however, no household should be evicted from RHS housing due to its residency status. ■

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<sup>15</sup>*Id.* at 69,110 (§ 3560.11).

<sup>16</sup>*Id.* at 69,164-5 (§ 3560.576).

<sup>17</sup>42 U.S.C.A. §§ 1474 and 1476 (West 2003).

## Have You Faxed in Your Bulletin Subscriber Survey?

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# California Extends Coverage of State Preservation Law to Non-Federal Properties

During its 2004 session, the California Legislature enacted revisions to its long-standing notice and right of offer law that make its coverage the broadest in the nation. These changes, contained in S.B. 1328 sponsored by State Senator Tom Torlakson, take effect on July 1, 2005.

## Background on the California Preservation Law

Since 1988, California has required certain private owners of properties subsidized under Department of Housing and Urban Development (HUD) and Rural Housing Service (RHS) programs to provide notice to tenants and state and local governments that they are intending to withdraw their units from the federal programs.<sup>1</sup> First applicable only to owners seeking to prepay their federally subsidized mortgages, these requirements have been revised over the years to cover project-based Section 8 contract terminations, as well as expirations of rent restrictions under the Low Income Housing Tax Credit program.<sup>2</sup> California has about 150,000 HUD- and RHS-subsidized properties, and another 15,000 units developed in the first three years of the tax credit program with only fifteen-year rent and use restrictions.

The law requires owners of such developments to provide specified withdrawal notices to tenants and affected public agencies, so that these recipients may take steps to preserve the housing or to ensure that tenants receive the required legal protections. Two withdrawal notices are now required: one at least twelve months prior to prepayment, termination or expiration, and a second notice six months prior to the conversion event. The second notice confirming the withdrawal provides a useful status report, because the owner might have decided to extend participation after serving the initial notice. It provides more specific information to public entities about the people who will be affected and when they will be affected, so that these entities might evaluate any impact on the affordable housing stock in their area, as required by state law. The second notice also informs tenants of actual proposed rents so they can better assess their options, since not all may receive replacement federal subsidies.

In addition to the withdrawal notices, California law requires withdrawing owners to provide a twelve-month

right of offer notice directly to interested preservation purchasers, including nonprofit and tenant organizations. These prospective purchasers must then receive access to certain specified financial information about the property so that they can exercise their statutory right to make a purchase offer.<sup>3</sup> The owner, however, is under no obligation to accept such an offer, unless it has contracted to sell the property to someone else, in which case certain preservation purchasers have a right of first refusal.

Often, some of the state notices concerning prepayment or Section 8 can be combined with those that are federally required. Certain specified transactions proposing to continue the property's affordable housing use are exempt from these requirements.<sup>4</sup>

## Changes Made in 2004

The California Legislature's 2004 changes<sup>5</sup> expanded coverage to non-federal units and revised the exemption provision, while also extending coverage to proposed sales made near the end of a property's time-limited restrictions. These revisions become effective July 1, 2005.

The revised law substantially expands coverage of the notice requirements to include expirations or terminations of affordability restrictions on units supported under other federal, state and local affordable housing efforts. These changes were prompted by recent situations in which tenants, with little advance warning, faced significant rent increases in units that had been supported with bond-financed mortgages that were being refinanced or that had reached the end of their rent restrictions. In addition to many units assisted with HUD or RHS mortgages, project-based Section 8 contracts or federal tax credits, tax-exempt bond-financed units (private activity bonds or 501(c)(3) bonds), units assisted under other federal subsidy programs like HOME, CDBG, and units assisted under homeless programs units will be covered by the California law. Such covered units include units assisted under state and local programs, such as California Department of Housing and Community Development grants or loans, tax increment financing, housing trust funds, or those created as a result of local density bonuses or development incentives.<sup>6</sup> In short, these changes extend coverage to an unknown but considerable number of additional units statewide.

<sup>1</sup>CAL. GOV'T CODE § 65863.10 to 65863.13 (West, WESTLAW current with all 2004 laws and propositions).

<sup>2</sup>See, e.g., 2000 Calif. Stat. 666 (S.B. 1572, effective Jan. 1, 2001, extending coverage to LIHTC units).

<sup>3</sup>CAL. GOV'T CODE § 65863.11 (West, WESTLAW current with all 2004 laws and propositions).

<sup>4</sup>CAL. GOV'T CODE § 65863.13 (West, WESTLAW current with all 2004 laws and propositions).

<sup>5</sup>2004 Calif. Stat. 110 (S.B. 1328, codified at CAL. GOV'T CODE §§ 65863.10 to 65863.13, effective July 1, 2005).

<sup>6</sup>CAL. GOV'T CODE § 65863.10(a)(3)(F) through (M) (West, WESTLAW current with all 2004 laws and propositions) (definition of "assisted housing development;" version effective July 1, 2005).

The revised law also extends provisions regarding preservation purchase offers to cover any owner proposal to sell or otherwise dispose of a covered development within five years prior to the expiration of rent restrictions. In the case of prepayments or project-based Section 8 terminations, coverage is extended to any proposed sale within five years of eligibility for prepayment or termination.

Finally, the 2004 legislation made clarifying changes to the exemption provision for specified preservation transactions. Under the new language, owners qualifying for the exemption need not provide any of the preservation notices otherwise required by state law, including the notice regarding the right of offer, and the exemption covers all proposed conversions, not just prepayments. To gain exemption, the law requires certain protections for existing tenants, as well as project affordability and access for low-income tenants, all of which are to be guaranteed in a regulatory agreement. The tenant protections required to qualify for the exemption include an agreement to apply for and accept any form of Section 8 that becomes available. ■

## Source of Income Discrimination in Northern California

In response to the challenges families and individuals have faced in using their Section 8 Housing Choice Vouchers, some jurisdictions across the country have passed anti-discrimination ordinances. California's voucher holders were caught in a conundrum when the state Department of Fair Employment and Housing (DFEH) took the position that the state's source-of-income anti-discrimination statute did not cover Section 8 voucher holders. Only a handful of California cities have passed their own protective ordinances, but with limited complaint tracking in some jurisdictions, it is impossible to tell whether the laws are effective.

The importance of such protective laws becomes apparent when one examines voucher success rates. For example, in the City of Oakland and Alameda County, both located in Northern California, success rates fell below 50% in 2000. That means that for every ten people issued a voucher, only five were able to use them to lease units within the search time allotted by the public housing authority (PHA) administering the voucher. Even when success rates improve, voucher holders who are able to lease units are restricted in their choice of housing because some landlords refuse to rent to voucher holders. Landlords' reluctance to rent to voucher holders may be further influenced by new policies that HUD is encouraging PHAs to adopt, such as reductions in the payment standard and changes in standards regarding number of family members per bedroom.<sup>2</sup>

This article focuses on the needs of voucher holders in Northern California where three jurisdictions adopted source-of-income discrimination ordinances — examining the impact of the ordinances, how they are being utilized, and their relationship to the state of California's source-of-income discrimination statute.<sup>3</sup>

### 2005 Voucher Funding Packet Available On-Line

NHLP has posted a new packet on the issues arising out of the 2005 voucher funding formula at [http://www.nhlp.org/html/sec8/voucher\\_funding\\_2005.cfm](http://www.nhlp.org/html/sec8/voucher_funding_2005.cfm). These are materials from the January 26, 2005, voucher funding teleconference. They include an updated chart on "Possible PHA Strategies to Respond to a Funding Shortfall in 2005." In addition, there is important information regarding the rules governing policies relating to portability. NHLP will post additional materials on 2005 funding issues as they become available.

<sup>1</sup>DAVID ZAFT, NHLP, EFFECT OF DEMOGRAPHIC CHARACTERISTICS ON SECTION 8 VOUCHER SUCCESS RATES AND LEASE-UP TIMES: OAKLAND AND ALAMEDA COUNTY HOUSING AUTHORITIES 3 (2004), available upon request from NHLP. In 2002-2003, success rates for these two PHAs increased to, still low, but improved rates of 63% and 86% respectively.

<sup>2</sup>See PIH 2004-7 (April 22, 2004). See also Memorandum from Department of Housing and Urban Development Secretary Alphonso Jackson (July 26, 2004) (on file with NHLP).

<sup>3</sup>The experience in California reflects nationwide trends. A 2001 study found that, nationally, voucher success rates in large metropolitan areas had dropped from 81% to 69% since 1993. ABT ASSOCIATES INC., STUDY ON SECTION 8 VOUCHER SUCCESS RATES, VOLUME I: QUANTITATIVE STUDY OF SUCCESS RATES IN METROPOLITAN AREAS, EXECUTIVE SUMMARY 1 (2001).

## Impact of Local Ordinances

One study has found that in jurisdictions where there are laws prohibiting discrimination against Section 8 participants specifically and/or in combination with laws prohibiting source of income discrimination, the success rate of Section 8 participants in utilizing their voucher is at least 12% higher than in other jurisdictions.<sup>4</sup> The study focused on all voucher holders in metropolitan areas in the lower forty-eight states and did not include an in-depth analysis of jurisdictions with anti-discrimination statutes.

In the San Francisco Bay Area, determining the impact of local source-of-income ordinances is all but impossible due to several factors—lack of awareness about local ordinances, insufficient tracking of voucher holders who have made discrimination complaints, and the chilling effect of DFEH's interpretation of the state's source-of-income statute.

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*State DFEH data from 1997 to 2003 does not track source of income discrimination complaints but does show that disability was the most common form of fair housing complaint coming from San Francisco.*

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### Corte Madera

The Town of Corte Madera has a little over 9400 residents, and a relatively small pool of rental housing. It is located twelve miles north of San Francisco in the county of Marin—one of the highest-cost housing markets in California. According to the city's general plan, only a few parcels of land have been left undeveloped that are not otherwise classified as open space or as a preserve.<sup>5</sup>

In 2000, the town adopted a source-of-income discrimination ordinance, protecting existing residents who become voucher holders against discrimination based solely on the fact that they are Section 8 recipients.<sup>6</sup> The town council indicated as a basis for adopting the ordinance that the housing authority covering that city (Marin Housing Authority) had noted a lack of landlord participation in the voucher program.

Neither the city nor the local fair housing agency tracks complaints regarding discrimination against voucher holders. However, anecdotally, staff at the local fair housing agency state that they are aware of a great deal of

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<sup>4</sup>MERYL FINKEL & LARRY BURON, STUDY ON SECTION 8 VOUCHER SUCCESS RATES, VOLUME I: QUANTITATIVE STUDY OF SUCCESS RATES IN METROPOLITAN AREAS 3-17, (2001) available at <http://www.huduser.org/publications/pubasst/sec8success.html>.

<sup>5</sup>CITY OF CORTE MADERA, CORTE MADERA GENERAL PLAN 2-1 (1989).

<sup>6</sup>Corte Madera, California Ordinance 858 (Dec. 5, 2000).

discrimination against voucher holders.<sup>7</sup> For example, there are many apartment rental ads in the *Marin Independent Journal*, the primary local newspaper, that say "No Section 8."<sup>8</sup> In Corte Madera, fair housing agency staff believe the incidence of discrimination has decreased since passage of the local law, but they have no data to support this.

### San Francisco

Discrimination based on source of income was banned across all of San Francisco by its board of supervisors in 1998. It appears that source of income discrimination complaints were not being tracked until the ordinance was passed.<sup>9</sup> However, "the lack of available and affordable housing with owners willing to accept a tenant with a Section 8 subsidy" is cited to as a problem in a city report that reviews data from 1994-1998.<sup>10</sup>

Data from Project Sentinel, a private, nonprofit fair housing agency in San Francisco, indicate that the largest numbers of complaints from 1998 to 2002 were based on disability, ethnicity or familial status, followed by national origin and race complaints. Source of income accounted for 4% of complaints. Low or very low-income people made up over two-thirds of all complainants.<sup>11</sup>

Data from the San Francisco Human Rights Commission (HRC) from 1998 to 2001 shows that the greatest number of fair housing complaints were based on disability, followed by complaints based on occupancy limits (multiple families living together), and race. (Of disability complaints, HIV-AIDS housing complaints accounted for 28%.) In 1998, source-of-income complaints constituted approximately 66% of all complaints made. After a dip in source of income complaints in 1999, the number of complaints increased steadily. By 2001, source of income complaints were back to their 1998 level in terms of total number, and constituted approximately 40% of all complaints made (a lower percentage due to an increase in the overall number of complaints).<sup>12</sup> These results mirror those from the city's 1998 Analysis of Impediments.<sup>13</sup>

State DFEH data from 1997 to 2003 does not track source of income discrimination complaints but does show that disability was the most common form of fair

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<sup>7</sup>Phone conversation between Maeve Elise Brown, NHLP, and Fair Housing of Marin staff, June 14, 2004.

<sup>8</sup>*Id.*

<sup>9</sup>See CITY OF SAN FRANCISCO, SAN FRANCISCO 2000 CONSOLIDATED PLAN (2000).

<sup>10</sup>*Id.* at 43.

<sup>11</sup>CITY OF SAN FRANCISCO, S.F. 2004 ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING 32-34 (2003).

<sup>12</sup>*Id.* at 35-37 (percentages estimated from graph III-5).

<sup>13</sup>CITY OF SAN FRANCISCO, SAN FRANCISCO 2000 CONSOLIDATED PLAN 56. (2000).

housing complaint coming from San Francisco, with race and national origin second and third, respectively.<sup>14</sup> A general “refusal to rent” category constituted 25% of complaints.<sup>15</sup> U.S. Department of Housing and Urban Development (HUD) data between 1999 and 2003 also shows disability as the largest complaints category for San Francisco.<sup>16</sup>

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*People with disabilities are still having a difficult time finding accessible units within the search time limits.*

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It may be that, in San Francisco, property owners’ disability bias, racism, et cetera, are influenced by economic need. When rental markets were tighter, residents had a very hard time finding landlords who would accept their Section 8 voucher. Rising vacancy rates in recent years have resulted in more landlords being willing to accept voucher holders as tenants.<sup>17</sup> San Francisco’s 2004 Analysis of Impediments report cites to a *San Francisco Chronicle* article, dated July 13, 2003, which discusses this phenomenon.

Special efforts by the San Francisco Housing Authority (SFHA) appear to have also increased the number of landlords willing to accept vouchers. Those efforts include successfully obtaining a 150% increase in Fair Market Rents from HUD, creating a landlord advisory committee to give landlords a greater sense of ownership of the voucher program, and focusing greater attention on the Project-Based Voucher Program which has increased owner participation significantly.<sup>18</sup>

However, people with disabilities are still having a difficult time finding accessible units within the search time limits. Nonprofit housing agencies point to a reluctance by the SFHA to grant extensions to voucher holders in the looser rental market. The difficulty that people with disabilities face may result from source of income and/or disability discrimination, exacerbated by inadequate or unrealistic search time requirements imposed by the local PHA.

Data gathering and complaint tracking are essential strategies for addressing the discrimination problem. HRC

and Project Sentinel have consistently tracked source-of-income discrimination data since passage of the local ordinance, and HRC recently implemented a computerized complaint system that will track demographic information as well. This type of tracking should yield more useful information for determining what is truly taking place in the rental housing market.

### **East Palo Alto**

The City of East Palo Alto adopted Urgency Ordinance, No. 248, prohibiting source of income discrimination, in November 6, 2000. The primary local fair housing agency is not tracking source of income complaints as yet.

### **Is Voucher Discrimination a Guise for Other Discrimination?**

In the three Bay Area cities with source-of-income ordinances, voucher holders are predominantly people with disabilities and people of color. SFHA reports that 31.6% of people on its waiting list for 2003 were families with disabilities, and 69.3% were people of color.<sup>19</sup> East Palo Alto is located in San Mateo County, where data for the county as a whole indicates that 23% of voucher holders are disabled.<sup>20</sup> Approximately 94% of East Palo Alto residents are people of color, a level of segregation which is indicative of how powerful the problem of racism is in San Mateo County.<sup>21</sup> Staff of Fair Housing of Marin estimated that most voucher holders in their area are disabled. The HUD Resident Characteristics Report (RCR) for Marin Housing Authority indicates that 48% of voucher holders had a disability as of the end of January 2005, and at least 34% of all voucher holders were people of color.<sup>22</sup> A 1994 report by Fair Housing of Marin found that people of color seeking rental housing in Marin County are discriminated against a whopping 42% of the time on average across the county. In Southern Marin County, that figure shot up to 83%. A 2002 report by the same agency found discrimination against people of color in Marin County 33% of the time on average across the country, with differential treatment figures shooting up to 90% in Southern Marin County.<sup>23</sup> Discrimination was subtle, rather than blatant.

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<sup>19</sup>See SFHA, PHA PLAN FOR SAN FRANCISCO HOUSING AUTHORITY (2003), available at [http://www.sfha.org/pha\\_plans/needs.htm](http://www.sfha.org/pha_plans/needs.htm).

<sup>20</sup>HUD, Resident Characteristics Report, at <http://pic.hud.gov/pic/RCRPublic/rcrha.asp> (Jan. 31, 2005).

<sup>21</sup>PROJECT SENTINEL, ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE FOR SAN MATEO COUNTY 14, 16 (2004)

<sup>22</sup>HUD, Resident Characteristics Report, at <http://pic.hud.gov/pic/RCRPublic/rcrha.asp> (Jan. 31, 2005).

<sup>23</sup>FAIR HOUSING OF MARIN, RACIAL DISCRIMINATION IN RENTAL HOUSING, A REPORT BY FAIR HOUSING OF MARIN (2002).

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<sup>14</sup>CITY OF SAN FRANCISCO, S.F. 2004 ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING 38 (2003) (citing state DFEH data).

<sup>15</sup>*Id.* at 39.

<sup>16</sup>*Id.* at 40.

<sup>17</sup>*Id.* at 57.

<sup>18</sup>*Id.* at 79-80.

For example, property owners would show the advertised rental to the African-American tester, but fewer units. In addition, there were differences in financial terms and requirements for African-American testers as compared to White testers.<sup>24</sup>

With the level of sophistication that racist property owners in Marin exhibit, it seems likely that voucher discrimination is sometimes used as a guise for discrimination against people of color, and perhaps people with disabilities and residents with other characteristics.<sup>25</sup> Voucher discrimination as a guise for other, unlawful discrimination is beginning to be documented nationally. For example, a Chicago study found “[v]oucher-holders [were] denied access to approximately 70% of the market rate units that are supposedly available to them,” and that voucher holders also face discrimination based on race and/or ethnicity.<sup>26</sup>

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*Voucher discrimination as a guise for other, unlawful discrimination is beginning to be documented nationally.*

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San Francisco agencies track complaints based on source-of-income discrimination. However, these agencies do not track the demographics of those making the complaint, other than whether the complainant was someone with a disability. According to *Housing Impediments/Disability: A Report to the Mayor's Office on Housing, January 2003*, “approximately ten percent of the population in San Francisco has a significant disability, [while] more than 25% of the people on the San Francisco Housing Authority’s Section 8 waiting lists are people with disabilities.”<sup>27</sup> The RCR as of June 2004 shows that 43% of San Francisco’s voucher holders have a disability, while at least 70% are people of color.<sup>28</sup>

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<sup>24</sup>FAIR HOUSING OF MARIN, RACIAL DISCRIMINATION IN RENTAL HOUSING, A REPORT BY FAIR HOUSING OF MARIN (1994). Exact data on the racial and/or ethnic breakdown of voucher holders in Marin is not available.

<sup>25</sup>Last year, Fair Housing of Marin found racial discrimination 60% of the time against people of color seeking residential care in Sonoma and Marin County facilities. See FAIR HOUSING OF MARIN, RACIAL DISCRIMINATION IN RESIDENTIAL CARE FACILITIES FOR THE ELDERLY, AN AUDIT REPORT BY FAIR HOUSING OF MARIN (2003). Once again, discrimination took the form of steering to facilities out of the area, differential financial terms and other subtle, insidious practices.

<sup>26</sup>LAWYERS’ COMMITTEE FOR BETTER HOUSING, INC., LOCKED OUT: BARRIERS TO CHOICE FOR HOUSING VOUCHER HOLDERS, REPORT ON SECTION 8 HOUSING CHOICE VOUCHER DISCRIMINATION 8, 11 (2003).

<sup>27</sup>CITY OF SAN FRANCISCO, SF 2004 ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING 69 (2003).

<sup>28</sup>HUD, *Resident Characteristics Report*, at <http://pic.hud.gov/pic/RCRPublic/rcrha.asp> (Jan. 31, 2005).

## Impact of California State Law

California law provides that it is unlawful for a landlord to discriminate based upon source of income. Source of income “means lawful, verifiable income paid directly to a tenant or paid to a representative of a tenant.”<sup>29</sup> The legislative history of this provision makes clear that the California legislature intended the provision to include housing assistance payments under the Housing Choice Voucher program.<sup>30</sup>

However, because DFEH has interpreted the law as not protecting voucher holders, state law has had a chilling effect on enforcement of local source-of-income laws. Local legal services and fair housing agencies are concerned that state law may pre-empt the local ordinances, and, as a result, are reluctant to push enforcement of their local ordinance. San Francisco’s 2004 Analysis of Impediments to Fair Housing report cites to the need for local fair housing laws (not just source of income), and the need for their enforcement but also notes a concern about possible state preemption of local fair housing laws.<sup>31</sup> The drop in complaints from 1999 to 2000 may indicate that the local anti-discrimination statute has had a deterrent effect. The rise in 2001 seems consistent with the growing sense amongst attorneys and counselors that the local law may be unenforceable due to state preemption.

## Conclusion

Data tracking is essential for planning next steps. San Francisco’s efforts in that record represent a positive example of how private nonprofit agencies, the city and the PHA can work together to develop a clear picture of voucher holders’ needs and experiences. All jurisdictions in California where advocates believe there is a discrimination problem should be gathering data, with fair housing, legal service agencies and cities working in partnership. With that data in hand, advocates can lobby the state for more protective laws. Jurisdictions without a source of income statute may decide it is high time to adopt one based on the data gathered.

Another component to making a breakthrough in this arena is to enforce the state source of income law on behalf of voucher holders, regardless of DFEH’s interpretation. An attempt is underway in Los Angeles, where a voucher holder with a disability recently filed suit in state court to

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<sup>29</sup>CAL. GOV. CODE § 12955(a) and (p) (West, WESTLAW through Ch. 33 & Res. Ch. 1 of 2004 Reg.Sess., Ch. 1 (end) of 3rd Ex.Sess., Chs. 1 & 2 (Prop. 57) & Res. Ch. 1 (Prop. 58) of 5th Ex.Sess., & Props. 55 & 56).

<sup>30</sup>NHLP, *The Case For Applying California's Source Of Income Anti-Discrimination Statute To Section 8 Tenants*, 31 HOUS. L. BULL. 125, 147 (2001).

<sup>31</sup>CITY OF SAN FRANCISCO, SF 2004 ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING 41 (2003).

enforce the statute.<sup>32</sup> Once and for all, the issue of whether or not the law is available to protect voucher holders needs to be settled so that residents and advocates can vigorously enforce its terms, work to create other protections at the state and/or local level, or engage in other grassroots advocacy. Advocates who think they may have a case appropriate for litigating this issue should contact Catherine Bishop or Maeve Elise Brown at (510) 251-9400, ext. 105 or 110 for support and advice. In the meantime, advocates should not be reluctant to advise tenants about local protective ordinances, which may, at a minimum, help in cases where moral or political persuasion are effective. ■

## California Plaintiff Continues to Litigate Voucher Discrimination Case

On April 6, 2004, Elisheba Sabi, a seventy-year-old disabled woman, filed suit against her landlord of seventeen years for refusal to accept her Housing Choice voucher.<sup>1</sup> She asserted six causes of action. Two causes of action are based upon disability discrimination in violation of the California Fair Employment and Housing Act and the California Civil Code,<sup>2</sup> and two causes are based upon source of income discrimination in violation of California Fair Employment and Housing Act<sup>3</sup> and the Unruh Civil Rights Act.<sup>4</sup> The remaining causes of action are based upon violations of California's Unfair Business Practices Act<sup>5</sup> and negligence.

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<sup>32</sup>See NHLP, *California Tenant Sues Landlord For Refusal to Accept Voucher*, 34 HOUS. L. BULL. 85, 99 (2004).

<sup>1</sup>For background on the case, see NHLP, *California Tenant Sues Landlord for Refusal to Accept Voucher*, 34 HOUS. L. BULL. 85, 99 (2004).

<sup>2</sup>CAL. GOV'T CODE §§ 12,955(a), (c), (d), (k) and 12,927(c)(1) (which language tracks the language of the Federal Fair Housing Act, 42 U.S.C. § 3604(f)(3)(B)); and CAL. CIV. CODE § 54.1 (West, WESTLAW current with all 2004 laws and propositions).

<sup>3</sup>CAL. GOV'T CODE §§ 12955(a), (c), (d), (k), (p) and § 12955.7 (West, WESTLAW current with all 2004 laws and propositions).

<sup>4</sup>CAL. CIV. CODE §§ 51 *et seq.* (West, WESTLAW current with all 2004 laws and propositions).

<sup>5</sup>CAL. CIV. CODE § 17200 (West, WESTLAW current with all 2004 laws and propositions).

The landlord demurred, alleging that Mrs. Sabi's request to pay part of her rent with a voucher cannot be a "reasonable accommodation" because participation in the voucher program is voluntary. To make this argument, the landlord relied heavily on *Salute v. Stratford Greens Garden Apartments*,<sup>6</sup> which held that an applicant for housing could not compel the landlord to accept vouchers because the requested accommodation related to the applicant's financial status, not her disability.<sup>7</sup> With respect to the source of income claim, the defendants claimed that the statute did not apply and again argued that the program was voluntary.

Mrs. Sabi responded to the demurrer by noting that the complaint alleged sufficient facts to satisfy the elements of a claim for reasonable accommodation.<sup>8</sup> Mrs. Sabi pleaded: (1) that she is disabled; (2) that the landlord knew or reasonably should have known of Mrs. Sabi's disability; (3) that the accommodation sought "may be necessary" to afford Mrs. Sabi an equal opportunity to use and enjoy her dwelling; and (4) that the landlord refused to make such accommodation.

With respect to the claim that the requested accommodation is reasonable, Mrs. Sabi noted that such a claim is highly fact specific<sup>9</sup> and that she has met the burden of showing that the accommodation requested is not only possible but reasonable. In addition, Mrs. Sabi has shown that the "accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability."<sup>10</sup>

Mrs. Sabi also argued that the landlord's reliance upon *Salute* was misplaced because the Ninth Circuit had rejected such reasoning in *Giebeler v. M & B Associates*.<sup>11</sup> In *Giebeler*, the Ninth Circuit held that *Salute* was inconsistent with the Supreme Court's analysis in *U.S. Airways v. Barnett*,<sup>12</sup> because *Salute* never reached the reasonableness inquiry, but stopped the analysis prematurely because the accommodation involved economic circumstances. The Ninth Circuit rejected the *Salute* conclusion that, as a

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<sup>6</sup>136 F.3d 293 (2d Cir. 1998).

<sup>7</sup>*Id.* at 301.

<sup>8</sup>See *United States v. California Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1380 (9th Cir.1997); *Giebeler v. M & B Associates*, 343 F.3d 1143, 1147 (9th Cir. 2003).

<sup>9</sup>See *United States v. California Mobile Home Park Management Co.*, 29 F.3d 1413, 1418 (9th Cir. 1994); *Giebeler v. M & B Associates*, 343 F.3d 1143, 1156 (9th Cir. 2003).

<sup>10</sup>*Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995).

<sup>11</sup>For a discussion of the case, see NHLP, *Ninth Circuit Requires Landlords to Adjust Economic Admission Requirements for Disabled Tenants*, 33 HOUS. L. BULL. 441, 446 (2003). *But see Note: Gimme Shelter: Does the Fair Housing Amendments Act of 1988 Require Accommodations for the Financial Circumstances of the Disabled?* 46 WM. & MARY L. REV. 787 (2004) (argues that *Giebeler* was wrongly decided and supports the reasoning in *Salute*).

<sup>12</sup>535 U.S. 391 (2002).

matter of law, participation in the voucher program could never be a reasonable accommodation.

On the source of income claim, Mrs. Sabi relied upon the plain language of the statute and the legislative history to demonstrate that the California source of income statute applied to the defendants.<sup>13</sup>

During the pendency of the litigation, the California legislature removed the sunset provision on the source of income statute and added the following language: "For the purposes of this section, "source of income" means lawful, verifiable income paid directly to a tenant or paid to a representative of a tenant. For the purposes of this section, the landlord is not considered a representative of a tenant."<sup>14</sup>

The court ruled from the bench in favor of the plaintiff. On the question of reasonable accommodation, the court stated "that under *Giebeler*, a cause of action exists for failure to accommodate an economic hardship that would not have existed but for the existence of the disability." The court further ruled that "the cause of action for 'source of income' discrimination under 12955 of the Government Code is valid because 12955 was designed to prevent discrimination based on a tenant's Section Eight [i.e., voucher] status."<sup>15</sup> Trial in the *Sabi* case should be held this year.

### Administrative Actions to Preserve Plaintiff's Voucher

Plaintiff originally obtained a voucher from the Santa Monica Housing Authority in 2003. For several months while plaintiff sought the landlord's acceptance of the voucher the housing authority extended the term of the voucher. The extensions were granted as part of the housing authority's policy and in response to a request to reasonably accommodate Mrs. Sabi's husband who was terminally ill. When he passed away, another request for an extension was made on behalf of Mrs. Sabi, who is also disabled. When it became clear that the landlord would not accept the voucher, plaintiff made a request that the housing authority place her at the top of the voucher waiting list as a reasonable accommodation of her disability. The housing authority responded by continuing to renew plaintiff's voucher in three-month increments subject to ongoing requests.

In making the request for an extension, Plaintiff noted that the housing authority is subject to Section 504 of the Rehabilitation Act of 1973 which provides that recipients of federal financial assistance, such as the Section 8 voucher program, must operate the federal program so that it is usable by disabled individuals.<sup>16</sup> In addition, she pointed out that the housing authority must use methods that result in making the voucher program readily usable by individuals with disabilities.<sup>17</sup>

The Fair Housing Act also imposes an affirmative duty upon the housing authority to reasonably accommodate the needs of disabled persons. This obligation includes an accommodation with respect to administrative policies.<sup>18</sup> The housing authority is further obligated to have policies to assist families that have been prevented from leasing suitable units because of illegal discrimination.<sup>19</sup>

The federal regulations recognize the housing authority's obligation to reasonably accommodate families with disabled members when the disability prevents the family from meeting certain program requirements, such as finding a unit within a specified number of days<sup>20</sup> or failing to respond to a request to remain on the waiting list.<sup>21</sup> The federal regulations also provide that the voucher payment standard may be increased for a disabled voucher recipient.<sup>22</sup>

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*A housing authority is obligated to consider a wide variety of requests for reasonable accommodation depending upon individual circumstances.*

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A housing authority is not limited to those instances of reasonable accommodation that are highlighted in the published regulations. Indeed, it is obligated to consider a wide variety of requests for reasonable accommodation depending upon individual circumstances. A 2003 HUD notice instructs, pursuant to Section 504, that "[w]hen a family member requires...policy modification to accommodate a disability, PHAs must provide such...policy modification unless so doing would result in a

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<sup>13</sup>NHLP, *Discrimination Based upon Source of Income Prohibited in California*, 30 HOUS. L. BULL. 1, 30 (2000); NHLP, *Source of Income Discrimination Protections for Section 8 Tenant-Based Assistance in California*, at <http://www.nhlp.org/html/sec8/index.htm> (last visited Jan. 31, 2005).

<sup>14</sup>CAL. GOV'T CODE § 12955(p)(1) (West, WESTLAW Current with all 2004 laws and propositions).

<sup>15</sup>*Sabi v. The Donald T. Sterling Corporation*, No. BC313345 (Cal. Super. Ct. Sept. 27, 2004) (reporter's transcript, on file with NHLP).

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<sup>16</sup>29 U.S.C.A. § 794 (West 2005); 24 C.F.R. § 8.24(a) (2004).

<sup>17</sup>24 C.F.R. § 8.24(b) (2004).

<sup>18</sup>*Giebeler v. M&B Assocs.*, 343 F.3d 1143, 1147 (9th Cir. 2003).

<sup>19</sup>24 C.F.R. § 982.54(b)(6) (2004).

<sup>20</sup>*Id.* at § 982.303(b)(2).

<sup>21</sup>*Id.* at § 982.204(c)(2).

<sup>22</sup>*Id.* at § 8.28(a)(5).

fundamental alteration in the nature of its program or an undue financial burden.”<sup>23</sup>

## Conclusion

Although source of income issues are unique to California, the reasonable accommodation issues in Sabi are issues that may arise nationwide. NHLP seeks information about cases that raise source of income claims under state or local ordinances and in any cases that raise the reasonable accommodation claim for the refusal to accept a tenant-based subsidy when the tenant’s disability requires such accommodation. ■

## DOT Issues New Final Uniform Relocation Act Rule<sup>1</sup>

The Department of Transportation (DOT) has released a new final rule that implements the Uniform Relocation Act (URA).<sup>2</sup> The new regulations<sup>3</sup> went into effect on February 3, 2005.<sup>4</sup> The Housing Justice Network (HJN) was successful in influencing DOT to adopt many of its recommendations to the proposed rule.<sup>5</sup> However, the new regulations remain deficient in addressing the needs of low-income residents on several key points.

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<sup>23</sup>Accessibility Notice: Section 504 of the Rehabilitation Act of 1973; the Americans with Disabilities Act of 1990; the Architectural Barriers Act of 1968 and the Fair Housing Act of 1988, Notice PIH 2003-31 (HA), ¶¶ I.B.4. and I.E.3 (Nov. 26, 2003).

<sup>1</sup>This article substantially relies upon analysis of final rule by S. Lynn Martinez, Esq., Attorney, the Western Center on Law and Poverty, Inc.

<sup>2</sup>Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. No. 91-646, tit. II, § 201, 84 Stat. 1895 (1970) (codified as amended by the Uniform Relocation Act Amendments of 1987, Pub. L. No. 100-17, tit. IV, § 404, 101 Stat. 248 (1987), at 42 U.S.C.A. §§ 4601 *et seq.* (West, WESTLAW through P.L. 108-468 (excluding 108-357, 108-375, 108-446, 108-447, 108-458, 108-466) approved 12-21-04)).

<sup>3</sup>Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs; Final Rule, 70 Fed. Reg. 590 (Jan. 4, 2005) [hereinafter Final Rule] (to be codified at 49 C.F.R. pt. 24).

<sup>4</sup>*Id.*

<sup>5</sup>Letter from the Housing Justice Network to the U.S. Dept. of Transportation (Feb. 13, 2004) [hereinafter HJN Comments] (on file with NHLP).

## Statutory Background

In enacting the URA, Congress “established a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by the Federal Agency or with Federal financial assistance.”<sup>6</sup> The act’s primary purpose is to minimize the hardships of persons who are injured as a result of federal programs or projects that are designed for the benefit of the public.<sup>7</sup>

In enacting the URA, Congress made findings about the growing problem of displacement and declared that:

- (1) displacement as a direct result of programs or projects undertaken by a Federal Agency or with Federal financial assistance is caused by a number of activities, including rehabilitation, demolition, code enforcement, and acquisition;
- (2) relocation assistance policies must provide for fair, uniform, and equitable treatment of all affected persons;
- (3) the displacement of businesses often results in their closure;
- (4) minimizing the adverse impact of displacement is essential to maintaining the economic and social well-being of communities; and
- (5) implementation of this chapter has resulted in burdensome, inefficient, and inconsistent compliance requirements and procedures which will be improved by establishing a lead agency and allowing for State certification and implementation.<sup>8</sup>

The URA specifically authorizes a lead federal agency to implement the Act’s mandates regarding residential and business displacement.<sup>9</sup> In 1985, President

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*See also* NHLP, *Advocates Submit Comments on Proposed Relocation Regulations*, 34 HOUS. L. BULL. 59, 67 (2004).

In addition to accepting 775 comments from eighty commenters, DOT also held public meetings regarding the proposed rule. Final Rule at 590.

HJN is a national affiliation of low-income housing advocates. Staff at the Western Center on Law and Poverty, who are HJN members, coordinated the HJN comments to the proposed rule.

<sup>6</sup>42 U.S.C.A. § 4621(b) (West, WESTLAW through P.L. 108-468 (excluding 108-357, 108-375, 108-446, 108-447, 108-458, 108-466) approved 12-21-04). The displacing federal, state, local or nonprofit entity will collectively be referred to as “the agency.”

<sup>7</sup>*Id.*

<sup>8</sup>42 U.S.C.A. § 4621(a) (West, WESTLAW through P.L. 108-468 (excluding 108-357, 108-375, 108-446, 108-447, 108-458, 108-466) approved 12-21-04).

<sup>9</sup>42 U.S.C.A. § 4633 (West, WESTLAW through P.L. 108-468 (excluding 108-357, 108-375, 108-446, 108-447, 108-458, 108-466) approved 12-21-04).

Ronald Reagan identified the DOT) (through its Federal Highway Administration as that leader.<sup>10</sup>

The new final rule's preamble expresses DOT's concern that some commenters appeared to consider the cost of their projects to be more important than the protections provided under the URA.<sup>11</sup> It is for this reason that the URA, in large part, was enacted. And, it is for this reason that advocates should pay particular attention to how DOT implements the URA.

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*The new final rule's preamble expresses DOT's concern that some commenters appeared to consider the cost of their projects to be more important than the protections provided under the URA.*

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## New Regulations Incorporate Select Comments

Implementation of the URA, through DOT's new final rule, incorporates a number of points raised in comments submitted by HJN. Unfortunately, DOT failed to accept or even address other important suggestions. Discussion about selected provisions of the new rule follows and includes notes about DOT responses to HJN comments or lack thereof.

### Anti-Discrimination Requirements

HJN recommended that the regulations should include reference to the Americans with Disabilities Act<sup>12</sup> and a number of relevant Executive Orders.<sup>13</sup> HJN also proposed that DOT include an anti-discrimination purpose. DOT accepted HJN's recommendation regarding Executive Order 12892, which requires agencies to affirmatively further fair housing.<sup>14</sup> However, DOT declined to accept the other proposals, while stating that the legal

authorities were "self-executing" and an explicit mention in a rule would risk inadvertent omission, thereby "creating the implication that any legal authority not referenced is somehow inapplicable."<sup>15</sup> Several other comments made by HJN regarding reasonable accommodations and accessibility issues for people with disabilities were also rejected on similar grounds.

### Temporary Relocation Limited to One Year

DOT's preamble to the regulations disapprovingly recognizes that agencies may attempt to avoid permanent relocation by calling a relocation "temporary."<sup>16</sup> Therefore any residential tenant who has been temporarily relocated for a period beyond one year must now be contacted by the agency and offered permanent relocation assistance.<sup>17</sup> DOT included this requirement in its proposed rule, and HJN comments supported the provision.

### No Waiver of Relocation Assistance or Benefits

The final rule prohibits agencies from proposing or requesting a displaced person to waive his or her rights or entitlement to relocation assistance and benefits under the URA.<sup>18</sup> Furthermore, displaced persons must be fully informed of their rights and benefits.<sup>19</sup> Likewise, the final rule confirms that "global settlements" (i.e., the packaging of relocation entitlements into one lump sum offer) do *not* comply with the requirements under the URA.<sup>20</sup>

## Eligibility

### Initial Date of Eligibility

In most cases, the initiation of negotiations (ION)<sup>21</sup> determines the eligibility of existing residents for relocation assistance.<sup>22</sup> Thus, the accurate determination of the ION date is of crucial importance. Initially, DOT proposed to clarify that when a tenant is permanently displaced as a result of an acquisition, the ION means "acceptance of the agency's offer to purchase the real property."<sup>23</sup> HJN objected to this clarification, citing instances when the agency and owner agree that the property will be vacated before acceptance of the purchase offer, and tenants are

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<sup>10</sup>Improvements of Administration and Implementation of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Memoranda of President, 50 Fed. Reg. 8953 (Feb. 27, 1985).

<sup>11</sup>Final Rule, *supra* note 3, at 593 (discussing owners' comments about the proposed provision that further distinguishes "temporary" from "permanent" relocation).

<sup>12</sup>42 U.S.C.A. §§ 12101, *et seq.* (West, WESTLAW through P.L. 108-498 (excluding P.L. 108-447, 108-458) approved 12-23-04).

<sup>13</sup>Exec. Order No. 12892, 59 Fed. Reg. 2939 (1994) (affirmatively furthering fair housing); 13217, 66 Fed. Reg. 33,155 (2001) (setting policy regarding community-based alternatives for individuals with disabilities); Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (2000) (eliminating Limited English Proficiency (LEP) barriers) and Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994) (declaring program, policy and activity regarding environmental justice for minority populations and low-income persons).

<sup>14</sup>Final Rule, *supra* note 3, at 616 (§ 24.8(o)).

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<sup>15</sup>*Id.* at 590.

<sup>16</sup>*Id.* at 593.

<sup>17</sup>*Id.* at 593.

<sup>18</sup>*Id.* at 623 (§ 24.207(f)).

<sup>19</sup>*Id.* at 620 (§ 24.203).

<sup>20</sup>*Id.* at 601.

<sup>21</sup>*Id.* at 614 (§ 24.2(a)(15) (defining ION)).

<sup>22</sup>*Id.* at 620 (§ 24.203(b)).

<sup>23</sup>Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs; Proposed Rule, 68 Fed. Reg. 70342, 70362 (Dec. 13, 2003) [hereinafter Proposed Rule] (proposed to have been codified at 49 C.F.R. § 24.2(a)(16)(iv)).

subsequently evicted to facilitate that agreement and to avoid relocation benefits. Alternatively, HJN proposed that DOT draft a clear rule that an agency may not negotiate for or make any offer that requires an occupied property to be vacated. In an alleged effort to provide increased protections for tenants, DOT changed the reference date of the ION to a “written agreement between the Agency and the owner to purchase the property.”<sup>24</sup>

#### *Notice of Eligibility*

In practice, the ION itself does not trigger eligibility but instead eligibility is triggered by an event (i.e., a verbal commitment of federal funds) made prior to the signing of any written agreement. In response to HJN’s comments regarding the notice of eligibility for relocation assistance and the confusion that often results from the failure to issue such notice at the appropriate time, DOT clarified that the notice of eligibility is a mandatory notice and that it must be issued promptly after the *first* action that triggers a person’s eligibility for relocation assistance.<sup>25</sup>

#### *Good Cause Eviction Required*

HJN strenuously objected to DOT’s proposal to amend its “eviction for cause” regulations, citing that the changes removed existing tenant protections and opened the door for increased eviction abuse by displacing entities. As a result, DOT did not make the proposed changes in the final rule.<sup>26</sup> DOT further clarified that relocation benefits can only be denied if the tenant received an eviction notice prior to the initiation of negotiations or is evicted thereafter “for serious or repeated violations of material terms of the lease or occupancy agreement.”<sup>27</sup> Significantly, DOT confirmed HJN’s position that the failure to move or relocate during the displacement process, or the failure to cooperate in the relocation process, is *not* good cause. Once either of these processes has commenced, the tenant—even if she is evicted—is still entitled to receive full relocation benefits.

#### *Possible Availability of Relocation Assistance Notwithstanding Lack of Ninety-Day Residency*

Generally, a tenant must establish eligibility for relocation benefits by occupying the replacement dwelling for at least ninety days prior to the ION.<sup>28</sup> The final rule clarifies that persons who do not meet the ninety-day occupancy requirement may still be entitled to relocation assistance if forced to move to a higher-cost replacement unit.<sup>29</sup> In such

cases, the payment shall be based on the amount that the rent (of the replacement housing unit) exceeds the base monthly rent (of the unit from which the tenant was displaced) over a period of forty-two months.<sup>30</sup>

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*DOT clarified that the notice of eligibility is a mandatory notice must be issued promptly after the first action that triggers a person’s eligibility for relocation assistance.*

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### **General Relocation Assistance and Moving Issues**

#### *Transportation Must Be Provided*

The final rule clarifies that the agency must offer all persons displaced from residential units with transportation to inspect replacement housing.<sup>31</sup> DOT declined HJN’s further suggestion to amend the regulation to affirmatively state that reasonable accommodations should be made for displaced people with disabilities, including but not limited to accessible transportation, accessible notices (e.g., in Braille, large print or on audiotape) and accessibility throughout the appeal process. Although DOT recognized the need for reasonable accommodations regarding transportation, it found the suggested language superfluous and stated that:

[a]gencies must make every effort to provide reasonable accommodations for all displaced persons, including the disabled, to minimize any adverse impacts. This is not a new requirement; it is a fundamental principle of relocation advisory services. As such, no additional changes were adopted.<sup>32</sup>

#### *Tenants Must Be “Made Whole”*

HJN advocated that tenants should be provided “just compensation” for improvements made to their units. For example, some tenant-owned improvements or modifications made to accommodate a tenant’s disability or the disability of a household member, such as ramps, may have no market value or salvage value because they are of limited use to anyone but the tenant who installed them. In such situations, HJN argued that the regulations should require that the household be compensated for the replacement value of the improvements. DOT declined to amend the regulations. However, it made assurances that

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<sup>24</sup>Final Rule, *supra* note 3, at 614 (§ 24.2(a)(15)).

<sup>25</sup>*Id.* at 620 (§ 24.203(b)).

<sup>26</sup>*Id.* at 622 (§ 24.206).

<sup>27</sup>*Id.* at 622 (24.206(a)(2)).

<sup>28</sup>*Id.* at 628 (§ 24.402(a)(1)).

<sup>29</sup>*Id.* at 630 (§ 24.404(c)(3)).

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<sup>30</sup>*Id.*; see also *id.* at 613 (§ 24.(a)(6)(viii)(c)) (defining “comparable replacement dwelling”).

<sup>31</sup>*Id.* at 602 (§ 24.205(c)(2)(ii)(E)).

<sup>32</sup>*Id.* at 601-02.

such tenants “would be ‘made whole’ through the relocation assistance provisions” of the URA.<sup>33</sup>

#### *Tenants Entitled to Actual Costs of Move*

A residential displaced person has three options for moving his or her household belongings: (1) using a commercial mover; (2) conducting a self-move and using the actual cost of the move; or (3) conducting a self-move and using the Fixed Residential Moving Cost Schedule.<sup>34</sup> The final rule clarifies that a displaced person cannot be paid for a self-move based on the lower of two bids or estimates.<sup>35</sup> In addition, DOT confirms that actual moving costs cannot be determined until after the move has been made.<sup>36</sup> The URA requires that any relocation “settlement” cannot be estimated but rather must be calculated on actual costs and benefits received.<sup>37</sup>

#### *Security and Utility Deposits Are Ineligible Moving Costs*

HJN objected to DOT’s proposal to amend the existing “Ineligible Moving and Related Expenses” provision<sup>38</sup> to include “refundable security and utility deposits” as an ineligible moving expense. HJN’s advocacy was unsuccessful.<sup>39</sup> DOT stated that absent a statutory change, there is no legislative authority to reimburse for these costs because they are “refundable.”<sup>40</sup> As noted in HJN’s comments, this “clarification” will have a devastating result on low-income tenants and other disadvantaged persons who cannot afford to pay deposits for their replacement units. HJN also questioned the actual “refundable” nature of security deposits since “deposits” are often not returned to the tenant when the unit is vacated.

### **The Comparable Housing Unit**

#### *Accommodation for People with Disabilities*

In response to HJN’s comment regarding the accommodation of people with disabilities, DOT revised its guidelines to address the physical attributes of replacement housing for persons with physical disabilities beyond those who depend upon wheelchairs, to encompass persons with a physical impairment that substantially limits one or more of the major life activities of a person.<sup>41</sup> As

requested by HJN, the guidelines instruct the displacing agency to consider other items, such as physical modification to a unit based upon the displaced person’s individual needs (e.g., a hearing-impaired person’s need for a visual fire alarm).<sup>42</sup>

#### *Accessibility and Egress*

Despite HJN’s objection based on safety concerns, the final rule adopts the proposed regulatory change to eliminate the requirement of two means of egress from housing units.<sup>43</sup> Before these amendments, the regulatory language required that there must be direct access to a common corridor that provides at least two means of egress when replacement units are on the second story.<sup>44</sup> Necessary compliance with local code requirements regarding egress from housing units remains.<sup>45</sup>

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*DOT revised its guidelines to address the physical attributes of replacement housing for persons with physical disabilities beyond those who depend upon wheelchairs.*

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#### *“Decent, Safe and Sanitary”*

The regulations require the use of “local” housing and occupancy codes to determine whether a replacement unit is “decent, safe and sanitary.”<sup>46</sup> DOT declined to affirmatively amend the definition to state that *all* applicable housing and occupancy standards (local or otherwise) must be considered in determining decent, safe and sanitary dwellings. DOT also declined to adopt HJN’s proposal to determine the standard based on that which is least likely to cause overcrowding and is most beneficial and desirable to the displaced person.

#### *Lead-Based Paint*

Initially, DOT proposed to extend the definition of “decent, safe, and sanitary dwelling” to include lead-based paint safety issues.<sup>47</sup> Although HJN supported this proposal (with suggested modifications), DOT has now withdrawn its inclusion of lead-based paint from the list of mandatory replacement housing requirements. Instead, DOT has amended Appendix A to state that *if* local

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<sup>33</sup>*Id.* at 600.

<sup>34</sup>*Id.* at 624 (§ 24.301(b)). See also Fixed Residential Moving Cost Schedule, at <http://www.fhwa.dot.gov/realestate/relocat.htm> (FRMCS); *id.* at 626 (§ 24.302 fn.3).

<sup>35</sup>Final Rule, *supra* note 3, at 624 (§ 24.301(b)).

<sup>36</sup>*Id.* at 601.

<sup>37</sup>*Id.*

<sup>38</sup>49 C.F.R. § 24.305 (2004).

<sup>39</sup>Final Rule, *supra* note 3, at 625 (§ 24.301(h)(12)).

<sup>40</sup>*Id.* at 604.

<sup>41</sup>*Id.* at 632 (Appendix A, § 24.2(a)(8)(vii)).

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<sup>42</sup>*Id.*

<sup>43</sup>*Id.* at 592; *id.* at 613 (§ 24.2(a)(8)(vi)).

<sup>44</sup>49 C.F.R. § 24.2 (2004) (defining “Decent, Safe, and Sanitary Dwelling”).

<sup>45</sup>Final Rule, *supra* note 3, at 613 (§ 24.2(a)(8)).

<sup>46</sup>*Id.* at 613 (§ 24.2(a)(8)).

<sup>47</sup>Proposed Rule, *supra* note 23, at 70,361 (§ 24.2(a)(8)(ii)).

housing and occupancy codes exist that require lead-based paint protections, the local codes “must be honored. Even where local law does not mandate adherence to such standards, it is strongly recommended that they be considered as a matter of public policy.”

## The Replacement Housing Payment

### *No Authorized Deductions, Including Unpaid Rent*

In accordance with HJN’s comments, the final rule confirms that the displacing entity is not permitted to make any unauthorized deductions from the replacement housing payment or relocation assistance.<sup>48</sup> This includes a prohibition against deducting any rent allegedly owed to the agency by the displaced tenant. In addition, DOT confirms that the URA expressly refrains from providing any authority for agencies to supersede state landlord/tenant laws governing rent disputes.<sup>49</sup>

### *Income Must Be Considered When Determining the Replacement Housing Payment*

In its proposed regulations, DOT sought to change language pertaining to the “financial means of the displaced persons” while failing to consider the displaced person’s income.<sup>50</sup> HJN argued that the proposed change eliminated the financial protections of the displaced persons. HJN pointed out that Congress intended the agency to consider the displaced person’s income in the final cost of the price or rent paid for the replacement dwelling by the displaced person.<sup>51</sup> Accordingly, HJN submitted that the proposed regulation was inconsistent with the statutory intent in that it did not clarify that the price or rent paid by the *displaced person* for the comparable unit cannot exceed, *after taking into account the displaced person’s income*, the previous price or rent paid for the unit from which she was displaced. DOT withdrew its proposed amendment in the final rule.<sup>52</sup>

### *Artificial Replacement Housing Payment “Caps” Remain*

HJN recommended that the final rule clarify that the antiquated statutory “caps” of \$5,250 and \$22,500 for displaced tenants and homeowners, respectively, were not “caps” at all—since they were artificially low and subject to the “last resort housing” exception of the URA stat-

ute and regulations.<sup>53</sup> Among other things, the last resort housing provision requires additional payments (or the development of new housing if necessary) when the statutory “caps” are inadequate to make a comparable housing unit affordable to the displaced person. DOT failed to address these comments.<sup>54</sup>

## Other Notable Changes

### *Mobile Homes*

The final rule defines the term *mobile home* to include both manufactured homes and recreational vehicles that are used as residences.<sup>55</sup>

### *Real Property Appraisals*

Substantial regulatory amendments were made with regard to real estate appraisal waivers, standards, scope of work and appraiser qualifications as they relate to real property acquisitions.<sup>56</sup>

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*The final rule confirms that the displacing entity is not permitted to make any unauthorized deductions from the replacement housing payment or relocation assistance.*

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### *Appendix A Provides Guidance*

The final rule’s Appendix A reflects increased content over the prior version.<sup>57</sup> The new appendix includes a detailed explanation of the regulatory sections for implementation purposes. In its preamble, DOT clarifies that Appendix A is an integral part of the regulation, and while it refrains from imposing mandatory requirements, it serves to provide important additional guidance and information concerning the purpose and intent of a number of the regulatory provisions in Part 24.<sup>58</sup>

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households that are considered “low-income” under the *federal* income guidelines. *See also* DOT, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act or URA) Low Income Calculations, at <http://www.fhwa.dot.gov/realestate/ua/ualic.htm> (Feb. 3, 2005).

<sup>53</sup>See 49 C.F.R. § 24.404 (2004).

<sup>54</sup>Agencies are required to respond to significant comments which raise relevant points, which, if adopted, would require a change in the agency’s proposed rule. *Safari Aviation, Inc. v. Garvey*, 300 F.3d 1144, 1151 (9th Cir. 2002).

<sup>55</sup>Final Rule, *supra* note 3, at 614 (§ 24.2(a)(17)) and 633 (Appendix A, § 24.2(a)(17)).

<sup>56</sup>*Id.* at 617-19 (§ 24.102-04)).

<sup>57</sup>*Id.* at 632-37.

<sup>58</sup>*Id.* at 605.

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<sup>48</sup>Final Rule, *supra* note 3, at 629 (§ 24.403(a)(6)).

<sup>49</sup>*Id.* at 591.

<sup>50</sup>Proposed Rule, *supra* note 23, at 70360 (§ 24.2(a)(6)(viii) (defining “comparable replacement dwelling”).

<sup>51</sup>See 42 U.S.C.A. §4624(a) (West, WESTLAW through P.L. 108-468 (excluding 108-357, 108-375, 108-446, 108-447, 108-458, 108-466) approved 12-21-04).

<sup>52</sup>Final Rule, *supra* note 3, at 613 (§ 24.2(a)(6)(viii) (defining “comparable replacement dwelling”).

Note that when calculating the replacement housing payment under the new final rule, the 30% rent-to-income ratio is *only* applicable to those

## Conclusion

The final rule is a definite improvement from prior regulations. However, it fails to provide the full protections required by the URA and other relevant laws.

It is important for advocates to make certain that agencies implement their local and state policies and practices and draft their relocation plans in ways that recognize the significant changes to outgoing URA regulations. To help effect compliance with the final rule, advocates are encouraged to send letters to their local agencies informing them of the rule and recommending policies in areas where the rule is ambiguous.

Advocates should also ensure that agencies which are acting under the new URA final rule carry out the provisions in a manner that is consistent with the law. Where it may be more difficult to monitor compliance with the URA statute, is prior to the ION stage and in the timely distribution of notices of eligibility for relocation assistance. It is also important to monitor whether agencies comply with other duly enacted statutes that seek to protect low-income and otherwise disadvantaged persons such as fair housing and disability rights laws.

Notwithstanding the final rule, advocates should consider challenging agency actions where the URA statute is violated. NHLP and the Western Center on Law and Poverty are interested in hearing about your experiences under the new final rule. Contact Catherine M. Bishop at (510) 251-9400 ext. 105 (cbishop@nhlp.org) or S. Lynn Martinez at (510) 891-9794 ext. 125 (slmartinez@wclp.org). ■

## New Rule Permits Eviction of Over-Income Public Housing Households

In November 2004, the Department of Housing and Urban Development (HUD) published a final rule permitting public housing authorities (PHAs) to terminate or evict tenants who are over income,<sup>1</sup> meaning that their incomes exceed 80% of area median income (AMI).<sup>2</sup>

The policy justification for the regulation is “that public housing should be available to eligible low-income families and that it is inappropriate to limit the ability of a PHA to move over-income families out of public housing to make room for low-income families on the waiting list.”<sup>3</sup>

The regulation exempts tenants who are receiving the benefits of the earned income disregard and who are participating in the Family Self-Sufficiency program. Those families cannot be evicted or terminated. The rationale for the exemption is that evicting such tenants would frustrate the purposes of the program or benefit.

Because there is not enough public housing to serve the need, there is a tension between serving higher-income existing tenants and those on the waiting list who may be lower income. The new regulation is inconsistent with policies such as promoting economic self-sufficiency within public housing and establishing an economic mix within public housing.<sup>4</sup>

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<sup>1</sup>PHA Discretion in Treatment of Over-Income Families, 69 Fed. Reg. 68,786 (Nov. 26, 2004) (to be codified at 24 C.F.R. §§ 960.261 and 966.4(2)(ii)).

<sup>2</sup>24 C.F.R. § 5.603 (2004) (definition of low-income family).

<sup>3</sup>69 Fed. Reg. 68,786 (Nov. 26, 2004).

<sup>4</sup>The concepts of deconcentration and economic mix are not necessarily the same. Economic mix is often used to encompass a broad range of incomes, some exceeding 80% of AMI and including the full range of market incomes. HUD states that deconcentration can be achieved with families with incomes below 80% of AMI. *See id.* at 68,787. Developments with an average family income at or below 30% of AMI cannot be considered higher income for purpose of deconcentration. Thus, no deconcentration efforts are required to provide a preference for the lowest-income families if average income in the development is 30% or less of AMI. But for those developments with average income at or below 30% of AMI, deconcentration efforts would require a preference for higher-income families. 24 C.F.R. § 903.2(c)(1)(iii) (2004); Public Housing Agency Plans: Deconcentration—Amendments to “Established Income Range” Definition, 67 Fed. Reg. 51,030 (Aug. 6, 2002).

The policy of evicting higher-income families is more consistent with the HUD policy of limiting the time that a tenant may reside in assisted housing. 69 Fed. Reg. 68,786 68,789-68,790 (Nov. 26, 2004) (HUD stated that it agreed with the comment that “HUD assistance should be temporary.”)

## The Anticipated Impact of the New Rule

While it is significant, the new rule is unlikely to have a large-scale impact. First, the new rule merely allows PHAs discretion to evict over-income households. It does not require the eviction of such households.<sup>5</sup>

Second, according to HUD data as of December 31, 2004,<sup>6</sup> only 1% of households had incomes above 80% of AMI, which is equal to 12,297 (1% of 1,229,715).<sup>7</sup>

The previous regulation permitted a PHA to evict over-income families only if the PHA determined that there was other decent, safe and sanitary housing available at a rent that did not exceed the tenant's current rent, or if local law required that the PHA evict the tenant. The previous regulation was designed to protect tenants in high-rent housing markets.

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*It is important to remember that a PHA is not required to adopt a policy to force out over-income tenants.*

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Without the protection of the federal regulation, it is probable that in some jurisdictions, families will be forced out of public housing and into substandard housing or into housing that costs more than 30% of their income. There are jurisdictions for which the fair market rent (FMR) for a unit with a particular number of bedrooms exceeds 30% of monthly income for a low-income family. For example, in Ft. Lauderdale, Las Vegas, Miami, Oakland, Orange County, Sacramento, San Diego, Ventura and Washington, D.C., the FMR is greater than 30% of the monthly income of large families with incomes slightly over 80% of AMI.<sup>8</sup> In some situations, the difference is more than \$250 per month. In four jurisdictions, Miami, Orange County, CA, San Diego and Washington, D.C., single person households with incomes slightly over 80% of AMI would also be adversely affected, although to a more limited extent than large families. Specific figures are provided in Table 1.<sup>9</sup>

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<sup>5</sup>69 Fed. Reg. at 68,786, 68,791 (Nov. 26, 2004), 960.261(a) (PHAs may evict or terminate).

<sup>6</sup>The HUD Resident Characteristic Report can be found at <http://pic.hud.gov/pic/RCRPublic/rcrmain.asp>.

<sup>7</sup>That same MTCS report states that 5% of the families are "Low Income, 80% of Median" and for 24% of the families there is no "Income Limit Available."

<sup>8</sup>As indicated in Table 1, these slightly over-income households have annual incomes that are \$100 greater than 80% of AMI.

<sup>9</sup>These nine metropolitan areas are among the thirty-nine identified by HUD in 2001 as having significant geographic concentrations of voucher households. HUD increased FMR levels for those thirty-nine areas and the FMR for these areas continue to be based on the 50<sup>th</sup> percentile of

## Implementation of the New Rule

It is important to remember that a PHA is not required to adopt a policy to force out over-income tenants. HUD stated in the introductory comments that it "will not penalize PHAs for not incorporating this rule into their admission and continued occupancy policies."<sup>10</sup>

There are procedural steps that a PHA must take before it may implement such a policy. Any policy adopted under the new rule must be included in the PHA's admission and continued occupancy policies.<sup>11</sup> The policy must be attached to the PHA's annual plan. If the annual plan has been approved for the year, the PHA may have to "submit a plan amendment if necessary under local guidelines."<sup>12</sup>

The introductory comments further state that, if the policy is adopted, a "PHA may proceed with eviction actions up to presentation to the court pending the [HUD] certification [i.e., approval] of the plan."<sup>13</sup> There is no legal basis for this statement. The eviction procedure—as well as the grievance procedure that must precede it—should not be commenced until the policy is formally adopted and approved by HUD. The HUD statement appears to claim that the HUD review of PHA plans is an empty formality when such review is expressly mandated by statute.<sup>14</sup> HUD appears to suggest that tenants may be threatened with eviction despite the fact that HUD is reviewing the policy and may reject the PHA's plan.

## Conclusion

Some PHAs may take steps to implement a policy at the local level to terminate tenancies of the highest-income families. If a PHA seeks to adopt such a policy, it is important to remember that a PHA is not required to do so. Any such policy will create a tension between residents and applicants and/or advocates representing these different groups. To assist the two groups in understanding the impact of such a policy, it would be helpful if the PHA could provide information regarding the number of tenant families with incomes above 80% of AMI who would

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recent movers as contrasted with the 40<sup>th</sup> percentile of recent movers applicable to all the other jurisdictions nationwide. See NHLP, *Racial Concentration in the Housing Choice Voucher Program*, 31 HOUS. L. BULL. 223, 223 (2001); NHLP, *HUD Announces That It Will Raise Section 8 Fair Market Rent Levels in 39 Metropolitan Areas*, 30 HOUS. L. BULL. 127, 135 (2000). The effect of the new rule may be magnified in these 50<sup>th</sup> percentile FMR areas.

<sup>10</sup>69 Fed. Reg. 68,786 (Nov. 26, 2004).

<sup>11</sup>*Id.* at 68,788.

<sup>12</sup>*Id.* The local guidelines referred to include the rules adopted locally for amendment of the PHA's annual plan 24 C.F.R. § 903.7(r)(2) (2003). If the PHA is required to amend the plan it must follow certain procedures. *Id.* at § 903.21.

<sup>13</sup>69 Fed. Reg. 68,786, 68,789 (Nov. 26, 2004).

<sup>14</sup>42 U.S.C.A. § 1437c-1(i) (West 2003).

## Table 1: Difference between FMR & 30% of Income for Over-Income Families

Metropolitan Area	1 Person		2 Persons		3 Persons		4 Persons		5 Persons		6 Persons		7 Persons		8 Persons	
	0 BR	1 BR	1 BR	1 BR	2 BR	2 BR	2 BR	2 BR	3 BR	3 BR	3 BR	3 BR	4 BR	4 BR	4 BR	4 BR
<b>Fort Lauderdale, FL</b>																
A. Low Income, annually	\$33,700.00	\$33,700.00	\$38,550.00	\$38,550.00	\$43,350.00	\$43,350.00	\$48,150.00	\$48,150.00	\$52,000.00	\$52,000.00	\$55,850.00	\$55,850.00	\$59,700.00	\$59,700.00	\$63,550.00	\$63,550.00
B. Low Income +\$100, annually	\$33,800.00	\$33,800.00	\$38,650.00	\$38,650.00	\$43,450.00	\$43,450.00	\$48,250.00	\$48,250.00	\$52,100.00	\$52,100.00	\$55,950.00	\$55,950.00	\$59,800.00	\$59,800.00	\$63,650.00	\$63,650.00
C. 30% of B., monthly	\$845.00	\$845.00	\$966.25	\$966.25	\$1,086.25	\$1,086.25	\$1,206.25	\$1,206.25	\$1,302.50	\$1,302.50	\$1,398.75	\$1,398.75	\$1,495.00	\$1,495.00	\$1,591.25	\$1,591.25
D. FMR, monthly	\$743.00	\$830.00	\$830.00	\$830.00	\$998.00	\$998.00	\$998.00	\$998.00	\$1,380.00	\$1,380.00	\$1,380.00	\$1,380.00	\$1,752.00	\$1,752.00	\$1,752.00	\$1,752.00
E. Difference between C. & D.	\$102.00	\$15.00	\$136.25	\$136.25	\$88.25	\$88.25	\$208.25	\$208.25	-\$77.50	-\$77.50	\$18.75	\$18.75	-\$257.00	-\$257.00	-\$160.75	-\$160.75
<b>Las Vegas, NV</b>																
A. Low Income, annually	\$33,100.00	\$33,100.00	\$37,800.00	\$37,800.00	\$42,550.00	\$42,550.00	\$47,300.00	\$47,300.00	\$51,050.00	\$51,050.00	\$54,850.00	\$54,850.00	\$58,650.00	\$58,650.00	\$62,400.00	\$62,400.00
B. Low Income +\$100, annually	\$33,200.00	\$33,200.00	\$37,900.00	\$37,900.00	\$42,650.00	\$42,650.00	\$47,400.00	\$47,400.00	\$51,150.00	\$51,150.00	\$54,950.00	\$54,950.00	\$58,750.00	\$58,750.00	\$62,500.00	\$62,500.00
C. 30% of B., monthly	\$830.00	\$830.00	\$947.50	\$947.50	\$1,066.25	\$1,066.25	\$1,185.00	\$1,185.00	\$1,278.75	\$1,278.75	\$1,373.75	\$1,373.75	\$1,468.75	\$1,468.75	\$1,562.50	\$1,562.50
D. FMR, monthly	\$665.00	\$773.00	\$773.00	\$773.00	\$907.00	\$907.00	\$907.00	\$907.00	\$1,234.00	\$1,234.00	\$1,234.00	\$1,234.00	\$1,550.00	\$1,550.00	\$1,550.00	\$1,550.00
E. Difference between C. & D.	\$165.00	\$57.00	\$174.50	\$174.50	\$159.25	\$159.25	\$278.00	\$278.00	\$44.75	\$44.75	\$139.75	\$139.75	-\$81.25	-\$81.25	\$12.50	\$12.50
<b>Miami, FL</b>																
A. Low Income, annually	\$30,300.00	\$30,300.00	\$34,600.00	\$34,600.00	\$38,950.00	\$38,950.00	\$43,300.00	\$43,300.00	\$46,750.00	\$46,750.00	\$50,200.00	\$50,200.00	\$53,650.00	\$53,650.00	\$57,150.00	\$57,150.00
B. Low Income +\$100, annually	\$30,400.00	\$30,400.00	\$34,700.00	\$34,700.00	\$39,050.00	\$39,050.00	\$43,400.00	\$43,400.00	\$46,850.00	\$46,850.00	\$50,300.00	\$50,300.00	\$53,750.00	\$53,750.00	\$57,250.00	\$57,250.00
C. 30% of B., monthly	\$760.00	\$760.00	\$867.50	\$867.50	\$976.25	\$976.25	\$1,085.00	\$1,085.00	\$1,171.25	\$1,171.25	\$1,257.50	\$1,257.50	\$1,343.75	\$1,343.75	\$1,431.25	\$1,431.25
D. FMR, monthly	\$682.00	\$775.00	\$775.00	\$775.00	\$929.00	\$929.00	\$929.00	\$929.00	\$1,204.00	\$1,204.00	\$1,204.00	\$1,204.00	\$1,419.00	\$1,419.00	\$1,419.00	\$1,419.00
E. Difference between C. & D.	\$78.00	-\$15.00	\$92.50	\$92.50	\$47.25	\$47.25	\$156.00	\$156.00	-\$32.75	-\$32.75	\$53.50	\$53.50	-\$75.25	-\$75.25	\$12.25	\$12.25
<b>Oakland, CA</b>																
A. Low Income, annually	\$46,350.00	\$46,350.00	\$53,000.00	\$53,000.00	\$59,600.00	\$59,600.00	\$66,250.00	\$66,250.00	\$71,550.00	\$71,550.00	\$76,850.00	\$76,850.00	\$82,150.00	\$82,150.00	\$87,450.00	\$87,450.00
B. Low Income +\$100, annually	\$46,450.00	\$46,450.00	\$53,100.00	\$53,100.00	\$59,700.00	\$59,700.00	\$66,350.00	\$66,350.00	\$71,650.00	\$71,650.00	\$76,950.00	\$76,950.00	\$82,250.00	\$82,250.00	\$87,550.00	\$87,550.00
C. 30% of B., monthly	\$1,161.25	\$1,161.25	\$1,327.50	\$1,327.50	\$1,492.50	\$1,492.50	\$1,658.75	\$1,658.75	\$1,791.25	\$1,791.25	\$1,923.75	\$1,923.75	\$2,056.25	\$2,056.25	\$2,188.75	\$2,188.75
D. FMR, monthly	\$945.00	\$1,132.00	\$1,132.00	\$1,132.00	\$1,342.00	\$1,342.00	\$1,342.00	\$1,342.00	\$1,870.00	\$1,870.00	\$1,870.00	\$1,870.00	\$2,293.00	\$2,293.00	\$2,293.00	\$2,293.00
E. Difference between C. & D.	\$216.25	\$29.25	\$195.50	\$195.50	\$150.50	\$150.50	\$316.75	\$316.75	-\$78.75	-\$78.75	\$53.75	\$53.75	-\$236.75	-\$236.75	-\$104.25	-\$104.25

<b>Orange County, CA</b>										
A. Low Income, annually	\$43,000.00	\$43,000.00	\$49,150.00	\$55,300.00	\$61,450.00	\$66,350.00	\$71,250.00	\$76,200.00	\$81,100.00	\$81,100.00
B. Low Income +\$100, annually	\$43,100.00	\$43,100.00	\$49,250.00	\$55,400.00	\$61,550.00	\$66,450.00	\$71,350.00	\$76,300.00	\$81,200.00	\$81,200.00
C. 30% of B., monthly	\$1,077.50	\$1,077.50	\$1,231.25	\$1,385.00	\$1,538.75	\$1,661.25	\$1,783.75	\$1,907.50	\$2,030.00	\$2,030.00
D. FMR, monthly	\$979.00	\$1,098.00	\$1,098.00	\$1,317.00	\$1,317.00	\$1,885.00	\$1,885.00	\$2,165.00	\$2,165.00	\$2,165.00
E. Difference between C. & D.	\$98.50	<b>-\$20.50</b>	\$133.25	\$68.00	\$221.75	<b>-\$223.75</b>	<b>-\$101.25</b>	<b>-\$257.50</b>	<b>-\$135.00</b>	<b>-\$135.00</b>
<b>Sacramento, CA</b>										
A. Low Income, annually	\$35,900.00	\$35,900.00	\$41,000.00	\$46,150.00	\$51,300.00	\$55,400.00	\$59,500.00	\$63,600.00	\$67,700.00	\$67,700.00
B. Low Income +\$100, annually	\$36,000.00	\$36,000.00	\$41,100.00	\$46,250.00	\$51,400.00	\$55,500.00	\$59,600.00	\$63,700.00	\$67,800.00	\$67,800.00
C. 30% of B., monthly	\$900.00	\$900.00	\$1,027.50	\$1,156.25	\$1,285.00	\$1,387.50	\$1,490.00	\$1,592.50	\$1,695.00	\$1,695.00
D. FMR, monthly	\$707.00	\$812.00	\$812.00	\$971.00	\$971.00	\$1,403.00	\$1,403.00	\$1,639.00	\$1,639.00	\$1,639.00
E. Difference between C. & D.	\$193.00	\$88.00	\$215.50	\$185.25	\$314.00	<b>-\$15.50</b>	\$87.00	<b>-\$46.50</b>	\$56.00	\$56.00
<b>San Diego, CA</b>										
A. Low Income, annually	\$38,650.00	\$38,650.00	\$44,150.00	\$49,700.00	\$55,200.00	\$59,600.00	\$64,050.00	\$68,450.00	\$72,850.00	\$72,850.00
B. Low Income +\$100, annually	\$38,750.00	\$38,750.00	\$44,250.00	\$49,800.00	\$55,300.00	\$59,700.00	\$64,150.00	\$68,550.00	\$72,950.00	\$72,950.00
C. 30% of B., monthly	\$968.75	\$968.75	\$1,106.25	\$1,245.00	\$1,382.50	\$1,492.50	\$1,603.75	\$1,713.75	\$1,823.75	\$1,823.75
D. FMR, monthly	\$854.00	\$975.00	\$975.00	\$1,183.00	\$1,183.00	\$1,725.00	\$1,725.00	\$2,080.00	\$2,080.00	\$2,080.00
E. Difference between C. & D.	\$114.75	<b>-\$6.25</b>	\$131.25	\$62.00	\$199.50	<b>-\$232.50</b>	<b>-\$121.25</b>	<b>-\$366.25</b>	<b>-\$256.25</b>	<b>-\$256.25</b>
<b>Ventura, CA</b>										
A. Low Income, annually	\$45,150.00	\$45,150.00	\$51,600.00	\$58,050.00	\$64,500.00	\$69,650.00	\$74,800.00	\$79,950.00	\$85,100.00	\$85,100.00
B. Low Income +\$100, annually	\$45,250.00	\$45,250.00	\$51,700.00	\$58,150.00	\$64,600.00	\$69,750.00	\$74,900.00	\$80,050.00	\$85,200.00	\$85,200.00
C. 30% of B., monthly	\$1,131.25	\$1,131.25	\$1,292.50	\$1,453.75	\$1,615.00	\$1,743.75	\$1,872.50	\$2,001.25	\$2,130.00	\$2,130.00
D. FMR, monthly	\$986.00	\$1,093.00	\$1,093.00	\$1,382.00	\$1,382.00	\$2,011.00	\$2,011.00	\$2,319.00	\$2,319.00	\$2,319.00
E. Difference between C. & D.	\$145.25	\$38.25	\$199.50	\$71.75	\$233.00	<b>-\$267.25</b>	<b>-\$138.50</b>	<b>-\$317.75</b>	<b>-\$189.00</b>	<b>-\$189.00</b>
<b>Washington, DC</b>										
A. Low Income, annually	\$40,600.00	\$40,600.00	\$46,400.00	\$52,200.00	\$58,000.00	\$62,650.00	\$67,300.00	\$71,900.00	\$76,550.00	\$76,550.00
B. Low Income +\$100, annually	\$40,700.00	\$40,700.00	\$46,500.00	\$52,300.00	\$58,100.00	\$62,750.00	\$67,400.00	\$72,000.00	\$76,650.00	\$76,650.00
C. 30% of B., monthly	\$1,017.50	\$1,017.50	\$1,162.50	\$1,307.50	\$1,452.50	\$1,568.75	\$1,685.00	\$1,800.00	\$1,916.25	\$1,916.25
D. FMR, monthly	\$915.00	\$1,045.00	\$1,045.00	\$1,187.00	\$1,187.00	\$1,537.00	\$1,537.00	\$2,000.00	\$2,000.00	\$2,000.00
E. Difference between C. & D.	\$102.50	<b>-\$27.50</b>	\$117.50	\$120.50	\$265.50	\$31.75	\$148.00	<b>-\$200.00</b>	<b>-\$83.75</b>	<b>-\$83.75</b>

Sources: HUD, FY 2005 Income Limits, at <http://www.huduser.org/datasets/til/105/index.html> (content updated Feb. 10, 2005); HUD, 2005 Fair Market Rents, at <http://www.huduser.org/datasets/fmr/fmr2005R/index.html> (content updated Feb. 28, 2005).

be affected by any new policy. For many PHAs this information is publically available, in percentages, from the Resident Characteristic Report data.<sup>15</sup> This information could be compared with the information that the PHA has concerning the income of the families on the waiting list. Information regard the income of families (e.g., the number of families in the range below 30% of AMI, between 30 and 50% and between 50 and 80% of AMI) who are on the waiting list is part of the PHA annual plan. Any policy should provide for ample notice of an eviction. Finally, in jurisdictions with high rents, any policy could provide for extra-lengthy notice periods or no eviction if there is no available decent, safe, sanitary housing that is affordable at 30% of the family's income. ■

## HUD Issues Mixed Performance Report

In December, the Department of Housing and Urban Development (HUD) released its 2004 Performance and Accountability Report.<sup>1</sup> This report is an opportunity every year for HUD to shine a light on its program results, management successes and financial condition.<sup>2</sup> HUD does its best to accentuate the positive, but the report also documents a number of significant shortcomings.

### Homeownership Numbers Decrease

Part of the report focuses on homeownership goals and achievements, which have been a big favorite of the current administration. Among these goals include expanding national homeownership opportunities especially for minorities, making the homebuying process

less complicated, decreasing predatory lending, keeping existing homeowners from losing their homes, and helping HUD-assisted renters to become homeowners.<sup>3</sup> Interestingly, for all the emphasis placed on homeownership objectives, HUD seems to have received failing marks relative to many of these goals.

For example, although HUD has not completed its data compilation, it anticipates that nearly 740,000 homebuyers and homeowners will have received housing counseling services in 2004.<sup>4</sup> While HUD boasts that it anticipates that 464,000 "minority" households will have also received housing counseling based on its expenditure of over \$37.5 million, an increase of nearly three times the number of households assisted in 2003,<sup>5</sup> the minority homeownership rate increased only by a mere 1.6%.<sup>6</sup> Unfortunately, larger numbers of minorities applying for home loans were turned down for those loans. The mortgage disapproval rates of minority applicants increased from 13.7% in 2002 to 15.3% in 2003.<sup>7</sup> Furthermore, in spite of the increase of 1.6% in the minority homeownership rate, the number of overall first-time homebuyers among FHA-insured home mortgages actually decreased by 4.3%.<sup>8</sup> This performance measure tracks overall the share of first-time homebuyers while excluding loans made for home improvements.<sup>9</sup>

The report also notes that the number of Federal Housing Administration (FHA) single-family mortgage insurance endorsements nationwide decreased from 1,337,728 in 2003 to 997,344 in 2004.<sup>10</sup> These FHA-insured mortgage rates are important since private lenders are more likely to lend funds insured by FHA, thereby increasing access to mortgage capital and homeownership opportunities for potential homebuyers.<sup>11</sup>

Some other failing marks include a decrease in the number of homeowner units assisted with HOME funds from 47,886 in 2003 to 22,701 in 2004, a decrease of more than 50%.<sup>12</sup> HUD explains that much of this decrease is due to improvements in its Integrated Disbursement and Information System that resulted in the purging of inaccurate data including large numbers of "phantom" units that were set up as commitments in the system but

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<sup>15</sup>The HUD Resident Characteristic Report can be found at <http://pic.hud.gov/pic/RCRPublic/rcrmain.asp>.

<sup>1</sup>HUD, PERFORMANCE AND ACCOUNTABILITY REPORT FY 2004 (2004) [hereinafter PERFORMANCE AND ACCOUNTABILITY REPORT], available at <http://www.hud.gov/utilities/intercept.cfm?/offices/cfo/pafinal.pdf>.

<sup>2</sup>*Id.* at 1-3 (Message from Secretary Jackson, November 15, 2004).

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<sup>3</sup>*Id.* at 2-9 to 2-34 (Goal H).

<sup>4</sup>*Id.* at 2-15.

<sup>5</sup>*Id.* at 2-26.

<sup>6</sup>*Id.* at 2-22.

<sup>7</sup>*Id.* at 2-30.

<sup>8</sup>*Id.* at 2-13.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at 2-12.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.* at 2-16 to 2-17.

were never completed.<sup>13</sup> In the future, HUD will not use “commitments” as a measure of performance but will instead use “completions” which are a more accurate indicator of accomplishments.<sup>14</sup> Other failing marks in the homeownership arena include a 20% decrease in the number of homeowners who used sweat equity to earn assistance with the Self-Help Homeownership Opportunity Program,<sup>15</sup> a 6.9% decrease in the number of real estate owned properties sold to owner occupants,<sup>16</sup> and a decrease in the number of homeowners who were able to avoid foreclosure of their homes through mortgage counseling from 91.9% in 2002 to a mere 47.1% in 2004.<sup>17</sup> Therefore, even if there are small increases in homeownership rates, those families losing their homes to foreclosure have increased nearly 45%,<sup>18</sup> far exceeding any gains made on the front end.

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### **Goal of Expanding Housing Opportunities for Residents Is Achieved in Limited Areas**

Another major objective of HUD this past year was the promotion of decent and affordable housing as a goal for achievement.<sup>19</sup> As part of that objective, HUD’s goals in 2004 included: expanding access to affordable rental housing, improving the physical quality and management of public and subsidized housing, increasing housing opportunities for seniors and the disabled, and assisting renters in moving toward self-sufficiency.<sup>20</sup>

### **Households Assisted with HOME Funds Drops Nearly 50%**

The report indicates that in several of the programs, the number of households assisted decreased significantly

in 2004. In the CDBG program there was a 13.4% decline in the number of households assisted from the year before.<sup>21</sup> In the HOME program the number of households assisted decreased by nearly 50%, dropping from 99,003 in 2003 to 51,291 in 2004.<sup>22</sup> The largest increase in numbers appears to be in the Native American Housing Block Grant program which HUD reported assisted 173,703 households in 2004 as opposed to 87,169 in 2003.<sup>23</sup> There appear to have been some strides made in the support of seniors with increases in the number of elderly projects that now have service coordinators.<sup>24</sup>

### **Only 1.15% of Residents Leaving Public Housing Have Incomes Sufficient to Afford Market Rents**

One of HUD’s goals this past year, which also parallels HUD’s current strategic plans, is an emphasis on helping HUD-assisted renters make progress toward self-sufficiency.<sup>25</sup> Incentives in this area include the earned income disregards, flat rent options, Family Self Sufficiency and Resident Opportunities for Self Sufficiency programs.<sup>26</sup> HUD seems to have made little progress towards this goal. Among non-elderly/non-disabled households admitted to public housing over the past five years, a mere 1.15% have left public housing with incomes sufficient to afford market-rate housing.<sup>27</sup> That figure is even less in Section 8 with only .72% of those leaving the program able to afford the private rental market.<sup>28</sup> In fact, for all of its emphasis on self-sufficiency, HUD seems to have been unable to assist residents in public housing in increasing their incomes at all this past year. According to the Performance and Accountability Report, the average earnings of able-bodied households in public housing programs actually decreased by 3.8% on average in 2004 from their levels only one year prior.<sup>29</sup> Average earnings among voucher holders showed only a slight increase of 1.2%, well short of the administration’s goal.<sup>30</sup> Surprisingly, HUD blames these decreases on what it terms “quotas” imposed by the Quality Housing and Work Responsibility Act of 1998 which require that 75% of new vouchers be targeted at families

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<sup>13</sup>*Id.* at 2-16.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* at 2-17.

<sup>16</sup>*Id.* at 2-19.

<sup>17</sup>*Id.* at 2-34.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* at 2-35.

<sup>20</sup>*Id.*

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<sup>21</sup>*Id.* at 2-39.

<sup>22</sup>*Id.* at 2-40.

<sup>23</sup>*Id.* at 2-39.

<sup>24</sup>*Id.* at 2-64.

<sup>25</sup>US DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HUD STRATEGIC PLAN FY 2003-FY 2008, 14 (2003).

<sup>26</sup>PERFORMANCE AND ACCOUNTABILITY REPORT FY 2004, *supra* note 1, at 2-67.

<sup>27</sup>*Id.* at 2-65.

<sup>28</sup>*Id.*

<sup>29</sup>*Id.* at 2-66.

<sup>30</sup>*Id.*

with incomes below 30% of area median income.<sup>31</sup> Not surprisingly, HUD fails to back up its assertion or document any correlation between the initial income levels of residents and their ability to increase family income.

### Family Self-Sufficiency Program: Some Success

HUD did demonstrate some success over this past year in assisting families through its Family Self-Sufficiency Program in increasing the amount of savings that residents have in their escrow accounts. According to the performance report, the average escrow disbursement in FY 2004 was \$5,487 compared to only \$4,741 the prior year.<sup>32</sup> HUD also boasts an increase in the number of graduates of the program from 802 in FY 2003 to 1,172 this past year.<sup>33</sup>

The remainder of the report focuses on HUD's ability to ensure equal access to housing for the disabled and those who face discrimination,<sup>34</sup> to manage its housing programs efficiently and maintain data protections for sensitive information,<sup>35</sup> and to promote participation of faith-based organizations.<sup>36</sup>

The last section of the report includes financial statements from HUD,<sup>37</sup> the independent auditor's report findings,<sup>38</sup> and a summary of the inspector general's report noting serious management deficiencies on the part of HUD.<sup>39</sup>

At the very end of HUD's 2004 Performance and Accountability Report are appendices. Appendix 2 contains useful data on the number of units of HUD-assisted housing in programs such as Section 8, housing for elderly and disabled persons, HOME, Housing Opportunities for Persons with AIDS, Community Development Block Grant and other programs.<sup>40</sup> The appendix is formatted using a timeline from 2001 through 2004.<sup>41</sup> This summary provides a good overall picture of the direction that HUD programs have taken over the past four years. ■

<sup>31</sup>*Id.*

<sup>32</sup>*Id.* at 2-68.

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* at 2-93 to 2-99.

<sup>35</sup>*Id.* at 2-105 to 2-132.

<sup>36</sup>*Id.* at 2-133 to 2-138.

<sup>37</sup>*Id.* at 3-1 to 3-61.

<sup>38</sup>*Id.* at 3-78 to 3-86.

<sup>39</sup>*Id.* at 3-86 to 3-92.

<sup>40</sup>*Id.* at App. 2, A-4.

<sup>41</sup>*Id.*

## Human Rights Watch Report on Prisoner Reentry and Federal Housing Programs

Human Rights Watch (HRW) has issued a report, *No Second Chance*, discussing the lack of access people with an arrest or criminal record have to the public housing and Housing Choice Voucher Program.<sup>1</sup> The report seeks to document the extent of the harm caused by federal policies directed at excluding from public housing even those with simply an arrest record, highlighting the lack of relationship between such policies and stated public safety concerns. Noting ways in which U.S. policies violate international human rights law, HRW's report recommends rational, reasonable solutions that balance public safety concerns against the needs of the millions of Americans who have an arrest or criminal record and need affordable housing. This article also includes recommendations from the National Housing Law Project (NHLP) regarding what advocates can do on the local level to make a positive difference and engage on the issues.

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*Estimates regarding the number of people likely to be excluded from public housing due to an arrest or criminal record are staggering.*

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HRW's report complements a report released by the Urban Institute last year, *Taking Stock*, which also examines the issue of access to affordable housing by people formerly incarcerated, either in jail or in prison.<sup>2</sup> Where Urban Institute provides a comprehensive overview of temporary and permanent affordable housing resources, examining barriers and solutions for formerly incarcerated persons, the HRW report focuses exclusively on federally subsidized housing.

### Who Is Affected by Public Housing and Voucher Admissions Policies?

Estimates regarding the number of people likely to be excluded from public housing due to an arrest or crimi-

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<sup>1</sup>The report uses the term "public housing" to refer to both conventional public housing and the voucher program. This article will refer to each program separately.

<sup>2</sup>CATERINA GOUVIS ROMAN & JEREMY TRAVIS, URBAN INSTITUTE, *TAKING STOCK, HOUSING, HOMELESSNESS AND PRISONER RE-ENTRY* (2004).

nal record are staggering. Those who will probably not be able to access public housing include the approximately 600,000 people who leave prison each year. Also included would be the 5,618,000 people (as of 2001) who have completed prison time.<sup>3</sup> Added to that are the millions of people arrested for criminal infractions—13.7 million in 2002 alone.<sup>4</sup> That figure is not anomalous. Another 13.6 million such arrests were made in 2003.<sup>5</sup> (These figures do not include traffic violations.)

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*Women are also over-represented in the jail and prison population as a direct result of harsher sentencing spawned by the U.S. "war on drugs" policies.*

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The poor, people of color, and women are over-represented in these statistics. In 2002, 14% of people in jail reported being homeless or living in temporary shelter immediately before incarceration. A 1996 study found that a whopping 49% of homeless adults had reportedly spent five or more days in a city or county jail while another 22% had spent time in military, state or federal prison.<sup>6</sup> An estimated 29% of people jailed were not employed in the month before their arrest.<sup>7</sup>

In 2001, of adults ever incarcerated, 8.9% were African American, 4.3% were Latino, and 1.4% were Caucasian. Yet African Americans age 18 and over represent just 8% of the total population, Latinos age 18 and over represent 8% while Caucasians age 18 and over represent 53.5% of the total population. With regard to drug-related offenses, approximately the same percentage of African Americans and Caucasians age 12 and older reported use of illegal drugs: 8.7% of African American reported use, while 8.3% of Caucasians reported use. Native Americans reported 12.1%, while Native Hawaiians and Asian Pacific Island-

ers reported 11.1%. Asians had the lowest rate, at 3.8%. At 8%, Latino reported use was close to the level of African Americans and Caucasians. Yet significantly more people of color are being jailed or imprisoned for illegal drug use than Caucasians. In 1996, more than one in four African Americans and Latinos were in jail for a drug offense versus one in seven Caucasians.<sup>8</sup> There is clearly a racial disparity in enforcement, sentencing or both.

Women are also over-represented in the jail and prison population as a direct result of harsher sentencing spawned by the U.S. "war on drugs" policies. Women are one of the fastest-growing segments of the jail population. In 1983, women accounted for 7.1% of inmates. By 1996, women had become 10.2% of the inmate population—a 31% increase.<sup>9</sup> This increase coincides with the "rapid increase in the percentage of jail inmates held for a drug offense during the 1980s . . . [when] the percentage charged with a drug offense rose from 9 percent in 1983 to 23 percent in 1989."<sup>10</sup> Drug-related enforcement appears to have increased in vigor in the late 1990s. The number of people in jail for a drug offense grew by 37% from 1996 to 2002—the largest source of jail population growth during that time.<sup>11</sup> Coincident with this increase, the number of women in jail rose another 2%, meaning that by the end of 2002, women constituted 12% of the jail population.<sup>12</sup> The number of women in prison is increasing as well. In 2003, the number of women in state and/or federal prison increased by 3.6% versus the 2% increase in men.<sup>13</sup>

The likelihood of an American having some form of criminal or arrest record has grown over the past thirty years. One in every 140 U.S. residents was in prison or jail at the end of 2003.<sup>14</sup> To give some perspective, the number of prisoners released in 2004 was four times the number released in 1980.<sup>15</sup> The increase in arrests and incarceration has been generated by changes in sentencing policies that have focused on punishing even non-serious, non-violent crime in a highly punitive fashion. "In 2000, an estimated 57% of Federal inmates and 21% of State inmates were

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<sup>3</sup>BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf>. That figure amounts to one in every thirty-seven adult U.S. residents in 2001.

<sup>4</sup>HUMAN RIGHTS WATCH, NO SECOND CHANCE, PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 9 (2004) (citing FEDERAL BUREAU OF INVESTIGATIONS, UNIFORM CRIME REPORTS, CRIMES IN THE UNITED STATES, 2002, 234, table 29, available at <http://www.fbi.gov/ucr/html>).

<sup>5</sup>FEDERAL BUREAU OF INVESTIGATIONS, UNIFORM CRIME REPORTS, CRIMES IN THE UNITED STATES, 2003, 270, table 29, available at [http://www.fbi.gov/ucr/cius\\_03/pdf/03sec4.pdf](http://www.fbi.gov/ucr/cius_03/pdf/03sec4.pdf).

<sup>6</sup>U.S. CENSUS BUREAU, NATIONAL SURVEY OF HOMELESS ASSISTANCE PROVIDERS AND CLIENTS (1996).

<sup>7</sup>BUREAU OF JUSTICE STATISTICS, PROFILE OF JAIL INMATES, 2002 (2004) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf>.

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<sup>8</sup>BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, PROFILE OF JAIL INMATES 1996, 5 (1998) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pji96.pdf>.

<sup>9</sup>BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, PROFILE OF JAIL INMATES 1996, 3 (1998) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pji96.pdf>.

<sup>10</sup>*Id.* at 4.

<sup>11</sup>BUREAU OF JUSTICE STATISTICS, CRIMINAL OFFENDERS STATISTICS (2004) available at <http://www.ojp.usdoj.gov/bjs/crimoff.htm#inmates>.

<sup>12</sup>BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2003, BULLETIN (2004) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf>.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>CATERINA GOUVIS ROMAN & JEREMY TRAVIS, URBAN INSTITUTE, TAKING STOCK, HOUSING, HOMELESSNESS AND PRISONER RE-ENTRY 9 (2004).

servicing a sentence for a drug offense.”<sup>16</sup> About half of all drug offenders were in jail for possession.<sup>17</sup>

## Access to Public and Other Subsidized Housing

Against a backdrop of a huge and growing need for affordable housing in the United States, people seeking reentry after incarceration face a monumental challenge. They are competing for housing with the 35.9 million other Americans who live at or below the federal poverty level.<sup>18</sup> They are also competing for fewer affordable units—at least 7% fewer in 1999 than in 1997.<sup>19</sup>

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*Against a backdrop of a huge and growing need for affordable housing in the United States, people seeking reentry after incarceration face a monumental challenge.*

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Stable, affordable housing is an urgent need for people leaving prison.<sup>20</sup> Subsequent to President Bush’s proclamation about the need for transitional housing for people leaving prison in his 2004 State of the Union address, the Department of Housing and Urban Development (HUD) became a partner in the U.S. Department of Justice (DOJ) Serious and Violent Offender Reentry Initiative.<sup>21</sup> However, HRW points out that transitional housing will never effectively meet the growing housing needs.

## Public Housing and Voucher Program Laws and Regulation

HRW’s report explains how congressional action and HUD’s regulatory interpretation set the stage for current admissions standards. Since 1988, Congress has encouraged public housing authorities (PHAs) to apply stricter screening requirements (and tougher eviction standards) in subsidized housing programs.<sup>22</sup> It was the Housing

Opportunity Extension Act of 1996 that urged, for the first time, the exclusion from subsidized housing of people with a particular criminal record.<sup>23</sup> The Quality Housing and Work Responsibility Act of 1998 (QHWRA) mandated the rejection of public housing applicants if, within a “reasonable time” before the application date, a household member had engaged in drug-related, violent or other criminal activity that would adversely affect the health, safety or right to peaceful enjoyment of the premises by other residents.<sup>24</sup> QHWRA also requires exclusion of anyone using illegal drugs at the time of the application, anyone subject to lifetime sex offender registration, and anyone convicted of methamphetamine manufacture on federally assisted housing property.

HUD has given somewhat conflicting marching orders to PHAs regarding individualized evaluation of applicants. On the one hand, HUD official guidance states that “[i]n deciding whether to admit applicants who are borderline in the PHAs’ evaluation process, the PHA should recognize that for every marginal applicant it assists, it is foregoing the opportunity to admit another applicant who clearly meets the PHA’s evaluation standards.”<sup>25</sup> The implication is that all marginal applicants should be automatically excluded.

On the other hand, HUD created regulatory parameters to PHA discretion to decide on applications to public housing. If PHAs obtain adverse information about an applicant, the PHAs are required to consider the time, nature and extent of the applicant’s conduct, including the seriousness of the offense.<sup>26</sup> In addition, the PHA is subject to fair housing considerations. “The tenant selection criteria to be established and information to be considered shall be reasonably related to individual attributes and behavior of an applicant and shall not be related to those which may be imputed to a particular group or category of persons of which an applicant may be a member.”<sup>27</sup>

Alas, HRW found that PHAs are excluding people from public housing (and possibly from the voucher program) for minor, non-violent offenses. For example, “[o]ne PHA official in rural South Carolina told Human Rights Watch: ‘Most of the people denied are denied for

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<sup>16</sup>BUREAU OF JUSTICE STATISTICS, CRIMINAL OFFENDERS STATISTICS, available at <http://www.ojp.usdoj.gov/bjs/crimoff.htm#feds>.

<sup>17</sup>*Id.*

<sup>18</sup>HUMAN RIGHTS WATCH, NO SECOND CHANCE, PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 13 (2004).

<sup>19</sup>*Id.* at 14 (citing HUD, A REPORT ON WORST CASE HOUSING NEEDS IN 1999: A NEW OPPORTUNITY AMIDST CONTINUING CHALLENGES (2001)).

<sup>20</sup>*Id.* at 16.

<sup>21</sup>See, e.g., DOJ, *Learn About ReEntry*, at <http://www.ojp.usdoj.gov/reentry/learn.html> (undated).

<sup>22</sup>See the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988), the Cranston-Gonzalez National Affordable Housing Act of 1990,

Pub. L. No. 101-625, 104 Stat. 4079 (1990), and the Housing Opportunity Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (1996).

<sup>23</sup>Housing Opportunity Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (1996).

<sup>24</sup>Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 1643 (1998).

<sup>25</sup>HUD, PUBLIC HOUSING OCCUPANCY HANDBOOK, DIRECTIVE No. 7465.1 REV-2, CHAPTER 4, 4-3(b)(3); this guidance may have been superceded by the HUD *Public Housing Occupancy Guidebook*, which is available at <http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebook.cfm>.

<sup>26</sup>24 C.F.R. § 960.203(d) (2004).

<sup>27</sup>*Id.* at § 960.203(a).

shoplifting charges, not paying for video rentals.”<sup>28</sup> In Pittsburgh, Pennsylvania, “housing officials insisted to Human Rights Watch that they would be justified even in excluding jaywalkers and shoplifters.”<sup>29</sup> PHAs are also imposing exceedingly long, mandatory exclusion periods.<sup>30</sup>

HRW’s research leads one to believe that some PHAs do not have the good judgment to exercise the discretion they are supposed to exercise in reviewing applications. Many PHAs are not even attempting to comply with the federal mandate that they exercise discretion in the application review process. HRW found many PHAs are not considering mitigating circumstances but, instead, flatly deny applicants.<sup>31</sup>

In the Housing Choice Voucher program, private owners are not required but are encouraged to consider mitigating factors.<sup>32</sup> HRW’s study found that private landlords are increasingly denying voucher holders based on the applicant’s criminal record.<sup>33</sup> PHAs are permitted to screen applicants for family behavior that may affect suitability as tenants but are not required to. PHAs are required to ban only a couple of categories of ex-offenders (e.g., registered lifetime sex offenders). PHAs have the authority to adopt criteria beyond the mandatory bans, which must be set forth in the PHA’s Section 8 Administrative Plan.<sup>34</sup> Unlike for public housing, PHAs do not have to consider mitigating factors in reviewing applications to the Voucher program.

### Consequences of Current Admissions Policies

Though no comprehensive, national data exists regarding the number of people who are affected by admissions standards addressing arrest and criminal records, HRW compiled statistics that begin to paint a picture. HUD indicated to HRW that 46,657 applicants for “conventional, project-based public housing” were denied in 2002 alone because of arrest or criminal records. Add to that the number of private landlord rejections of voucher holders based

on arrest or criminal record, and PHA denials of voucher applications, and we would begin to have a record of the number of people affected.

However, PHAs are not currently required to report voucher denials to HUD or to track landlord denials of voucher holders based on arrest or criminal records. Even the 46,657 figure reported by HUD may be low, since PHAs are not always reporting rejections of applicants on the additional, non-federal grounds that PHAs are allowed to impose. HRW reports “considerable inconsistencies” in numbers reported to it by PHAs versus the numbers that those PHAs had reported to HUD. “Many PHA officials told HRW that they did not even keep statistics on criminal exclusions.”<sup>35</sup> Finally, as HRW notes, none of these figures will capture the number of people discouraged from applying in the first place because they believed, or PHA staff told them, that they were not eligible.<sup>36</sup>

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*HRW’s study found that private landlords are increasingly denying voucher holders based on the applicant’s criminal record.*

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One figure that we do know, however, is approximately how many people with felony convictions were released over the past five years: 3.5 million. Based on its research, HRW estimates that most PHAs exclude applicants for arrest or criminal records within five years of the application date. Thus, those 3.5 million people are not currently eligible for public housing per most PHAs’ admissions policies.<sup>37</sup> This figure does not include those with an arrest record or other, non-felony record that still results in the denial of access to the public housing or voucher programs.

Without housing, people may become desperate and may become a threat to public safety. They are also likely to become victims. Women who are forced into homelessness are often violently assaulted and abused. Men and women alike are likely to become seriously ill from living in unsanitary conditions. Mental health problems such as depression are a likely outcome or will be exacerbated. Other human costs which detract from the community are the cost to children who are not able to be reunited with

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<sup>28</sup>HUMAN RIGHTS WATCH, NO SECOND CHANCE, PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 46 (2004).

<sup>29</sup>HUMAN RIGHTS WATCH, NO SECOND CHANCE, PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 47 (2004).

<sup>30</sup>See *Ouellette v. Housing Authority of Old Town*, No. Ap-03-17, 2004 Me. Super. LEXIS 60 (Me. Super. Ct. of Maine, Penobscot County, March 11, 2004) (in denying application for housing, PHA failed to consider whether a reasonable time had passed since conviction, so case remanded to PHA for further consideration).

<sup>31</sup>HUMAN RIGHTS WATCH, NO SECOND CHANCE, PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 54-59 (2004).

<sup>32</sup>42 U.S.C. § 1437f(o)(6)(B) (2004).

<sup>33</sup>HUMAN RIGHTS WATCH, NO SECOND CHANCE, PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 19 (2004).

<sup>34</sup>See 24 C.F.R. §§ 982.553(a), 982.54(d)(1), 982.54(d)(23), and 982.307(a)(1) (2004).

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<sup>35</sup>HUMAN RIGHTS WATCH, NO SECOND CHANCE, PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 31, 32 (2004).

<sup>36</sup>*Id.* at 33.

<sup>37</sup>*Id.* at 33-34.

their parents, since without stable housing, parents cannot retain custody of their children.

## Second Chance Act and Enhanced Second Chance Act

Shortly after the White House announced support for reentry services, the Second Chance Act was introduced in the House of Representatives by Rob Portman (R-OH) and Danny Davis (D-IL).<sup>38</sup> The Act would provide funding to states to develop a wide variety of reentry services, including “post-release” housing (presumably temporary), transitional housing, and “assist[ance] in securing permanent housing.” If the Act moves forward through Congress, the language regarding “assistance” should be amended to a mandate for the development of permanent housing, or support the development of sufficient post-release and transitional housing such that formerly incarcerated people are allowed to stay a minimum of five years – the average PHA exclusion period for such people. The Re-Entry Enhancement Act<sup>39</sup> was also introduced in the House, with housing language that is substantially similar to that of the Second Chance Act.

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*International Human Rights Law  
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The Senate introduced two proposals on the same topic several months later. The first proposal, also called the Second Chance Act,<sup>40</sup> is essentially the same as the House version when it comes to housing. The second proposal, entitled the Enhanced Second Chance Act,<sup>41</sup> has key differences, including a specific proposal that HUD require PHAs to conduct individualized determinations of housing applications from those with criminal records.<sup>42</sup> PHAs are already, essentially, required to conduct such evaluations but, as documented by the HRW report, many PHAs are not even attempting to do so.

With four versions of the Second Chance Act introduced by Congress this year, it appears that advocates

could have a great opportunity to ameliorate Reentry problems in their communities by educating community groups and local politicians about the strengths and weaknesses of each proposed Act. One or more of these Acts should be taken up by the new, incoming Congress this next year. In the meantime, a four-year Prisoner Re-Entry Initiative involving the Departments of Justice, Labor and HUD, to “help individuals exiting prison make a transition to community life and long-term employment,” was funded at the rate of \$25 million. Advocates may have an opportunity through this program to involve themselves in Reentry advocacy.

## International Human Rights Principles and Housing

International Human Rights Law recognizes housing as a basic right to which residents of all countries are entitled. The U.S. does not. The HRW report highlights how far behind other countries the U.S. government is in terms of its attitude toward housing for its people. The Universal Declaration of Human Rights, ratified by the United Nations in 1948, finds that everyone has the right to housing (as well as other forms of social assistance, including medical care).<sup>43</sup> Among the many subsequent international treaties and documents that have also found housing to be a right, the most important is the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>44</sup> The ICESCR requires ratifying states to “strive to ensure that all their residents have adequate housing.”<sup>45</sup> The U.S., which has signed the ICESCR but not ratified it, continues to refuse to declare that housing is a right and, in fact, goes through myriad semantic contortions to avoid the appearance that it does not care for its people.

The concept of access to affordable, decent housing by those in need is embodied in the U.S. Housing Act of 1937, and by Congressional declarations in 1949 that “a decent home and a suitable living environment for every American family” are critically important for the nation.<sup>46</sup> Congress reaffirmed in 1968 that “the highest priority and emphasis should be given to meeting the housing needs for those families for which the national goal has not become a reality.”<sup>47</sup>

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<sup>43</sup>Universal Declaration of Human Rights, G.A. Res. 217A(III), art. 25(1), U.N. Doc. A/810 (1948).

<sup>44</sup>HUMAN RIGHTS WATCH, NO SECOND CHANCE, PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 22 (2004).

<sup>45</sup>*Id.* at 23.

<sup>46</sup>42 U.S.C.A. § 1441 (West 2003). This section was not amended by the Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 1643 (1998).

<sup>47</sup>12 U.S.C.A. § 1701t (West 2003).

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<sup>38</sup>Second Chance Act of 2004, H.R. 4676, 108th Cong. (2004).

<sup>39</sup>Re-Entry Enhancement Act, H.R. 5075, 108th Cong. (2004).

<sup>40</sup>Second Chance Act of 2004, S. 2789, 108th Cong. (2004).

<sup>41</sup>Enhanced Second Chance Act of 2004, S. 2923, 108th Cong. (2004).

<sup>42</sup>*Id.* at § 20.

However, elected officials in Congress and the White House have never made affordable housing the highest priority. Congress has never insisted that adequate funding be provided. And, the U.S. government has steadfastly refused to declare that the principles set forth in the various housing acts are *rights* of U.S. residents. To declare that safe, affordable housing is a right—not just a lofty goal, never to be seriously pursued—would provide U.S. residents a more powerful basis for arguing that Congress should fully fund affordable housing.

HUD's failure to require the collection of accurate, complete data on the impact of admissions policies also violates international human rights principles<sup>48</sup> and flies in the face of basic notions of fairness and what should be considered reasonable behavior by a governmental agency. To impose policies, especially those likely to be harmful to a section of the population, without tracking their effect, is simply irresponsible. It appears that no studies exist to show an increase in public safety due to the exclusion of those with arrest or criminal records.<sup>49</sup>

International Human Rights Law also abhors policies that interfere with the integrity of the family. Subsidized housing policies that make family reunification impossible, such as excluding a family member with a criminal record, violate the Convention on the Rights of the Child (CRC) which was ratified by 192 countries. In fact, the U.S. is one of only two nations that has not ratified the CRC. Yet, U.S. courts apply its provisions in other contexts as customary international law.<sup>50</sup>

### Disjoint Between Policy and Data

The lack of tracking, data gathering and studies on HUD's part contrasts sharply with data and studies being gathered and produced by scholarly institutions concerning what factors increase or decrease public safety in public housing developments. For example, for the past six years, Professor Felton Earls at the Harvard School of Public Health has spearheaded the Project on Human Development in Chicago Neighborhoods, a "major, interdisciplinary study aimed at deepening society's understanding of the causes and pathways of juvenile delinquency, adult crime, substance abuse, and violence."<sup>51</sup> The U.S. Department of Education, and the U.S. Department of Health and Human Services (Administration for Children, Youth

and Families) are the only two federal agencies helping to fund this multi-year set of studies. In Oregon, as a result of pressure by local advocates, "housing officials in Portland, Oregon in 2003 agreed to impose a sort of moratorium on the strictest of their exclusion policies and commission a study at Portland State University to examine whether someone with a criminal record can be a good tenant."<sup>52</sup> It appears that no study of this sort has been conducted until now.

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*Subsidized housing policies that make family reunification impossible violate the Convention on the Rights of the Child.*

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HRW's research highlights the importance of undertaking scholarly studies on this topic. HRW found that other types of housing providers feel that people with criminal records are not a risk to safety. Rather, the providers found that such people appreciated the opportunity to have a second chance, and, as a consequence, made good tenants.<sup>53</sup>

Acts and policies of government should be based on facts—not on law-and-order posturing, unexamined beliefs or taboos. For example, HRW addresses the fact that housing policy for affordable housing has taken its lead from national drug policy. The problem is that national drug policy considers all illegal drug use to be abuse. Facts—including data gathered by the federal government—prove that this notion is false. "U.S. Department of Health and Human Services statistics reveal that only a small percentage of those who use drugs become heavy drug abusers or addicts."<sup>54</sup> Yet any kind of use is treated as a danger to community health and welfare and leads to the exclusion of people from federally subsidized housing.

Similarly, the term "sex offender" conjures up notions of unsavory people pawing at children. The HRW report explains that

"[s]ome of the over 450,000 people currently listed in state sex offender registries are young men who had sexual relationships with girlfriends no more than a few years younger than them... Some are

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<sup>48</sup>HUMAN RIGHTS WATCH, NO SECOND CHANCE, PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 33 (2004).

<sup>49</sup>*Id.* at 35. HRW requested such data from HUD and from PHAs but received none.

<sup>50</sup>*Id.* at 41.

<sup>51</sup>The Project on Human Development in Chicago Neighborhoods, PHDCN General Overview, at <http://www.hms.harvard.edu/chase/projects/chicago/> (2004).

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<sup>52</sup>HUMAN RIGHTS WATCH, NO SECOND CHANCE, PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 36 (2004). Professor Annette Jolin, Chair of the PSU Department of Criminology and Criminal Justice, spearheads the study.

<sup>53</sup>*Id.* at 38-40.

<sup>54</sup>*Id.* at 62-63.

women convicted for failing to protect a child from sexual abuse by a boyfriend, husband, or other male family member.”

Also included are people convicted of “indecent exposure or lewd displays, often related to a substance abuse or mental health diagnosis or homelessness. For example, relieving oneself in public can—and many times does, in the case of homeless people and the mentally ill—result in a charge of indecent exposure.”<sup>55</sup> These are not the people that one thinks of when hearing the term “sex offender.” HRW’s report shines the spotlight on the question of who we, as a society, really want to have excluded from public housing. Should someone who urinated in public because he was homeless and did not have access to a bathroom be excluded from housing?

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*HUD’s policies with regard to people with an arrest or criminal record are clearly grounded in a moralistic perspective on who should be entitled to housing of last resort.*

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HUD’s policies with regard to people with an arrest or criminal record are clearly grounded in a moralistic perspective on who should be entitled to housing of last resort. HUD has declared:

Because of the extraordinary demand for affordable rental housing, public and assisted housing should be awarded to *responsible* individuals...At a time when the shrinking supply of affordable housing is not keeping pace with the number of Americans who need it, it is reasonable to allocate scarce resources to *those who play by the rules*...<sup>56</sup>

Implicit in this language is that someone with an arrest or criminal record is irresponsible or has not played by the rules. Yet an arrest or criminal record do not necessarily indicate that someone will be a bad tenant. HUD has not even bothered to obtain data to support its policies. And is HUD willing or entitled to also make the moral judgment about whether, ideally, a child should be able to have both parents present in the household? In an era in which the terms “moral values” and “family values” roll off the tongues of U.S. government officials, what is

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<sup>55</sup>*Id.* at 66-69.

<sup>56</sup>*Id.* at 20 (2004) (emphasis added) (citing HUD, OFFICE OF PUBLIC AND INDIAN HOUSING, ‘ONE STRIKE AND YOU’RE OUT’ POLICY IN PUBLIC HOUSING (1996), which is contained in Guiding Principles of a One Strike Policy, HUD Notice PIH 96-16, § I(b) (Apr. 12, 1996)).

HUD’s stand on family reunification? Many with arrest or criminal records have family in public housing with whom they would like to live. As HRW notes, having a formerly incarcerated person rejoin his or her family who are already residing in a public housing unit would not reduce the supply of units for other families. The only rational reason to exclude such a person would be for public safety reasons. Yet, HUD does not have data to support exclusion on those grounds.

In fact, HRW found “no evidence that HUD makes an effort to ascertain how PHAs exercise their discretion in the admissions process.”<sup>57</sup> HUD consistently refused to meet with HRW over the course of research for its report. In response to written HRW questions regarding PHA practices that are inconsistent with HUD policy, HUD admitted that

[o]nly where a PHA fails to comply with all applicable laws, usually in extreme circumstances, will HUD undertake the day-to-day management decisions of a PHA. It is only in this rare situation where HUD is acting as the landlord, and substituting its own judgment for that of the PHA, that HUD would have actual knowledge of the specifics regarding the exercise of PHA discretion, absent a complaint made directly to HUD.<sup>58</sup>

## HRW Policy Recommendations

### To Congress

HRW recommends that Congress require PHAs to conduct individualized evaluation of public housing and voucher applicants with a criminal record, prohibiting automatic rejection. HRW also recommends that Congress ratify a key international document—the International Covenant on Economic, Social and Cultural Rights—acknowledging *the right* of residents to safe, affordable housing.

### To HUD

The HRW report found that PHAs are denying applicants automatically. HRW recommends that HUD policies and regulations require individualized assessment of subsidized housing applicants with a criminal record, prohibiting automatic exclusions, and requiring PHAs to consider evidence of rehabilitation, the impact on minor children of the denial of housing, and whether denial is likely to leave the applicant homeless.<sup>59</sup>

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<sup>57</sup>HUMAN RIGHTS WATCH, NO SECOND CHANCE, PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 58 (2004).

<sup>58</sup>*Id.* at 58-59.

<sup>59</sup>Though HUD has already encouraged PHAs to “exercise discretion” in finding solutions other than eviction for alleged criminal conduct of

Other HRW recommendations include HUD requiring PHAs not to consider arrests in the admissions process (absent a pattern), to consider only acts relevant to being a good tenant, and not to consider criminal records more than ten years old (which is a very long time—NHLP would recommend a shorter time period). Monitoring of PHAs by HUD to ensure that admissions decisions are not arbitrary and do not have a disproportionate impact on racial or ethnic minorities, and assessments of whether policies excluding people with a criminal record from public housing have any appreciable effect on public safety are the other, most significant recommendations to HUD.

#### **To PHAs**

HRW's recommendations for PHAs largely mirror those for HUD. However, HRW includes a suggestion that is more appropriately directed to Congress or HUD—that the administrative appeal process be available for all who are denied housing and that the process be conducted in a professional manner such that there is an adequate opportunity to be heard at the appeal and a clear record from which to proceed to court, if necessary. HRW also suggests that PHAs direct denied applicants to available legal assistance and ensure that criminal records are obtained from a reliable source.

#### **To Legal Service Organizations**

HRW suggests the removal of barriers to representation of people denied admission to subsidized housing. Legal Services should monitor PHA policies and practices and work to ensure that applicants are aware of their right to challenge an application denial. Many legal service providers told HRW that they do not work on such cases.

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*HUD should require PHAs to document the grounds for all housing application denials, particularly those based on an arrest or criminal record.*

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#### **To the United Nations**

HRW suggests that the Committee on Economic Social and Cultural Rights focus on the human rights dimensions of government-assisted housing, and that the U.N. special Rapporteur on the Right to Adequate Housing report on the U.S. denial of housing assistance to individuals based on their criminal history.

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participants in subsidized housing, it appears that PHAs require a specific regulatory mandate, delineating exactly what they must consider and how. See Letter from HUD Secretary Martinez to PHA Directors (June 6, 2002), available at <http://www.hud.gov/offices/pih/regs/rucker6jun2002.pdf>.

## **NHLP Recommendations**

In addition to HRW's valuable recommendations, NHLP recommends the following:

#### **Expand the supply of affordable housing.**

For 67 years, Congress has failed to fulfill the goals of the National Housing Act and subsequent legislation which proclaims the importance of meeting the housing needs of U.S. residents. Congress must fulfill its commitment.

#### **Restore adequate funding to PHAs.**

Congress and HUD have created an environment in which abuse of the public in the subsidized housing admissions process is guaranteed. By underfunding PHAs and the programs they administer, Congress has virtually ensured that PHAs will not have sufficient staff to take the time to review individual applications carefully, evaluating such factors as rehabilitation and the detriment to the applicant and his/her family if the application is denied.

#### **Make one-strike policy administration and service to people seeking reentry part of the HUD process of reviewing PHAs.**

Under current Public Housing Assessment System (PHAS) rules, PHAs are scored favorably if they have "adopted policies, implemented procedures and can document that they successfully screen out and deny admission to certain applicants with unfavorable criminal histories."<sup>60</sup> HUD should require PHAs to document the grounds for all housing application denials, particularly those based on an arrest or criminal record.

PHAs should also be required to show that they have exercised discretion in denials based on a criminal or arrest record, and that their written policies delineate clearly what mitigating factors will be considered and how discretion will be exercised. These requirements should be part of the basis for the PHAS scoring system. Similar requirements should also be incorporated into the Section 8 Management Assessment Program, which is used to evaluate PHAs performance in the management of their voucher program.

#### **Investigate how PHAs handle applications from those with criminal or arrest records and take corrective action as necessary.**

Given the abuses documented in HRW's report, HUD should undertake a thorough investigation of PHAs' treatment of applications from those with arrest or criminal records. Such an investigation should solicit the input of the community of nonprofits and other groups which

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<sup>60</sup>24 C.F.R. § 960.203(b) (2004).

work with PHAs and with people with a criminal or arrest record so that a true picture of PHA behavior can be established.

#### **Challenge unreasonable admissions policies/practices.**

HRW noted the good work of several legal service offices in this arena. See *Bonner v. Housing Authority of Atlanta*, Georgia, No. 1:04-CV-376-MHS (N.D. GA October 11, 1995). Also note the work of the Homeless Person's Representation Project of Baltimore, Maryland, and recent adoption by a local PHA of revised admissions guidelines. See also *Ouellette v. Housing Authority of the City of Old Town*, Docket No. Ap-03-17, 2004 Me. Super. LEXIS 60 (March 12, 2004).

As part of a long-term strategy to educate the courts and pressure the federal government into complying with international law, local advocates should raise international law arguments in individual cases and to local PHAs. Advocates and community groups can help develop more reasonable policies through the PHA Plan process. Advocates should also take advantage of the Urban Institute Reentry Mapping Service as a tool for determining where people exiting prison are settling which could, in turn, assist in fair housing analysis.<sup>61</sup>

#### **Revise Legal Services Corporation regulations as necessary.**

To the extent that Legal Services Corporation requirements impede the ability of legal service offices to address unfair admissions policies, they must be revised.

#### **Educate the public about Reentry issues.**

Public interest law offices should educate groups who may be non-traditional allies on the consequences of the failure to provide decent, affordable housing for people who are reentering (as well as for others in need). Non-traditional audiences include rotary clubs, sheriff's associations, and neighborhood associations.

#### **Monitor and study local admissions policies.**

There is a desperate need for data on the nature and impact of admissions policies regarding people with arrest or criminal records. Advocates may have excellent case studies in their backyard just waiting to happen. For example, HRW found that the Salt Lake County PHA undertakes individualized applicant reviews while Salt Lake City PHA (in the same county) automatically excludes applicants with minor offenses.<sup>62</sup> Both PHAs feel

they have reduced crime in their housing developments. This example is ripe for study of whether either sets of policies does, indeed, improve public safety, and whether one set of policies was more effective than the other.

PHAs are supposed to be coordinating with government officials and residents regarding crime reduction strategies.<sup>63</sup> Being open to assessment and study of their admissions policies and practices could be one valuable form of coordination with governmental officials and residents. Local advocates should partner with residents and local officials to assist in making sure this happens. Data for an assessment should be readily available since PHAs are supposed to be tracking crime-related problems in their developments and reporting crimes to local law enforcement.<sup>64</sup>

Whether admissions policies are achieving increased safety for residents or the community is one concern.

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Another critical concern is arbitrariness and fair housing violations in the admissions process. HRW recommends that HUD monitor local PHAs to ensure that admissions decisions are not arbitrary and do not have a disproportionate impact on racial or ethnic minorities. NHLP recommends that, in addition, monitoring by organizations on the local level would be most effective. Public interest law offices should formally take on this task in partnership with local fair housing organizations.

#### **Develop sensible Reentry plans.**

Congress, HUD, DOJ, and even the White House are promoting the notion that those reentering communities need comprehensive support. In the words of the Department of Justice,

"[s]ince the return of these high-risk adult and juvenile offenders is imminent, corrections, law enforcement and community service agencies should collaborate to monitor offenders while assisting them in the development and implemen-

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<sup>61</sup>Urban Institute, *Re-entry Mapping Network*, at <http://www.urban.org/Template.cfm?Section=Commentary&NavMenuID=10&Template=/TaggedContent/ViewPublication.cfm&PublicationID=9048> (Oct. 12, 2004).

<sup>62</sup>HUMAN RIGHTS WATCH, NO SECOND CHANCE, PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 38 (2004).

<sup>63</sup>24 C.F.R. § 902.43(a)(5) (2004).

<sup>64</sup>*Id.*

tation of a concrete, specific reentry plan. Unless communities do this, they will continue to be victimized by these offenders.”<sup>65</sup>

Public interest law offices should work with the local and state prison system on the development of “concrete, specific reentry plans,” making sure that housing is part of those plans. Local PHAs should be brought to the table as part of that conversation, along with other community groups. The DOJ is even providing funding for groups to “develop, implement, enhance, and evaluate reentry strategies.”<sup>66</sup>

### **Study how people with criminal records fare as tenants.**

Public interest law offices should work with other local agencies—fair housing, prisons, et cetera—to conduct a study of how well arrestees and ex-convicts do as tenants in housing that is not subsidized. Advocates could work with parole officers and use Urban Institute’s mapping capability to determine where parolees are located and track them. Outcome of studies should be reported to HRW, NHLP, local mayors, HUD and PHAs, and generally used to influence policy locally and nationally.

### **Continue work on relevant criminal law issues.**

Knowing the effect that sentencing can have on the ability of someone to access the public housing or voucher programs, public interest law offices should work with the local public defender and the courts on achieving resolutions that won’t have a negative impact on the person’s housing future. Creating or expanding diversion programs, and working on other, related issues, such as the sealing of criminal records, could help low-income people in the community access much-needed affordable housing.

## **Conclusion**

Congress and HUD have established a flawed admissions process that allows arbitrary, punitive applicant screening behavior by PHAs. Whether out of ignorance or political expediency, Congress and HUD have implemented and maintained statutes and regulations unreasonably and unfairly excluding people with arrest and/or criminal records from public and other subsidized hous-

ing. Rather than moralizing about an issue of great public concern, HUD should be gathering data and determining concrete solutions based on hard information. HRW’s report shows how distressingly out of touch with international human rights policies U.S. domestic housing policy is and delineates why current policies are unfair and probably have no rational relationship to their stated goal of increased public safety. ■

## **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,<sup>1</sup> Lexis,<sup>2</sup> or, in some instances, the court’s Web site.<sup>3</sup> Copies of the cases are *not* available from NHLP.

### **Fair Housing—Disability**

*Andover Hous. Auth. v. Shkolnik*, 820 N.E.2d 815 (Mass. 2005). On an appeal in a summary process eviction action, the Massachusetts Supreme Judicial Court affirmed judgment for possession in favor of Plaintiff-Appellee public housing authority and rejected Defendant-Appellant public housing residents’ arguments regarding disability discrimination. Defendant-Appellants contended that the noise from their dwelling unit was a result of various physical and mental disabilities, including dementia, for which Plaintiff-Appellee was required to provide reasonable accommodation pursuant to the Fair Housing Act, 42 U.S.C. § 3604(f), and state law, MASS. GEN. LAWS ch. 151B, § 4. In rejecting Defendant-Appellants’ arguments, the court emphasized that Defendant-Appellants had failed to show that the requested reasonable accommodation—namely, delay or withdrawal of the eviction action—would permit Defendant-Appellants to comply with lease provisions regarding excessive noise.

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<sup>65</sup>U.S. Department of Justice, Office of Justice Programs, *Learn About Reentry*, at <http://www.ojp.usdoj.gov/reentry/learn.html#go3> (last visited Jan. 3 2004).

<sup>66</sup>Funds are provided through a program called the Serious and Violent Offender Reentry Initiative, which is a partnership between DOJ and the National Institute of Corrections, and the U.S. Departments of Education, Health and Human Services, Housing and Urban Development, Labor, Veterans Affairs, and the Social Security Administration. A list of current grantees is available at <http://www.ojp.usdoj.gov/reentry/sar/welcome.html>.

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<sup>1</sup><http://www.westlaw.com>.

<sup>2</sup><http://www.lexis.com>.

<sup>3</sup>For 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>.

## Federal Courts—Class Actions

*Matyasovszky v. Hous. Auth. of the City of Bridgeport*, 2005 WL 41385 (D.Conn. Jan. 7, 2005). The federal district court granted a motion for class certification in this challenge by non-elderly disabled persons to the “elderly-only” occupancy designation of housing developments operated by Defendant city. The court, *inter alia*, rejected Defendant’s arguments regarding the lack of numerosity, pointing to the estimated 197 putative class members, and rejected Defendant’s arguments regarding lack of commonality, emphasizing that Plaintiffs “need not establish that all questions of law and fact among the putative class are identical.”

## Federal Courts—Private Right of Action Public Housing—HOPE VI

*Cabrini Green Local Advisory Council v. Chicago Hous. Auth.*, 2005 WL 61467 (N.D. Ill. Jan. 10, 2005). In this fair housing action by Plaintiff public housing resident organization challenging inadequate relocation in relation to the redevelopment of public housing, the federal district court granted in part and denied in part Defendant public housing authority’s motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6), Federal Rules of Civil Procedure. The court concluded, *inter alia*, that promises of adequate relocation that were impossible for Defendant to fulfill did not deprive Plaintiff of standing; Defendant’s voluntary cessation of challenged relocation practices did not render Plaintiff’s claims moot; and, following *Wallace v. Chicago Housing Authority*, 298 F. Supp. 2d 710 (N.D. Ill. 2003), that Plaintiff validly asserted 42 U.S.C. § 1983 causes of action under the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*, the Quality Housing and Work Responsibility Act, Pub. L. No. 105-276, 112 Stat. 2461 (1998), and various civil rights executive orders. ■

## 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 January 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,<sup>1</sup>(2) bound volumes of the *Federal Register*, (3) HUD Clips,<sup>2</sup>(4) HUD,<sup>3</sup> and (5) USDA’s Rural Development Web page.<sup>4</sup> Citations are included with each document to help you secure copies.

### HUD Federal Register Proposed Rules

#### 70 Fed. Reg. 1,774 (Jan. 10, 2005) Release in the Public Use Database of Certain Mortgage Data and Annual Housing Activities Report Information of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation

**Summary:** The Department of Housing and Urban Development (HUD) is proposing a change to its regulations to permit the release to the public of certain data and information that have been, and will be, submitted to HUD by the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac).

**Comment Due Date:** March 11, 2005.

#### 70 Fed. Reg. 3,266 (Jan. 21, 2005) Change in Default Reporting Period

**Summary:** This proposed rule would revise the regulations under the single-family mortgage insurance program that require mortgagees to report the status of all single-family mortgages insured by HUD that are in default after sixty days or that are ninety or more days delinquent, as applicable. The rule would require mortgagees to report to HUD mortgages that are thirty or more days delinquent on the last day of the month.

**Comment Due Date:** February 22, 2005.

<sup>1</sup>At [http://www.access.gpo.gov/su\\_docs](http://www.access.gpo.gov/su_docs).

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

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

<sup>4</sup>At <http://www.rdinit.usda.gov/regs>.

**HUD Federal Register Notices**  
**70 Fed. Reg. 370 (Jan. 4, 2005)**

**Notice of Submission of Proposed Information Collection to OMB; HUD Standardized Grant Application Forms**

*Summary:* The proposed information collection requirement described below has been submitted to the Office of Management and Budget for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal. HUD is requesting approval for a revision of currently approved information. The proposed forms are to be used to support a consolidated and streamlined grant application process in accordance with the provisions of Public Law 106-107, the Federal Financial Assistance Improvement Act of 1999. The forms are similar to those used in previous annual grant application processes.

*Comments Due Date:* February 3, 2005.

**70 Fed. Reg. 371 (Jan. 4, 2005)**

**Notice of Proposed Information Collection: Comment Request, Environmental Reviews**

*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 information collection applies to applicants seeking HUD financial assistance for their project proposals and is used by HUD for the performance of the Department's compliance with the National Environmental Policy Act and related federal environmental laws and authorities in accordance with HUD environmental regulations, 24 C.F.R. part 50.

*Comments Due Date:* March 7, 2005.

**70 Fed. Reg. 1,454 (Jan. 7, 2005)**

**Redelegation of Authority Regarding Local Public Housing Hub Directors/Public Housing Program Center Coordinators**

*Summary:* In this notice, the Assistant Secretary for Public and Indian Housing redelegates to the local Public Housing Hub Directors/Public Housing Program Center Coordinators the authority to review and approve designated housing renewals pursuant to Section 7 of the United States Housing Act of 1937. HUD has not delegated authority for approval of new designated housing plans.

*Effective date:* December 23, 2004.

**70 Fed. Reg. 2,218 (Jan. 12, 2005)**

**Notice of Regulatory Waiver Requests Granted for the Third Quarter of Calendar Year 2004**

*Summary:* Section 106 of the Department of Housing and Urban Development Reform Act of 1989 (the HUD Reform Act) requires HUD to publish quarterly Federal Register notices of all regulatory waivers that HUD has approved. Each notice covers the quarterly period since the previous Federal Register notice. The purpose of this notice is to comply with the requirements of Section 106 of the HUD Reform Act. This notice contains a list of

regulatory waivers granted by HUD during the period beginning on July 1, 2004, and ending on September 30, 2004.

**70 Fed. Reg. 2,774 (Jan. 14, 2005)**

**Section 8 Housing Assistance Payments Program—Contract Rent Annual Adjustment Factors, Fiscal Year 2005**

*Summary:* This notice announces revised Annual Adjustment Factors (AAFs) for adjustment of Section 8 contract rents for specified programs. These factors apply to housing assistance payment contract anniversaries for calendar months commencing after the date of publication of this notice. The AAFs are based on residential rent and utilities time-series cost indices from the Bureau of Labor Statistics Consumer Price Index (CPI) survey and from HUD's Random Digit Dialing rent change surveys.

*Effective Date:* January 14, 2005.

**70 Fed. Reg. 3,264 (Jan. 21, 2005)**

**Annual Indexing of Basic Statutory Mortgage Limits for Multifamily Housing Programs**

*Summary:* In accordance with Section 206A of the National Housing Act, HUD has adjusted the basic statutory mortgage limits for multifamily housing programs for calendar year 2005.

*Effective Date:* January 1, 2005.

**70 Fed. Reg. 3,939 (Jan. 27, 2005)**

**Privacy Act of 1974; Notice of Matching Program: Matching Tenant Data in Assisted Housing Programs**

*Summary:* Pursuant to the Computer Matching and Privacy Protection Act of 1988, as amended, and the Office of Management and Budget's Guidance on the statute, HUD is updating its notice of a matching program involving comparisons between income data provided by applicants or participants in HUD's assisted housing programs and independent sources of income information. The matching program will be carried out to detect inappropriate (excessive or insufficient) housing assistance under the National Housing Act, the United States Housing Act of 1937, Section 101 of the Housing and Community Development Act of 1965, the Native American Housing Assistance and Self-Determination Act of 1996, and the Quality Housing and Work Responsibility Act of 1998. The program provides for the verification of the matching results and the initiation of appropriate administrative or legal actions. This notice supplements the overview of computer matching for HUD's assisted housing programs published in the *Federal Register* on March 9, 2004, and October 25, 2004.

*Effective Date:* Computer matching is expected to begin on February 28, 2005, unless comments are received which will result in a contrary determination, or forty days from the date a computer matching agreement is signed, whichever is later.

*Comments Due Date:* February 28, 2005.

## HUD Housing Notices

### Notice H 2005-01 (Jan. 7, 2005)

#### Fiscal Year 2005 Interest Rate for Section 202 and Section 811 Capital Advance Projects

*Summary:* This notice sets forth the Fiscal Year 2005 nominal interest rate for the Section 202 and Section 811 Capital Advance Programs. Based on the formula specified in the Housing and Community Development Act of 1987, the interest rate is 5.25%.

*Expires:* January 31, 2006.

### Notice H 2005-02 (Jan. 12, 2005)

#### Extension of Notice H 03-07, Deployment of Military Personnel to Active Duty

*Summary:* Notice H 03-07, which was issued April 22, 2003, and expired April 30, 2004, is being reinstated and extended to January 31, 2006.

*Expires:* January 31, 2006.

### Notice H 2005-03 (Jan. 26, 2005)

#### Guidance on Asset Management Issues Concerning Bond Financed Section 8 Projects

*Summary:* Notice H 03-28, which was issued December 1, 2003, and expired December 31, 2004, is being reinstated and extended to January 31, 2006.

*Expires:* January 31, 2006.

### Notice H 2005-04 (Jan. 26, 2005)

#### Reinstatement and Extension of Notice 97-49, Backing-Out Trustee Sweep Savings Before Calculating Annual Adjustment Factors for Projects which Originally Received a Financial Adjustment Factor and whose Bonds were Refunded

*Summary:* Notice H 03-27, which was issued December 1, 2003, and expired December 31, 2004, is being reinstated and extended to January 31, 2006.

*Expires:* January 31, 2006.

### Notice H 2005-05 (Jan. 26, 2005)

#### Reinstatement and Extension of Notice 96-19, Telecommunications Service Contracts between Telecommunications Service Providers and Project Owners

*Summary:* Notice H 03-32, which was issued December 29, 2003, and expired December 31, 2004, is being reinstated and extended to January 31, 2006.

*Expires:* January 31, 2006.

### Notice H 2005-06 (Jan. 27, 2005)

#### Reinstatement and Extension of Notice 97-31, Lead-Based Paint: Notification of Purchasers and Tenants in HUD-Insured, HUD-Held and HUD-Subsidized Housing

*Summary:* Notice H 03-31, which was issued December 29, 2003, and expired December 31, 2004, is being reinstated and extended to January 31, 2006.

*Expires:* January 31, 2006.

### Notice H 2005-07 (Jan. 31, 2005)

#### HUD Single Family Non-Judicial Foreclosure Statute

*Summary:* This notice provides instructions to HUD staff for conducting non-judicial foreclosures on Secretary-held mortgages. The National Servicing Center is charged with this responsibility, which may be further delegated to a contractor.

*Expires:* January 31, 2006.

## HUD PIH Notices

### Notice PIH 2005-01 (HA) (December 8, 2004)

#### Implementation of the Consolidated Appropriations Act (HR 4818 – H Rept 108-792), 2005 Funding Provisions for the Housing Choice Voucher Program

*Summary:* This notice implements the Housing Choice Voucher (HCV) Program funding provisions resulting from enactment of the Consolidated Appropriations Act, 2005. In that law, Congress modifies the method of calculating and distributing renewal funds, public housing agency administrative fees, and continues to prohibit the use of renewal funds for over-leasing. The Act specifies that calendar year 2005 will be the funding period for such renewals and administrative fees under the HCV program. The requirements of the Act supersede any other notice or regulation to the extent that such notice or regulation is inconsistent with the Act. This notice describes the requirements of the Act, and supersedes relevant sections of a prior Federal Register notice regarding the renewal of expiring annual contributions contracts.

*Expires:* December 31, 2005.

### Notice PIH 2005-02 (HA) January 5, 2005

#### Requirements for Designation of Public Housing Projects

*Summary:* This notice reiterates the streamlined requirements for designating public housing projects for occupancy by elderly families only, disabled families only, or elderly and disabled families only. This notice also includes the requirements and procedures for renewal of, or changes to, previously HUD-approved designation plans.

*Expires:* January 31, 2006.

### Notice PIH 2005-04 (HA) (January 18, 2005)

#### Exigent Health and Safety Deficiency Correction Certification New Reporting Procedures

*Summary:* This notice describes the new electronic exigent health and safety (EHS) system for public housing agencies (PHAs) and Public Housing Field Office staff. This notice explains how PHAs are to certify to the correction or abatement of the life-threatening (i.e., EHS) deficiencies observed during Uniform Physical Condition Standards inspections. It also outlines the procedures for Field Office staff to enter and record any follow-up activities that they have completed to ensure that EHS deficiencies have been corrected or abated.

*Expires:* January 31, 2006.

## **RHS Administrative Notice**

**RD AN No. 4042 (1980-D)(January 18, 2005)**

### **Eligibility of Non-U.S. Citizens for Single Family Housing Guaranteed Loan Program Assistance**

*Summary:* This notice provides guidance concerning what documentation non-U.S. citizens must supply in order to be considered for a loan note guarantee under the Single Family Housing Guaranteed Loan Program.

Expiration Date: January 31, 2006. ■



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