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Housing Law Bulletin

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***Utility Allowance Adjustments: Dealing With
Skyrocketing Energy Costs*** —see page 249


***RHS Appropriation Funds New Rural Tenant
Protection Vouchers*** —see page 253


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 SPECIAL
 FEATURE

AN ESSENTIAL RESOURCE FROM THE NATIONAL HOUSING LAW PROJECT

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614 Grand Avenue, Suite 320, Oakland CA 94610
Telephone (510) 251-9400 • Fax (510) 451-2300

727 Fifteenth Street, N.W., 6th Fl. • Washington, D.C. 20005

www.nhlp.org • nhlp@nhlp.org

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Cover: Residents at Mandela Gateway, a 168-unit mixed-income, mixed-use development completed in 2005 by the Oakland Housing Authority and BRIDGE Housing, a California developer of affordable housing. Photo courtesy of the Oakland Housing Authority.

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Inquiries or comments should be directed to Eva Guralnick, Editor, *Housing Law Bulletin*, at the National Housing Law Project, 614 Grand Avenue, Suite 320, Oakland, CA 94610, Tel: (510) 251-9400 or via e-mail to nhlp@nhlp.org

Utility Allowance Adjustments: How Housing Advocates Can Proactively Address Skyrocketing Energy Costs

Over the last few weeks the cumulative effect of Hurricanes Katrina and Rita has been chronicled by numerous television and print sources, focusing on the general devastation to the region and the cost of rebuilding. However, only a few of these same media sources have begun to address a related topic which will have much broader geographic and financial consequence to low-income families—the hurricanes' impact on short-term energy costs.

On the eve of the 2005-2006 heating season (October through March), industry forecasts projected that the additional costs associated with restoring Gulf Coast oil and natural gas production, oil refining, and natural gas processing will further strain the already-tight natural gas and petroleum product markets. Consequently, this winter's residential space-heating expenditures are expected to increase for all fuel types compared to last year's levels. Specifically, government officials are forecasting an almost 50% increase in natural gas consumer prices and an approximately 30% increase for heating oil over last winter.¹ As a result, this winter's unchecked home-heating costs will surely have a substantial impact upon the affordability of shelter and play a critical role in the low-income household's budget, along with direct housing costs.

Some tenants may benefit from the federal Low-Income Energy Assistance program, although the Congressional leadership has targeted that program in its efforts to cut spending to provide tax cuts. Even those tenants fortunate enough to benefit from federal housing assistance will experience significant additional financial strain from imminent utility cost spikes. Therefore, for those programs, it is imperative that advocates take full advantage of the rules and procedures for reviewing and adjusting utility allowances to alleviate the impacts of these rising costs for subsidized housing residents.

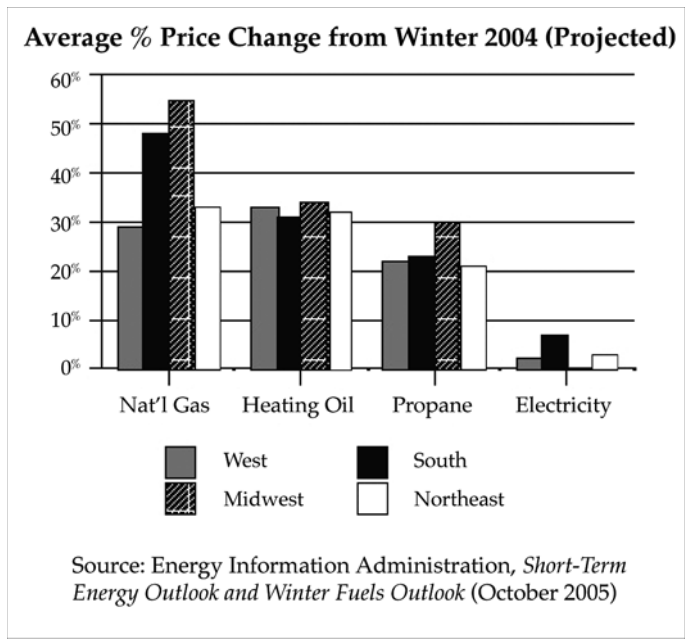
Utility Allowances: Background

To keep assisted housing affordable for lower-income households, the United States Housing Act directs that the resident's share of rent in most federally assisted housing programs usually be limited to no more than 30% of the household's adjusted monthly income.² In interpreting

¹ENERGY INFORMATION ADMINISTRATION, SHORT-TERM ENERGY OUTLOOK AND WINTER FUELS OUTLOOK (2005).

²42 U.S.C.A. § 1437a(a) (West Supp. 2003).

the statute, the Department of Housing and Urban Development (HUD) has always defined the tenant rent contribution to include both shelter and the costs for reasonable amounts of utilities.³ Where utilities are tenant-paid, an amount that a public housing authority (PHA) or Section 8 project owner determines necessary under the rules to cover the resident's reasonable utility costs is the "utility allowance," which is generally credited against the tenant's share paid to the owner, for those tenants paying an income-based rent.



Utility allowances are based on an estimate of the reasonable cost of different types of utilities, depending upon the quantity allowed in light of their end uses.⁴ The covered utilities requiring allowances, if tenant-paid, include electricity, natural gas, propane, fuel oil, wood or coal, and water and sewage service, as well as garbage collection. The functions, or end-uses, covered by an allowance include space heating, water heating, cooling, refrigeration, lighting, or appliances, but not telephone or cable TV service. Utility allowances can be small or large, ranging from less than \$20 to over \$200 monthly, depending on the PHA, the climate zone, local utility rates, the number of utilities and uses covered, and the dwelling unit and/or household size.

³See, e.g., Tenant Allowances for Utilities, 49 Fed. Reg. 31,399, 31,400 (Aug. 7, 1984); *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 420 (1987).

⁴See generally NHLP, HUD HOUSING PROGRAMS: TENANTS' RIGHTS, ch. 6 (3d ed. 2004).

Nevertheless, in order to maintain the resident's rent-to-income share within the statutory limit, the PHA (for public housing and vouchers) or Section 8 project owner must review the utility allowance schedule at least annually.⁵ In addition, if the applicable utility rates have increased by 10% or more since the previously established or adjusted allowance, the PHA or Section 8 owner must immediately increase the utility allowance accordingly.⁶ Unfortunately, in reality, this later adjustment often fails to occur in a timely fashion, thus leaving the tenant with the burden of paying any cumulative rate increase until the next adjustment.

For voucher tenants, the voucher program's structure may impede certain tenants from realizing the full benefit of a properly adjusted allowance. Voucher participants receive no dollar benefit from increases in the allowance once the sum of the rent paid to the owner plus the utility allowance exceeds the current payment standard established by the PHA.⁷ Households will only benefit where their "gross rent" (which includes the utility allowance) is less than the local voucher payment standard.⁸ Therefore, utility allowance increases without a corresponding increase in the payment standard may only be of help to a limited number of households.

Utilities in Low Income Housing Tax Credit (LIHTC) units present yet another wrinkle. The LIHTC program requires that the statutory maximum rents (expressed as a percentage of area median income for a hypothetical family size derived from the number of bedrooms) include a utility allowance for any tenant-paid utilities.⁹ The utility allowance to be deducted, however, is often determined by some public agency, depending on the type of property involved.¹⁰ Where units or tenants are not

⁵E.g., 24 C.F.R. § 965.507(a) (2005) (PHAs); 24 C.F.R. § 880.610 and 881.601 (2005) (project-based Section 8 program); 24 C.F.R. § 982.517(c) (2005) (housing choice voucher program). Utility allowances for those tenants paying income-based rents in RHS Section 514 and 515 properties (i.e., those with rental assistance or paying in excess of the minimum basic rent) present the same problem, but are covered by different rules. 7 C.F.R. §§ 3560.202 and 3560.205 (2005).

⁶E.g., 24 C.F.R. § 965.507(b) (2005) (PHAs); 24 C.F.R. § 880.610 and 881.601 (2005) (project-based Section 8 program); 24 C.F.R. § 982.517(c) (2005) (housing choice voucher program). The RHS regulations apparently lack a 10% rate increase trigger.

⁷For a more thorough discussion, including five hypothetical tenant scenarios, see Michael L. Hanley, *Effect of Utility Allowance Increases on Section 8 Housing Choice Voucher Participants*, at <http://www.gulphny.org/Housing/Utility-Allowances.html> (last visited Oct. 21, 2005).

⁸*Id.*

⁹The LIHTC maximum allowable rent calculation, like HUD affordable housing programs, includes an allowance for costs to be paid by the tenant for utilities inclusive of heat, electricity, air conditioning, water, sewer, oil or gas where appropriate. 26 U.S.C.A. § 42(g) (2005).

¹⁰Internal Revenue Service regulations (26 C.F.R. § 1.42-10 (2005)) establish the following guidance: for buildings assisted by Rural Development

regulated or assisted, the “PHA utility allowance” must be used, unless either the owner or the tenant has obtained an allowance from the local utility provider under specified procedures.¹¹ Changes in the allowance are to be effective within ninety days.¹² Thus, for LIHTC units, increased allowances directly reduce an owner’s rental income dollar for dollar, while offering no prospect of increased public subsidy from federal appropriations. As a result, the LIHTC owner has little incentive to ensure that the other agencies involved make timely increases to utility allowances, or that allowances initially obtained from utilities themselves are properly adjusted for rate increases.

Advocates working with federal housing tenants should now consider taking the following steps to alleviate the imminent financial burdens for millions of low-income families this winter.

Steps Advocates Can Take Now

Facing these looming rate increases, advocates working with federal housing tenants should now consider taking the following steps to alleviate the imminent financial burdens for millions of low-income families this winter.

- Advocates should contact their local utilities providing natural gas, electricity and fuel oil to verify the effective date of any scheduled rate increases.¹³
- Next, contact the PHAs and private Section 8 and LIHTC property owners to ascertain their plans for the prompt utility allowance adjustments required by federal law, especially those in the HUD programs for rate increases in excess of 10%.
- For voucher tenants, advocates should adopt the two-step approach of reviewing the adequacy of their utility

(RD), formerly FmHA, the RD-approved utility allowance must be used; for HUD-assisted buildings, the HUD-approved allowance. If a tenant has a voucher, then the PHA’s voucher utility allowance must be used. If neither HUD or RD assists the building, and the tenant lacks a voucher, the utility allowance may be obtained from the local PHA or from the local utility provider. The LIHTC statute (26 U.S.C.A. § 42(g) (2005)), however, requires owners to use the allowance under “Section 8,” which arguably means either the PHA’s voucher allowance or the allowance used by neighboring project-based Section 8 developments.

¹¹26 C.F.R. § 1.42-10(b)(4)(ii) (2005).

¹²26 C.F.R. § 1.42-10(c) (2005).

¹³Historical utilities price information, sorted by region and/or major metropolitan area, is available through the Bureau of Labor Statistics and can be found at <http://www.bls.gov>.

allowances while simultaneously urging PHAs to increase their respective payment standards—keeping in mind the fact that each PHA has sole discretion to increase payment standards up to 110% of the published Fair Market Rent, and possibly higher.¹⁴ Moreover, the PHA’s affirmative mandate to maintain a “reasonable rent” for voucher holders¹⁵ warrants a concomitant increase in the payment standard.

Analyzing Historical Energy Cost Increases and Required Utility Allowance Adjustments

While attention to this winter’s allowances is critical in light of the 2005-2006 projected heating costs, advocates should remain aware of the opportunity to pursue the issue on a broader scale—analyzing allowances and rates, and seeking reimbursement for previously inadequate allowances.¹⁶ Look for additional articles in the *Bulletin* or for materials posted on the NHLP Web site addressing these issues in greater detail. ■

¹⁴The regulations state that each “PHA may establish the payment standard amount for a unit size at any level between 90 percent and 110 percent of the published FMR for that unit size. HUD approval is not required to establish a payment standard amount in that range (‘basic range’).” 24 C.F.R. § 982.503(b)(1)(I) (2005). In order for the PHA to establish their payment standard outside the “basic range” they must request HUD approval; and HUD has the sole discretion of granting or denying this approval. 24 C.F.R. § 982.503(b)(2) (2005).

¹⁵24 C.F.R. § 982.507 (2005).

¹⁶See generally *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418 (1987) (recognizing tenants’ § 1983 claim to challenge improper utility allowances in public housing).

Third Circuit Requires Philadelphia Housing Authority to Increase Utility Allowance for Rate Hikes¹

The United States Court of Appeals for the Third Circuit recently issued an extremely important decision on the calculation of utility allowances in public housing. The court's ruling holds promise for all federally assisted housing in this period of imminent post-Katrina skyrocketing utility bills. *McDowell v. Philadelphia Hous. Auth.*, 423 F.3d 233 (3d Cir. 2005).

The appellate decision involved a long-running case in which tenants had sued the housing authority in 1997 pursuant to 42 U.S.C. § 1983 for its failure to adjust its utility allowances for rate increases as required by federal law. After certification of a tenant class, the parties executed a settlement agreement, which was incorporated into a consent decree under the continuing jurisdiction of the district court. The settlement essentially required the housing authority to follow the federal regulations for the annual review and adjustment of allowances, including the requirement to revise allowances when utility rates increase by 10% or more from those used to calculate the prior allowances.

The court's ruling holds promise for all federally assisted housing in this period of imminent post-Katrina skyrocketing utility bills.

When natural gas rates increased in December of 2000 by 11%, and then increased again one month later, tenants repeatedly requested an allowance adjustment but the Philadelphia Housing Authority refused to act. The tenants, represented by Community Legal Services, finally sought to enforce the consent decree through a civil contempt motion in October of 2002. The parties again reached another settlement two months later, with increased allowances effective January 1, 2003, but no resolution of the tenants' request for sanctions during the two-year period of noncompliance.

The district court subsequently denied the tenants' motion, finding no showing of any actual provable injury

¹Much of this article is based on an analysis by Roger D. Colton, of Fisher, Sheehan and Colton (FSC) in Boston, about whom more can be found at <http://www.fsconline.com>.

from the violation of the decree. This finding was based upon its acceptance of the Philadelphia Housing Authority's revised gas consumption calculations for the period between 1999 and 2002, which retroactively decreased the base allowances, more than offsetting the impact of the rate shortfalls. Thus, the district court accepted the housing authority's contention that tenants were owed nothing despite its admitted violation of the consent decree and rate regulations.

On appeal, the Third Circuit, with Supreme Court nominee Judge Alito writing for the panel, rejected this position out of hand. Using contract principles to construe the terms of the consent decree, the court found its terms unambiguous, requiring and permitting only prospective adjustments.² The court stated:

When [the utility provider] raised its rates, the tenants were entitled under paragraph 8 of the decree to have their allowances recalculated based on the increased rates and the consumption factor in effect at the time. The difference between the allowances so calculated and the allowances the tenants received is the loss the tenants suffered and the benefit the PHA reaped as a result of the latter's contempt.³

This reasoning is directly applicable to millions of federally assisted tenants because, although the regulatory citations vary, the conditions set forth in paragraph 8 of the consent decree are largely the same as those embodied within HUD's utility allowance regulations for all of its programs.⁴ Therefore, when utility rates go up, "tenants [a]re entitled. . . to have their allowances recalculated based on the increased rates and the consumption factor in effect at the time."⁵ If a housing authority or property owner does not do this, "the difference between the allowances so calculated and the allowances the tenants received is the loss the tenants suffered."⁶ That loss is "actual provable injury" to be assessed against the non-complying public housing agency or owner.

Consequently, the utility allowances provided to public and assisted housing tenants throughout the country over the past several years warrant careful scrutiny, as natural gas, fuel oil and electricity prices have increased

²The court's conclusion on this point was reinforced by the extrinsic evidence provided by HUD's regulations that require prior notice of adjusted allowances, except in the case of those required for rate increases. *See* 24 C.F.R. § 965.502(c) (2005).

³423 F.3d at 241.

⁴*Compare* 423 F.3d at 238, *with* 24 C.F.R. § 965.507(b) (2005) (PHAs); *and* 24 C.F.R. §§ 880.610 and 881.601 (2005) (project-based Section 8 program); *and* 24 C.F.R. § 982.517(c) (2005) (housing choice voucher program).

⁵423 F.3d at 241.

⁶*Id.*

substantially. Inadequate utility allowance adjustments effectively result in hundreds of millions of dollars of rent overcharges in the subsidized housing programs.⁷ Indeed, the Philadelphia case alone involved overcharges estimated at more than \$4 million. The recently announced rate hikes by many utility companies as a result of the hurricane's interruption of supplies only heighten the urgency of prompt review, analysis, and remedial action on this problem. ■

⁷See generally NHLP, *Shifting Affordable Housing Cost Burdens to Tenants: A Historical Perspective*, 35 HOUS. L. BULL. 8, 9 (2005).

New Report on Winning Construction Jobs

The Brennan Center for Justice recently published a new report entitled *Winning Construction Jobs for Local Residents: A User's Guide for Community Organizing Campaigns* that discusses a five-step strategy that community advocates can use to create and/or retain high-quality construction jobs for their local residents—especially women and people of color. The report draws upon the successes and setbacks experienced in campaigns throughout the U.S.—including campaigns in New York, Hartford, Los Angeles and Seattle—and focuses attention on what has worked best and what should be avoided.

The five-step approach outlined in *Winning Construction Jobs* includes: (1) identifying the right target; (2) getting a seat at the table; (3) supporting high-road contractors; (4) implementing pre-apprenticeship training; and (5) monitoring outcomes. Through this five-step framework, the report provides an analysis of the core stakeholders and potential allies in a construction jobs campaign, descriptions of existing programs, and detailed explanations of legal tools necessary to get the agreements in writing. Overall this report provides an insightful look into many of the strategies that have proven to be successful for a number of community advocates in their fight for economic equality in some of our nation's most under-represented communities.

The report is available online at www.brennancenter.org/programs/downloads/constructionjobs.pdf.

RHS FY 2006 Appropriations Act Funds Rural Tenant Protection Vouchers

The housing programs of the Rural Housing Service (RHS) will receive funding for Fiscal Year 2006 (FY06) comparable to that they received in FY05, despite the Administration's continuing efforts to substantially cut funding for the agency's housing programs, particularly its Section 515 rental housing program. More significantly, the legislation authorizing appropriations for RHS, which was signed into law on November 10,¹ contains several provisions for new programs authorizing the agency to protect residents against displacement when an owner prepays a Section 515 loan. It also contains funding and an authorization for the agency to begin restructuring its existing Section 515 inventory in order to ensure its continued fiscal and physical viability.

Housing Programs FY06 Funding

Funding for the RHS housing programs is considered by the House and Senate Agricultural Appropriations committees. Both committees adopted FY06 funding recommendations for the RHS housing programs and the House and Senate approved those recommendations earlier this year. Because the House and Senate recommendations differed, a House and Senate conference committee was formed to reconcile the differences and to make final recommendations to both chambers of Congress. The conference committee met in late October and issued a conference report that, in practically every case, adopted the higher funding level approved by either the House or Senate.² In most instances, the conference committee's recommendations are identical to the programs' FY05 funding levels and substantially higher than those sought in the Administration's FY06 Budget, which was sent to Congress in February of this year.

The table on the following page shows the enacted FY06 agricultural appropriations and compares them to last year's actual funding level and the Administration's funding request.

The conference committee's approved recommendations were passed by the House on October 28, and by the Senate on November 3, 2005. The President signed the bill

¹Pub. L. No. 109-97 (Nov. 10, 2005).

²MAKING APPROPRIATIONS FOR AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION, AND RELATED AGENCIES PROGRAMS FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2006, AND FOR OTHER PURPOSES, H.R. Rep. No. 109-255 (2005) (hereinafter H. Rep. No. 109-255).

Rural Housing Service Housing Programs Funding
(All figures in millions of dollars)

Program	FY06 Ag. Approp.	FY05 Actual	Administration's FY06 Proposal
Single Family Home Loans (§ 502 direct)	1140.8	1140.8	1000
Single Family Home Loans (§ 502 guaranteed)	3681	3309	3474
Home Repair Loans (§ 504)	35	35	36
Home Repair Grants (§ 504)	31	31	30
Rental Housing Loans (§ 515)	100	100	27
Farm Labor Housing Loans (§ 514)	38	42	38
Farm Labor Housing Grants (§ 516)	14	16	14
Rental Assistance subsidy	653	592	650
Rural Rental Vouchers	16	0	214
Guaranteed Rental Housing Loans (§ 538)	100	100	200
Housing Preservation Grants	10	9	10
Preservation Demonstration Loans	2.97	0	3
Rental Housing Restructuring	9	0	0
Self Help Technical Assistance Grants (§ 523)	34	34	34

on November 10. Final passage of the bill notwithstanding, funding for all of the RHS programs, as well as all other discretionary federally funded programs, is likely to be trimmed ultimately as a result of Congress' efforts to cut overall discretionary spending and offset the funding commitments made for the Gulf Coast hurricanes and other purposes. If the cuts are made, they are likely to come as part of an across-the-board cut in federal discretionary spending, which may be approved either as part of an omnibus appropriations bill or as a separate bill after all the federal appropriations bills have been passed by Congress.

Vouchers for Residents of Prepaid Section 515 Developments

The appropriation bill has some very significant developments for persons interested in Rural Rental Housing and Rural Rental Housing Preservation. For the first time, it includes funding for Rural Housing Vouchers, which have long been authorized under Section 542 of the Housing Act of 1949,³ but never funded. The authorizing legislation contemplated that the Rural Housing Voucher program would operate in rural areas much like the HUD

Housing Choice Voucher program. The agricultural appropriations bill, which authorize \$16 million for the program, limits its use to protecting residents of Section 515 Rural Rental Housing whose owners have prepaid their loans after September 30, 2005.⁴ It establishes the funding level for individual vouchers as the difference between "comparable market rent for the [prepaid] section 515 unit and the tenant paid rent for such unit."⁵ It also directs that the Secretary of Agriculture "shall, to the maximum extent practicable, administer such vouchers with current regulations and administrative guidance applicable to section 8 housing vouchers administered by the Secretary of the Department of Housing and Urban Development."⁶

While the \$16 million appropriation for the rural voucher program is clearly insufficient to run a major voucher program, particularly if the Administration pushes for the removal of the prepayment restrictions imposed by the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA),⁷ the funding will allow RHS

⁴H. Rep. No. 109-255, at 20-21.

⁵*Id.* at 20.

⁶*Id.* at 20-21.

⁷Codified at 42 U.S.C. § 1472(c) (2003). In its budget request, the Administration estimated that if 10% of the Section 515 housing stock were to

³42 U.S.C.A. §1490r (West 2003).

to start up a voucher program and to address various administrative issues as to how it will be run. For example, one of the first decisions that the agency will have to make is whether it will administer the voucher program directly or if it will contract with local housing authorities or state agencies to run the program. RHS Administrator Russell Davis estimates that the \$16 million appropriation will fund approximately 3,500 vouchers.

Nonprofit Prepayment Due Diligence Grants

The appropriations bill also adopts a recommendation of the National Rural Preservation Task Force, formed by the Housing Assistance Council and the National Housing Law Project, to increase the grants that are available to nonprofit and public organizations that are considering the purchase of a Section 515 development that the owner is planning to prepay. For the last several years the appropriations bills have limited due diligence grants to \$25,000. Participants in the National Rural Preservation Task Force reported that the amount was not sufficient and recommended increasing it to \$50,000. The Agricultural Appropriations bill follows that recommendation.⁸

The FY06 RHS appropriations legislation is a pleasant surprise in that it marks a clear departure by Congress from the Administration's efforts to continue to eliminate or reduce funding for the RHS housing programs.

Restructuring and Revitalization Authorization

The FY06 appropriations act also authorizes \$9 million for a new demonstration program for the restructuring and revitalization of existing Section 515 housing projects. This demonstration program is intended to provide RHS with the authority to begin to implement the restructuring and revitalization proposals contained in the Comprehensive Property Assessment report that was

be prepaid over the next three years, it would require a \$642 million dollar voucher program to protect the residents. To meet that need, the Administration proposed that \$214 million be appropriated for the program in each of the next three fiscal years. Congress did not adopt the Administration's proposal because it never provided Congress any information as to how it calculated its needs or how it proposed to run the voucher program. Accordingly, the House and Senate Appropriations committees ignored the Administration's request. Realizing that it may be useful to initiate a protection program for residents of Section 515 housing comparable to what exists for residents of HUD housing, the Senate Agricultural Appropriations Committee proposed the \$16 million program on its own.

⁸H. Rep. No. 109-255, at 20.

released by the Department of Agriculture in November 2005. That report concluded that the Section 515 housing stock will need physical revitalization if it is to continue to serve the needs of low-income households for the remaining balance of the properties' mortgage term. Because existing project reserve accounts are generally insufficient to undertake that revitalization, the report recommended that RHS restructure the outstanding loans to enable owners to upgrade the properties. The appropriations bill authorizes RHS to use the \$9 million to reduce or eliminate interest rates on existing loans, defer loan payments, subordinate loans, reduce or reamortize existing debt, and to provide other forms of assistance, such as advances or incentives, authorized by the Secretary.⁹

The appropriations act also makes \$1 million available for RHS to contract with third parties to acquire necessary automation and technical services to restructure Section 515 loans. It is not clear from the report whether this allows RHS to contract with private parties to actually carry out the restructuring, as was done by HUD, or to simply purchase technical services to facilitate RHS' capacity to undertake the restructuring.

Rural Preservation Demonstration

Finally, the appropriations act authorizes \$2.97 million for the continuation of the Rural Housing Preservation Demonstration program, funded for the first time in FY05. Under that program, RHS provided low-cost thirty-year loans to third party intermediaries for the preservation of Section 515 housing. While it is not yet clear exactly how these intermediaries will use the funds, the FY06 appropriations makes additional funding available under the program.¹⁰

Conclusion

The FY06 RHS appropriations legislation is a pleasant surprise in that it marks a clear departure by Congress from the Administration's efforts to continue to eliminate or reduce funding for the RHS housing programs. In light of the fact that next year's appropriations bill is likely to be considered, if not passed, just before the mid-term elections, it is likely that funding for the RHS housing programs will remain level for yet another year. Moreover, Congress' willingness to protect residents of Section 515 housing against displacement when owners prepay their loans is also a welcome and long overdue development. It remains to be seen how the Administration will propose to implement this new authority. NHLP plans to publish reports on new developments in the RHS voucher program in future issues of the *Housing Law Bulletin*. ■

⁹*Id.* at 19-20.

¹⁰*Id.* at 21.

PHAs to Reimburse Nationwide Class of Enhanced Voucher Holders

As a result of the settlement of a nationwide class action challenging the failure of the Department of Housing and Urban Development to adjust voucher subsidies provided after certain mortgage prepayments during the late 1990s,¹ PHAs should now be taking steps to identify and reimburse affected class members. HUD has issued two notices advising public housing agencies (PHAs) of the settlement and their duties to identify tenants who should have received subsidy adjustments and provide them with lump-sum reimbursements or rent credits.²

Taylor had challenged as contrary to statute HUD's failure to adjust voucher payment standards for certain tenants residing in certain HUD-subsidized properties prepaid between Fiscal Years (FYs) 1997-1999.³ The affected tenants are those who (1) received so-called "preservation vouchers" to subsidize the new higher post-prepayment rents, but (2) were then denied additional subsidy increases to cover *subsequent* rent increases at the property, levied after one year from the prepayment that triggered their voucher eligibility.

Because of the 1999 statutory clarification, the only prepayment voucher tenants who were entitled to reimbursement are those with unadjusted voucher subsidies between FYs 1997-1999.⁴ The *Taylor* settlement does *not* affect (1) those tenants who received enhanced vouchers as a result of Section 8 opt-outs; or (2) tenants who moved

after receiving their "preservation voucher" but prior to such a subsequent rent increase (because their subsidy would have then become subject to ordinary voucher payment standard rules).

Implementing the Settlement

Pursuant to the settlement terms, HUD issued a second specific directive to all PHAs,⁵ requiring each PHA that issued preservation vouchers during the affected period to identify those class beneficiaries still receiving voucher assistance no later than each tenant's next annual recertification. Absent a narrow exception, the notice then directs the PHA to determine the appropriate reimbursement and make payment through either a lump sum or rent credits. Former preservation voucher tenants who subsequently moved who now seek a determination of eligibility would have to apply to the PHA that issued their preservation voucher for that determination. If eligible, the PHA must reimburse them through a lump sum payment.

Local housing advocates can help affected tenants by ensuring that HUD and PHAs follow the terms of the settlement. A Web site⁶ now provides most of the information needed by advocates and claimants. However, advocates will still have to determine whether tenants are entitled to reimbursements, by taking the following steps.

Step #1: Review the currently updated list of affected properties, to see if there are any local properties and tenants in your service area. In lieu of the cryptic list attached to HUD's first notice, Plaintiffs' counsel has developed and posted the current list of affected properties with more identifying information, such as address, city and state,⁷ to help identify affected properties in specified states or cities. Note that this list only identifies those properties that HUD has agreed are potentially affected—others may be subsequently identified. If the affected properties are not located within your service area but within that of someone you know, please contact them and pass along this information.

¹Taylor v. Jackson, No. 02-CV-1120AA (D. Ore. filed 2002).

²HUD Notice PIH 2005-10 (Mar. 23, 2005) and HUD Notice PIH 2005-24 (July 8, 2005), available at <http://www.nhlp.org/html/pres/casedocs.cfm?id=800030>.

³For more background on the case, see NHLP, *Settlement Reached in Enhanced Voucher Class Action*, 35 HOUS. L. BULL. 147, 163 (June 2005). Pleadings and settlement documents in the case are available (the latter without a password) from NHLP's Web site at <http://www.nhlp.org/html/pres/casedocs.cfm?id=800030>. One federal court had upheld such a claim on behalf of the tenants at one Minnesota property, 215 Alliance v. Cuomo, 61 F. Supp. 2d 879 (D. Minn.1999). See NHLP, *Minnesota Section 8 Tenants Win Major Preservation Victory*, 29 HOUS. L. BULL. 161, 161 (1999). In 1999, Congress clarified the statute, Pub. L. No. 106-74, § 538(a), 113 Stat. 1122 (Oct. 20, 1999) (codified at 42 U.S.C. § 1437f(t)), while specifically contradicting HUD's interpretation. H.R. Rep. 106-286, 106th Cong., 1st Sess., at 22 (Aug. 3, 1999). HUD implemented this change only prospectively, HUD Notice PIH 2000-09 (Mar. 7, 2000), thus continuing the harm challenged in *Taylor*.

⁴Tenants who received a preservation voucher upon prepayment during the relevant period and remained in place should have had their assistance converted to an "enhanced voucher" at their first annual recertification following enactment of the enhanced voucher statute on October 20, 1999, thus terminating their harm.

⁵HUD, Notice PIH 2005-24 (July 8, 2005), available at <http://www.nhlp.org/html/pres/casedocs.cfm?id=800030>.

⁶<http://www.hud-enhanced-vouchers.org>. Some of the legal documents may still not be posted there, but may be obtained from NHLP's Web site at <http://www.nhlp.org/html/pres/casedocs.cfm?id=800030>.

⁷The list is posted both on NHLP's Web site at <http://www.nhlp.org/html/pres/casedocs.cfm?id=800030> and at www.hud-enhanced-vouchers.org. The Excel file can be sorted in various ways. Note that for approximately 100 properties, there is not yet any further identifying information beyond what HUD first provided (e.g., no address, city or state), so advocates should scroll through those at the end to see if they recognize either the property name or PHA involved.

Based on HUD data on terminated mortgages, Plaintiffs' counsel initially estimated that tenants in 620 properties containing almost 60,000 units were possibly affected by HUD's no-adjustment policy. HUD, however, has so far identified only approximately 430 properties as having housed tenants receiving preservation vouchers,⁸ with far fewer vouchers than units having actually been made available. Plaintiffs' counsel is currently reviewing with HUD the apparent discrepancy of approximately 190 properties with about 16,000 units, as well as the shortfall of at least 26,000 vouchers issued, even in just a partial subset of the properties already acknowledged as covered by HUD. Once the correct number and identity of affected properties and vouchers is determined, it is still necessary to determine at the local level how many of those properties and tenants experienced a subsequent rent increase and a resulting improper subsidy determination.

Step #2: Determine whether there was an unsubsidized rent increase. In order to establish tenant eligibility for reimbursements at these prepaid properties, there must have also been a second rent increase that was not covered by increased voucher subsidy payments. This second rent increase will probably have to be established by making an inquiry of the tenants, PHA and/or project management. PHAs should know whether this happened because voucher owners must notify the PHA of rent increases,⁹ although their records may be hard to find unless affected tenants remain on their voucher program. The resident manager of a development may also have this information.

Step #3: Calculate the reimbursements due to eligible tenants. This should involve straightforward arithmetic—adding up the amount of rent increase(s) levied by the owner that were not covered by increases in the voucher subsidy and multiplying them by the number of months that they were effective.

Step #4: Address any PHA resistance to making the payments. Under Notice 2005-24, a PHA may only make payments or credits to the extent that it has sufficient budget authority available under its Annual Contributions Contract, and cannot

make any payments or adjustments if they would "jeopardize continued assistance for other current voucher participants."¹⁰ Payments can be delayed until funds become available. Although this exception should thus be limited to those rare situations where making payments would require a current voucher family to be terminated,¹¹ some PHAs may nevertheless be reluctant to pay if they have been recently experiencing funding shortfalls.

Tenants, advocates or PHAs with questions or problems should contact Plaintiff's counsel, Micky Ryan of the Oregon Law Center, at (800) 898-5594 x147, or via e-mail at enhancedvouchers@yahoo.com. ■

¹⁰See HUD Notice PIH 2005-24, at 6-7.

¹¹*Id.* Even if a PHA has no immediately available funding to pay reimbursements (counting reserves), the draft directive's language ("reserves resulting from turnover") suggests that funds freed up upon voucher turnover must be used for this purpose. For information on each PHA's current funding levels, see the Center on Budget and Policy Priorities Web site at <http://www.cbpp.org>, or the January 21, 2005, letter sent by HUD to each PHA. Information about reserves must be obtained locally from each PHA.

Post-Rucker Decisions: Three Years Later

There have been several reported court and hearing officer decisions regarding evictions from assisted housing and terminations of vouchers which applied to or have been impacted by the *Department of Housing and Urban Development v. Rucker* decision.¹ Several of these decisions have already been summarized in previous issues of the *Housing Law Bulletin*;² this article provides advocates with an overview and update of more recent decisions.

These decisions do not fit into any neat pattern. One court found that the criminal activity of the guest must be current to justify an eviction. Another reviewed the decision of a public housing agency (PHA) and found

⁸HUD's list is included as Attachment A to Notice PIH 2005-24 (July 8, 2005).

⁹See 24 C.F.R. § 982.308(g)(4) (2005).

¹Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2000).

²NHLP, *One Strike Evictions: Post Rucker Decisions*, 32 HOUS. L. BULL. 201 (2002).

that failure to consider mitigating circumstances was an abuse of discretion. In other cases, courts have felt compelled to enforce *Rucker* despite mitigating circumstances. Several decisions have interpreted *Rucker* in the context of other applicable laws, including state law and a consent decree. And in one case, a challenge to the HUD regulations regarding the termination of voucher assistance for criminal activity was rejected and a tenant won a voucher termination hearing because the PHA failed to submit sufficient evidence to support the allegation.

Criminal Conduct of a Guest Must Be Current to Justify an Eviction

The Missouri Court of Appeals, in *Wellston Housing Authority v. Murphy*, affirmed the circuit court's holding that a housing authority could not evict a public housing tenant based upon the extensive criminal record of a guest, where the guest's criminal activity occurred prior in time to the individual becoming a guest of the tenant and did not occur during the term of the tenant's lease.³

Tenant Murphy entered into a lease with Wellston Housing Authority (WHA). The lease agreement contained a provision which allowed WHA to terminate a lease for criminal activity "by the tenant, any household member, a guest, or other person under the tenant's control."⁴

In other cases, courts have felt compelled to enforce Rucker despite mitigating circumstances.

WHA became aware that Marilyn Murphy was being visited by Morris Lockett, who allegedly had an extensive criminal record. It was not until Murphy inquired about adding Lockett to the lease that WHA explained he was barred from the property because of his past record. Murphy agreed not to allow Lockett on the premises. Despite this agreement, Lockett visited with Murphy. As a result, WHA had him arrested for trespassing. Subsequent to Lockett's arrest, WHA sent Murphy a termination notice. The notice gave alternative reasons for the eviction. First it indicated she was being evicted for having an unauthorized male with a criminal record residing in the apartment. Alternatively, the notice provided that the tenancy was terminated because the tenant invited a male with a

³Wellston Hous. Auth. v. Murphy, 131 S.W.3d 378, 381 (2004).

⁴*Id.* at 379.

criminal record to visit after being told to refrain. Murphy refused to vacate the premises and WHA filed an unlawful detainer action against her.⁵

WHA asserted two arguments against Murphy. First, it argued that it could evict Murphy because of the extensive criminal history of her guest. In support of this claim, WHA argued that pursuant to 42 U.S.C. § 1437d (l)(6), it had the authority to terminate a tenancy if a guest under the tenant's control engaged in "any criminal activity" and posed a threat to the public housing residents and their rightful enjoyment of the property. The court rejected this argument concluding that the statute did not extend so far as to include criminal conduct that occurred prior to the tenant's lease term.⁶

Second, WHA asserted that terminating Murphy's lease for permitting Lockett on her premises was synonymous with the authority it has to prohibit persons with criminal records to reside in its units or to enter onto the property altogether. The court rejected this argument, too. It stressed that WHA's right to prohibit Lockett from entering the premises is separate and distinct from the rights to terminate Murphy's lease.⁷

Housing Authority Must Consider Relevant Circumstances in Non-Criminal Case

In *Alich v. Dakota County Comm. Dev. Auth.*,⁸ the Minnesota Court of Appeals reviewed the facts and determined that the Dakota County Community Development Authority (CDA) failed to consider all relevant and mitigating circumstances and thus acted in an arbitrary and capricious manner.⁹

Tenant June Alich informed the CDA that she was getting married and would no longer require housing assistance. Less than a week later, she called back informing the CDA that her marriage was off and asked if she could remain in the program. However, CDA terminated her voucher the day she called. Alich sought review by certiorari against the CDA's decision to terminate her assistance under the Section 8 Housing Choice Voucher Program.¹⁰

Citing *Rucker*, the court recognized that CDA had the discretion to determine when a termination of assistance is appropriate. It then interpreted the governing HUD regulation¹¹ as directing a PHA to "consider all relevant

⁵*Id.* at 380.

⁶*Id.* at 381.

⁷*Id.*

⁸*Alich v. Dakota County. Comm. Dev. Auth.*, No. C4-02-818, 2003 WL 230726, at *2 (Minn. App. Ct. Feb. 4, 2003).

⁹*Id.*

¹⁰*Alich, supra* note 8, at *1.

¹¹24 C.F.R. § 982 (c)(2)(i) (2005).

circumstances such as the seriousness of the case¹² before terminating such a vital subsidy. In reviewing the circumstances, the court found Alich had historically complied with her housing requirements and that the CDA was not in a detrimental position as it had not yet rewarded her voucher to another eligible participant nor had it cancelled the contract with her landlord.¹³ As a result, the court found that CDA's actions were arbitrary and capricious especially in light of the purposes of the Section 8 program and reinstated the tenant's voucher.

This decision is consistent with HUD directives to housing authorities to consider relevant circumstances and to exercise discretion in a judicious manner.¹⁴

Courts Sustain Evictions Despite Mitigating Circumstances

*Lowery v. Housing Authority of the City of Terre Haute*¹⁵ involved a disabled father who lived with his two minor children. The court noted that the housing authority sought eviction for violation of the lease, which prohibited boarders, disturbing the peaceful enjoyment of other residents, and criminal activity of the tenant, members of the household or guest that threatens the health, safety or right to peaceful enjoyment of the premises by other residents or employees.

On appeal, the tenant objected on due process grounds to the fact that his stepson, who had been staying in the tenant's unit, was placed on a list of banned persons and prohibited from entering the housing authority property. The court dismissed that argument as well as an argument that the tenant was denied due process in the eviction action because it found that the tenant did not request a grievance hearing in the eviction action in a timely manner.

¹²Alich, *supra* note 8, at *2. Other courts and judges have also found that all of the surrounding circumstances must be considered by the housing authority or the court. See e.g., *Powell v. Housing Authority of the City of Pittsburgh*, 571 Pa. 552, 812 A.2d 1201, 1217 (2002) (concurring opinion, "it is incumbent on PHAs to consider "all relevant circumstances" before terminating a family's assistance based on the errant conduct of less than all of its members."); *Oakwood Plaza Apts. v. Smith*, 800 A.2d. 265 (N.J. Super. Ct. App. Div. 2002) (remand to trial court to determine if Section 8 landlord had considered certain factors). See also *State ex rel. Mary Smith v. Hous. Auth. of St. Louis County*, 21 S.W.3d 854 (Mo. Sup. Ct. 2000) (Court, pre-*Rucker*, reviewed housing authority's action—under state law provision regarding a review of agency hearing—and found that the housing authority abused its discretion because it failed to consider mitigating circumstances).

¹³Alich, *supra* note 8, at 2.

¹⁴Letter from Mel Martinez to Public Housing Directors (April 16, 2002), available at <http://www.nhlp.org/html/pubhsg/rdcases.htm>; Letter from Assistant Secretary Michael Liu to Public Housing Directors (June 6, 2002), available at <http://www.nhlp.org/html/pubhsg/rdcases.htm>.

¹⁵*Lowery v. Hous. Auth. of the City of Terre Haute*, 826 N.E.2d 685 (Ind. App. 2005).

With respect to the activity of the stepson, the court danced around the law and the facts. It noted that the tenant did not admit that his stepson engaged in any criminal activity.¹⁶ Throughout the opinion, there are references only to disturbances at the neighboring school and the manager witnessing "an altercation in which several young men were threatening" the stepson who was standing outside of the tenant's apartment.¹⁷ The court did note that the problems were not drug related so that the strict liability provisions of *Rucker* were not implicated.¹⁸

The Alich decision is consistent with HUD directives to housing authorities to consider relevant circumstances and to exercise discretion in a judicious manner.

Next the court looked at the issue of whether the tenant violated the lease by admittedly allowing his stepson to reside in the unit for "about a month" despite notices and warnings issued by the PHA regarding the stepson.¹⁹ The court found that this act by the tenant was grounds for termination despite the fact that the court recognized that "it was not apparent from the record that [the tenant who was physically infirmed] could exert physical control over [the stepson]" to prevent him from entering the TCHA premises.²⁰ Moreover the court noted that the housing authority could have taken out a restraining order against the stepson to prevent his entry. Despite these musings, the court rested its affirmation of the trial court decision on the fact that "there is evidence from which the trial court could infer that [the tenant] allowed or invited [the stepson] to return to the apartment."²¹

In *Royal Oak Apartments v. Solt*,²² the Court of Appeals of North Carolina cited the *Rucker* standard, which denies an innocent tenant defense, but nevertheless considered

¹⁶*Id.* at 689.

¹⁷*Id.* at 687.

¹⁸"[I]t does not appear that [the stepson's] problems are drug-related, arguably invoking the strict liability implications of *Rucker*." *Id.* at 690.

¹⁹*Id.* at 689.

²⁰*Id.* at 690. Elsewhere in the opinion the court noted that the property manager stated that the tenant stated that he did not know how to make his stepson leave the premises. *Id.* at 686.

²¹*Id.* at 690. The court also speculated the tenant could have added the stepson to the lease but chose not to so as to avail himself of his generous rent subsidy. Such speculation was not warranted since it was clear that TCHA would not have allowed the stepson to be added to the lease.

²²*Royal Oak Apts. v. Solt*, 155 N.C.App. 221, 573 S.E.2d 773, 2002 WL 31894957 (2002).

and rejected tenant Melissa Solt's defense that she could not control the violent actions of her ex-husband.²³ Solt moved into the Royal Oak apartments and at the time did not reside with her estranged husband, Travis Eddie. Although they were legally separated, Eddie resided with Solt on occasion and was considered a "guest" under the terms of the lease. On two separate occasions, which were four days apart, Eddie got into violent confrontations, once with Solt's neighbor and the other with Solt. Both required the summoning of law enforcement. After the first confrontation, Royal Oak sent Solt "A Notice of Lease Violation" and verbally warned her that "any future misconduct on the part of her guest would result in the termination of her lease." After the second confrontation, Royal Oak gave Solt a notice to quit and informed her that her lease was about to expire and would not be renewed.²⁴ The trial court found that during the relevant period of time, Solt permitted Solt to live with her "on and off."

The court upheld an eviction, stating that the resident had a responsibility to live up to her end of the lease agreement and exclude her ex-husband, whom she knew had violent tendencies, from the premises.

In light of *Rucker*, the court upheld her eviction, stating that Solt had a responsibility to live up to her end of the lease agreement and exclude her ex-husband, whom she knew had violent tendencies, from the premises.²⁵ Though the court acknowledged the severity of the ruling, it affirmed the trial court's eviction decision. The court of appeals' emphasis on Solt's responsibilities belies the fact that Solt asserted that she had no control over her former husband and the fact that it took six police officers to subdue Eddie.

Courts Interpret *Rucker* in the Context of State Laws and a Consent Decree

Consent Decree

In *Brown v. Philadelphia Housing Authority*,²⁶ the Philadelphia Housing Authority moved to vacate the *Brown* consent decree, claiming that subsequent changes in federal regulations and statutes warranted revision of the

²³*Id.* at *6.

²⁴*Id.* at *3.

²⁵*Id.*

²⁶*Brown v. Philadelphia Hous. Auth.*, 237 F. Supp. 2d 567 (E.D. Pa. 2002).

Brown decree.²⁷ *Brown* is a civil rights action brought by Philadelphia Housing Authority tenants nearly thirty years ago regarding tenants' rights to a hearing prior to eviction. One of the provisions that the PHA objected to was its obligation under the *Brown* decree to afford tenants who allegedly have engaged in violent or drug-related criminal activity a grievance hearing prior to eviction.

The Philadelphia Housing Authority made several arguments, one of which focused on the inconsistency between *Rucker* and the *Brown* decree. The court rejected this argument. In its analysis, it concluded that although *Rucker* allows for greater flexibility to evict tenants associated with drug-crime related activities, it "does not make any of the obligations of the *Brown* decree impermissible under federal law."²⁸ Moreover, the *Brown* decree does not have any effect upon whom the Philadelphia Housing Authority may evict. The court also noted that none of the changed circumstances the Philadelphia Housing Authority alluded to as justification for vacating the *Brown* decree were unforeseen. For example, the court found that "[i]t is not unforeseeable that an agency like HUD would work to clarify or modify its regulations in respect to public housing assistance." In addition, the Philadelphia Housing Authority failed to show any inconsistencies between federal law and the *Brown* decree.²⁹

Interpretation of *Rucker* with Applicable State Law

In *New York City Housing Authority v. Taylor*,³⁰ the Supreme Court, Appellate Term, 2nd and 11th Judicial Dist, reversed the civil court decision dismissing the petition against tenant Oreater Taylor. Taylor resided in a development that required tenants to sign a lease agreement, indicating their promise to be responsible for the behavior of their household members. Taylor's son was convicted of selling crack cocaine to an undercover police officer in the building. Police executed a search warrant and obtained a gun, bullets, additional illegal substances and a large sum of money.³¹ The New York City Housing Authority then commenced an eviction proceeding.³²

The civil court found that the NYCHA had failed to show that the premises were used to operate an illegal business and that the tenant "had reason to know of the activity and acquiesced therein."³³ The court disagreed

²⁷*Id.* at 568.

²⁸*Id.* at 573.

²⁹*Id.* at 577.

³⁰*N.Y. City Hous. Auth. v. Taylor*, No. 2004-511KC, 6 Misc.3d 135(A), 800 N.Y.S.2d 351 (Table), 2005 WL 433299, at *1 (N.Y. Supp. App. Term Feb. 18, 2005).

³¹*Id.*

³²*Id.*

³³*Id.*

and reversed, finding Taylor responsible for her son's illegal activity. The court determined that Taylor must have had knowledge of the activities that occurred in her apartment and to have acquiesced.³⁴

In 88-09 Realty, LLC v. Hill, the court applied the standard of "knowledge and acquiescence" and held that the landlord had met its burden.

In another case,³⁵ *88-09 Realty, LLC v. Hill*, the Supreme Court, Appellate Division, 2nd Department, applied the standard of "knowledge and acquiescence" established in case law developed in New York City courts and held that the landlord had met its burden in establishing that Priscilla Hill's son was using her apartment for drug dealing.³⁶ The court also noted that her son's activities "persisted over such a period of time and were the subject of complaints by people in the community as to give an inference that the appellant knew or should have known of the activities, and acquiesced therein."³⁷ Two years later, in *Satterwhite v. Hernandez*,³⁸ the New York Supreme Court, Appellate Division, First Department, held that the penalty of terminating Connie Satterwhite's public housing tenancy on the ground of non-desirability was supported by substantial evidence and did not "shock the conscience."³⁹ Police officers found drugs which were both in plain view and hidden and ammunition in the apartment, thus supporting good cause for her eviction.⁴⁰

In another New York case, *B&L Associates v. Wakefield*, the Civil Court, New York City, Kings County declined to follow the cases, such as *88-90 Realty*, that required "knowledge and acquiescence" and determined that the "no fault" eviction standard of *Rucker* applied.⁴¹ The court concluded that Melissa Wakefield's landlord had successfully established a prima facie case against her and awarded possession. Despite the fact that the court stated that it would not recognize her defense of lack of knowl-

edge, the court then considered the tenant's defense. Ultimately, however, the court concluded that it did not find Wakefield's testimony credible.⁴²

Court Rejects State Law Innocent Tenant Defense

The facts in *Boston Housing Authority v. Figueroa* are undisputed. Wanda Figueroa was a tenant at the Cathedral public housing development. Figueroa's son, a household member, had been involved in various criminal incidents, including an armed robbery of a deliveryman at the development. In compliance with its policy, the Boston Housing Authority (BHA) conducted a private conference to discuss Figueroa's son and his violation of the lease. After the discussion, the BHA decided to terminate Figueroa's lease based on the continuous threat the son posed to the development. Subsequently, Figueroa exercised her right to a grievance hearing.⁴³

The Massachusetts Housing Court found that *Rucker* preempted the state law "special circumstances" or innocent tenant defense articulated in the Massachusetts state case *Spence v. Gormley*.⁴⁴ It found that such a defense "in a state public housing eviction case would frustrate or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress as determined by the Supreme Court in *Rucker*."⁴⁵ Moreover the court concluded that even if Figueroa were not precluded from asserting the *Gormley* defense, evidence suggested she could have foreseen and prevented her son's criminal behavior.⁴⁶

The court also noted that public housing authorities have broad discretion under the one-strike statute and are not required to evict every tenant. Housing authorities can consider the totality of the circumstances. Significantly, the court stated that a housing authority's discretion is not boundless. A state court can review and determine if a housing authority exercised "discretion in an unfettered manner that violated federal law or principles of due process."⁴⁷ However, in *Figueroa*, because the tenant had received a grievance hearing, the court concluded that both federal law and due process were satisfied.

Figueroa's son was subsequently charged and sentenced to six years in prison on drug and firearm possession convictions. Figueroa argued that her son no longer

³⁴*Id.*

³⁵*88-09 Realty, LLC v. Hill*, 305 A.D.2d 409, 757 N.Y.S.2d 904, N.Y. Slip Op. 13848 (2003).

³⁶*Id.* at 905.

³⁷*Id.*

³⁸*Satterwhite v. Hernandez*, 16 A.D.3d 131, 790 N.Y.S.2d 124 (2005).

³⁹*Id.* at 125.

⁴⁰*Id.*

⁴¹*B&L Assocs. v. Wakefield*, 785 N.Y.S.2d 681, 683 (2004).

⁴²*Id.*

⁴³*Boston Hous. Auth. v. Figueroa*, No. 02-SP-03297, 2002 WL 24029487, at * 2 (Mass. Hous. Ct. Oct. 10, 2003).

⁴⁴*Spence v. Gormley*, 387 Mass. 258, 439 N.E.2d 741 (1982).

⁴⁵*Boston Housing Authority v. Figueroa*, *supra* note 43, at *4.

⁴⁶*Id.* at *5.

⁴⁷*Id.* at *5, note 6.

posed a threat to the residents of her community. The court rejected this argument too on the assumption that her son, who had returned to the premises after the incident and before incarceration, would most likely return to the development upon his release from prison.⁴⁸

Public Housing Tenant Entitled to a Grievance Hearing for Drug and Gun Allegations

The federal regulations provide that a PHA may exclude from the grievance procedures any grievance that involves criminal activity that threatens the health and safety of other residents or employees of the PHA, any violent or drug-related criminal activity on or off the premises, or any criminal activity that resulted in the felony conviction of a family member.⁴⁹ Pursuant to Massachusetts law and the Boston Housing Authority (BHA) tenant grievance procedures, “a public housing tenant is not entitled to a grievance hearing in cases of eviction if there is reason to believe that a tenant or her household member, *on or adjacent to BHA property*, has possessed, carried or illegally kept a weapon”⁵⁰ In *Boston Housing Authority v. Perez*, the Boston Housing Court contrasted this language with the language in the United States Housing Act regarding conduct “on or off” housing authority premises. The court found that possession of a gun by a resident within three-quarters of a mile of BHA property is not adjacent. Because the tenant was not provided with a grievance hearing and the notice to quit stated that she was not entitled to a grievance hearing, the court granted tenant’s motion for summary judgment and dismissed the BHA’s complaint for possession.⁵¹

Voucher Tenant Wins Termination Hearing Because of Lack of Evidence

The Sacramento City and County Housing Authority (SHA) sought to terminate the voucher of a tenant for the alleged violent criminal activity of her son which took place sixty miles from the tenant’s home. The housing authority based its entire case on a newspaper article which described the shooting death of a police officer during the chase of two robbery suspects but did not mention the son’s name. There was no evidence submitted as to what the SHA did to confirm the information.

When asked what steps SHA took to determine whether to exercise discretion to allow the non-offending members to continue to participate in the program, the SHA could produce no evidence of such evaluation. Based on these findings, the hearing officer declined to sustain the proposed termination.⁵²

In Powell, the Supreme Court of Pennsylvania held that a PHA has may terminate a Housing Choice Voucher for violent criminal conduct of a household member without proving that the conduct is an actual threat.

Court Affirms Voucher Termination for Criminal Activity of Son

In *Powell v. Housing Authority of the City of Pittsburgh*, the Supreme Court of Pennsylvania held that a PHA has the authority to terminate a Housing Choice Voucher for violent criminal conduct of a household member without proving that the conduct is an actual threat to the “health, safety, or right to peaceful enjoyment of premises by other residents...or of persons residing in the immediate vicinity.”⁵³

Tenant Beverly Powell resided with her three sons and had a voucher issued by the housing authority. She signed a “family obligations” certificate for her voucher that allowed the housing authority to terminate her tenancy if any member of her family engaged in “drug related criminal activity, or violent criminal activity.” Thereafter, two of Powell’s three sons carjacked a vehicle from a supermarket a mile from Powell’s housing unit by pepper spraying the elderly occupant and physically removing her from the car. The Housing Authority of the City of Pittsburgh terminated Powell’s subsidy, citing she was in violation of the “family obligations” provision.⁵⁴

In her defense, Powell asserted two arguments: first, that the statute did not authorize the PHA to terminate the voucher for criminal activity, and, second, that the regulation exceeded the scope of the voucher statute because it allowed for termination for any criminal activity and did not limit the cause to criminal activity in the immediate

⁴⁸*Id.*

⁴⁹24 C.F.R. § 966.51(2)(i) (2005).

⁵⁰*Boston Hous. Auth. v. Perez*, No. 05-SP /0/1/7/8/0, slip op. at 4 (Mass. Hous. Ct., Boston, August 5, 2005) (emphasis added). Compare *Powell v. Hous. Auth. of the City of Pittsburgh*, *infra* note 53 (discussing the term “immediate vicinity”).

⁵¹*Perez*, slip op. at 7.

⁵²Housing Authority of the City of Sacramento and the Housing Authority of the County of Sacramento, decision August 1, 2005. (The hearing officer cited *Rucker*, was confused about the distinction between the voucher program and public housing, but noted that *Rucker* was not applicable to off-site terminations for non-drug-related criminal activity.)

⁵³*Powell v. Hous. Auth. of the City of Pittsburgh*, 571 Pa. 552, 576 (2002).

⁵⁴*Id.* at 557.

vicinity of the premises. The Supreme Court considered and decided only the latter argument.⁵⁵

The Supreme Court applied the *Chevron* test for determining the lawfulness of the regulation.⁵⁶ The court therefore first looked to determine if Congress directly addressed the issue.

“If the intent of Congress is clear, that is the end of the matter . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute. Where the legislative delegation to an agency to fill a gap is implicit, rather than explicit, a court may not substitute its own construction of a statutory provision for the agency’s ‘reasonable interpretation.’”⁵⁷

Applying these standards, first the court reviewed the legislative history of the voucher statute and determined that Congress in 1990 never addressed whether a housing authority had the authority to terminate voucher benefits for criminal activity only if such activity was in the immediate vicinity of the premises.⁵⁸ When applying the second prong of analysis in accordance with *Chevron*, the court determined that the regulation—which permits a housing authority to terminate a voucher without finding that the criminal activity was in the immediate vicinity of the premises, as is dictated by 42 U.S.C. § 1437f(d)(1)(B)(iii) when a landlord is evicting a tenant—is a permissible construction of the voucher statute and thus is entitled to deference.

Many of the decisions stress the importance of federally subsidizing housing programs and how they are serving a need.

The court stated that “if a PHA were only permitted to terminate assistance for activities on or near the assisted premises, the deterrent effect of this policy would be substantially diminished because the family could lease housing outside the area where the family member engages in the proscribed activities.”⁵⁹ In addition, the court con-

cluded that without this regulation, the housing authority would be required to continue to assist families that it was prohibited from accepting into the voucher program. Thus, the regulation filled a gap in the statutory framework in a reasonable manner and was therefore entitled to deference.

Conclusion

Many of the decisions discussed above stress the importance of federally subsidizing housing programs and how they are serving a need. Although *Rucker* enforced a simple standard, the courts seem willing to consider tenant defenses of lack of control or lack of knowledge and whether a housing authority or landlord has exercised its discretion and considered the circumstances surrounding the alleged violation. In many cases however, even though the court considers the tenant’s defense, the court orders or upholds eviction or termination. ■

Recent Cases

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

Eviction — Defenses; Fair Housing — Reasonable Accommodation

Douglas v. Kriegsfeld Corp., 2005 WL 2600210 (D.C. Oct. 13, 2005) (en banc) (not yet released). In this currently

⁵⁵*Id.* at 565-566.

⁵⁶*Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

⁵⁷*Powell v. Hous. Auth. of the City of Pittsburgh*, supra note 53, at 564.

⁵⁸*Id.* at 570.

⁵⁹*Id.*

¹<http://www.westlaw.com>.

²<http://www.lexis.com>.

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

unreleased opinion, an en banc panel of the District of Columbia Court of Appeals reversed the trial court's decision to bar a discrimination defense asserted by a Defendant-Appellant tenant in an eviction action. Plaintiff-Appellee landlord sought eviction of Defendant-Appellant for Defendant-Appellant's failure to maintain her unit in clean and sanitary condition. Defendant-Appellant had requested through counsel a stay of the eviction proceedings in order to clean her unit and eventual dismissal of the proceedings if the unit remained in sanitary condition as a reasonable accommodation of her alleged mental disability.

Federal Courts — Sovereign Immunity; Lead Paint

Cudjoe v. Dep't of Veterans Affairs, 2005 WL 2559713 (3rd Cir. Oct. 13, 2005). In this suit by a minor resident of an apartment building allegedly owned by the Department of Veterans Affairs for injuries related to lead paint exposure, the Third Circuit held that the waiver of sovereign immunity contained in the Toxic Substances Control Act, 15 U.S.C. § 2688, did not apply to a cause of action for triple damages under the Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. § 4852d(b)(3).

Multifamily Housing Preservation

Carabetta Enters., Inc. v. United States, 2005 WL 2757523 (Fed. Cl. Oct. 19, 2005). The Court of Federal Claims awarded \$18.3 million to Plaintiff owners and managers of Section 221(d)(3) and 236 multifamily housing properties after a bench on damages. Plaintiffs filed suit against Defendant United States for breach of contract for Defendant's failure to provide guaranteed loans for several properties owned by Plaintiffs. *See also Carabetta Enterprises v. United States*, 58 Fed. Cl. 563 (2003) (order on parties' cross-motions for summary judgment).

United Manor, Ltd. v. United States, 2005 WL 2995375 (Fed. Cl. Oct. 31, 2005). Citing, inter alia, *Franconia Assocs. v. United States*, 536 U.S. 129 (2002), and *Alder Terrace v. United States*, 161 F.3d 1372 (Fed. Cir.1998), the United States District Court for the Eastern District of Pennsylvania ruled that Plaintiff Section 236 property owner's takings challenge to federal prepayment restrictions accrued not on the date of the passage of the Low Income Housing Preservation and Resident Homeownership Act of 1990, 12 U.S.C. §§ 4101-4147, but on its later twenty-year mortgage anniversary date. The court denied Defendant United States' motion to dismiss Plaintiffs' claim as time-barred. ■

Recent Housing-Related Regulations and Notices

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

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

HUD Federal Register Final Rules

70 Fed. Reg. 59,892 (Oct. 13, 2005) Project-Based Voucher Program

Summary: This rule replaces the current project-based certificate regulations with a comprehensive new project-based voucher program. This rule is based on statutory authorities enacted in 1998 and 2000, and follows a proposed rule and public comment.

Effective date: November 14, 2005.

70 Fed. Reg. 61,366 (Oct. 24, 2005) Revisions to the Public Housing Operating Fund Program; Correction to Formula Implementation Date

Summary: This document corrects HUD's final rule published on September 19, 2005, that implements revisions to the public housing Operating Fund Program. The final rule includes dates from the proposed rule that assumed both an initial implementation of the revised formula in Fiscal Year 2006 and a one-year period for PHAs to transition to the new formula. In converting the rule from a proposed to final rule, HUD unintentionally failed to revise certain dates to reflect the updated schedule for implementation of the revised formula. Accordingly, the September 19, 2005, final rule inadvertently denies PHAs the one-year transition period. This document corrects the

¹http://www.access.gpo.gov/su_docs.

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

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

⁴<http://www.rdinit.usda.gov/regs>.

September 19, 2005, final rule to provide that the revised allocation formula will be implemented for calendar year 2007, and adjusts the related dates specified in the rule to reflect the corrected implementation date.

Effective date: The final rule is effective on November 18, 2005.

HUD Federal Register Proposed Rules

70 Fed. Reg. 64,746 (Oct. 31, 2005) Semiannual Regulatory Agenda

Summary: In accordance with Section 4(b) of Executive Order 12866 "Regulatory Planning and Review," as amended, HUD is publishing its agenda of regulations already issued or that are expected to be issued during the next several months. The agenda also includes rules currently in effect that are under review and describes those regulations that may affect small entities, as required by Section 602 of the Regulatory Flexibility Act. The purpose of publication of the agenda is to encourage more effective public participation in the regulatory process by providing the public with early information about pending regulatory activities.

HUD Federal Register Notices

70 Fed. Reg. 57,654 (Oct. 3, 2005) Final Fair Market Rents for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program for Fiscal Year 2006

Summary: This notice provides final FY 2006 fair market rents (FMRs) for all areas that reflect the estimated fortieth and fiftieth percentile rent levels trended to April 1, 2006. However, it does not include final determinations on 50th percentile rent levels, as proposed in HUD's notice published on August 25, 2005. The thirty-day public comment period on that notice ended September 26, 2005, and HUD is evaluating the public comments. A notice that provides final determinations on fiftieth percentile FMRs will be issued subsequently, and as further discussed in Section VII of this notice. This notice also invokes the Secretary's authority to waive regulatory requirements for exception FMRs in areas affected by Hurricane Katrina and by displacement of residents of the affected area.

Dates: The FMRs published in this notice are effective on October 1, 2005.

70 Fed. Reg. 57,716 (Oct. 3, 2005) Regulatory and Administrative Waivers Granted for Public and Indian Housing Programs to Assist with Recovery and Relief in Hurricane Katrina Disaster Areas

Summary: This notice advises the public of HUD regulations and other administrative requirements governing HUD's Office of Public and Indian Housing programs

that have been waived in order to facilitate the delivery of safe and decent housing under these programs to families and individuals who have been displaced from their housing by Hurricane Katrina.

Effective Date: September 27, 2005.

70 Fed. Reg. 58,942 (Oct. 7, 2005) HUD's Draft Section 504 Self-Evaluation Report on HUD-Conducted Programs and Activities; Reopening of Comment Period

Summary: On June 22, 2005, HUD published a notice in the *Federal Register* soliciting comments on its draft Section 504 self-evaluation report of HUD-conducted programs, activities, and regional office facilities. The draft report was prepared consistent with HUD's responsibilities under Section 504 of the Rehabilitation Act of 1973, as amended, and under HUD's implementing regulations. The public comment period closed on July 22, 2005. HUD has received numerous requests to re-open the period for public comment. This notice announces the re-opening of the public comment period on the Section 504 draft self-evaluation report.

Comment Due Date: November 7, 2005.

70 Fed. Reg. 61,298 (Oct. 21, 2005) Notice of Certain Operating Cost Adjustment Factors for 2006

Summary: This notice establishes annual factors used in calculating rent adjustments under Section 524 of the Multifamily Assisted Housing Reform and Affordability Act of 1997 as amended by the Preserving Affordable Housing for Senior Citizens and Families into the 21st Century Act of 1999, and under the Low-Income Housing Preservation and Resident Homeownership Act of 1990.

Effective date: February 11, 2006.

HUD PIH Notice

Notice PIH 2005-33 (HA) (October 25, 2005) Reissuance of Section Eight Management Assessment Program (SEMAP) Guidance to HUD Field Offices Assisting SEMAP Troubled, Near-Troubled and Non-Troubled PHAs

Summary: This notice reissues Notice PIH 2004-16 and provides guidance for Hub Directors and Program Center Coordinators to follow in assisting Public Housing Agencies determined troubled or non-troubled under the SEMAP for the Housing Choice Voucher Program.

Expires: October 31, 2006. ■

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