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SPECIAL FEATURE

AN ESSENTIAL RESOURCE FROM THE NATIONAL HOUSING LAW PROJECT

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A Brief Review of State and Local Preservation Purchase Laws*

The Role of State and Local Government

During the past two decades, both before and after the creation and operation of the federal preservation programs, many state and local governments have become increasingly aware of the integral role played by privately owned, federally supported developments in meeting their affordable housing challenges. Additional funding is obviously needed to preserve more housing, both to ensure proper rehabilitation and to purchase at-risk properties. Many state and local governments have recently begun to allocate more of their own resources or other funds within their control (usually, bond financing and tax credits) to meet these preservation needs.[1]

Because funding alone may prove insufficient to preserve high-priority developments, states and cities have also undertaken other regulatory preservation initiatives, such as improved notices.[2] Others have reevaluated the principle of owner choice underlying the current prepayment and opt-out policies, where owners alone determine whether to preserve properties as affordable housing. Some states and cities have enacted measures to transform this preservation issue into a public policy decision, by adopting additional rights of first refusal, rights of offer, or rights to purchase, when an owner seeks to convert property to market-rate use. These restrictions express conscious public policies about which properties should be preserved through transfers to preservation purchasers, often those endorsed by the tenants, and possibly supported with additional public funding. This article and the accompanying chart on pages 224-225 provide a brief summary of these state and local laws.

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*Ed. Note: This article is an update of *Rights of First Refusal in Preservation Properties: Worth a Second Look*, which first appeared in 32 HOUS. L. BULL. 1, 1 (2002), and includes relevant state and local legislation enacted since then in Illinois, New York City, California, and Rhode Island.

[1] *See* National Housing Trust, *Working Paper: State and Local Preservation Initiatives*, *available at* http://www.nhtinc.org/documents/State_Pres.pdf (updated June 2005).

[2] *See* NHLP, *Preserving Federally Assisted Housing at the State and Local Level: A Legislative Tool Kit*, 29 HOUS. L. BULL. 183, 183 (1999) (survey of state and local preservation initiatives). *See also, e.g.*, COLO. REV. STAT. § 24-32-718 (2006) (state database for notices of termination); CONN. GEN. STAT. §8-68c (2006) (one-year notice for prepayments and terminations to tenants and state and local governments); WASH. REV. CODE § 59.28.040 (2006) (one-year notice for prepayments and expirations to tenants, PHA and state and local governments); MINN. STAT. § 504B.255 (2006) (one-year notice to tenants for prepayments or Section 8 terminations); MINN. STAT. § 471.9997 (2006) (requiring tenant impact statement to local government at least twelve months prior to intended prepayment or termination).

Existing Purchase Opportunity Laws in General

State and local purchase opportunity laws differ in several important respects, including (1) what kinds of affordable properties are covered, (2) what event triggers their application, (3) the nature of the purchase opportunity provided, and (4) which entities can take advantage of the purchase opportunity. The balance of this article will cover these points, as well as procedural protections.

Types of Housing Covered

In creating purchase opportunities, these state and local preservation laws seek to address the threatened conversion of affordable housing that is supported by a variety of federal, state and local programs. The law might cover any federally assisted, restricted use property or only, for example, prepayments of subsidized mortgages subsidized by the Department of Housing and Urban Development (HUD) or termination of project-based Section 8 contracts. Newer state and local laws commonly address at least both prepayment of mortgages on HUD-subsidized properties, properties subsidized by Rural Development (RD), as well as properties with expiring project-based Section 8 contracts, or contract terminations or non-renewals initiated by owner action.[3] In addition to covering these HUD and RD properties, other states and cities also cover properties with expiring rent restrictions under the federally funded but state-administered Low-Income Housing Tax Credit (LIHTC) program.[4] Of these, California, Illinois, and New York City have reached still further to cover certain state and locally supported affordable housing, with California and New York City providing the most extensive coverage—reaching those with expiring or terminating restrictions under many other state or local affordable housing programs that have income eligibility and rent restrictions.[5]

Note that many of the programs covered by these laws no longer promise the possibility of an ongoing subsidy as part of the transaction, which makes preservation more difficult because more funding usually must be raised to provide equivalent affordability to current and future tenants. Section 8 and other rent subsidy programs are the notable exception.

Many of the programs covered by these laws no longer promise the possibility of an ongoing subsidy as part of the transaction.

The "Triggering Event"

A related issue raised by these laws is what event "triggers" the statutory purchase opportunity. Triggering events are primarily of two types: (1) a planned sale or other disposition of the property, or (2) any action that would affect the current affordability structure, such as expiration or termination of use or affordability restrictions or any subsidies. In some jurisdictions, even though coverage is nominally broad to cover many types of housing or multiple conversion threats, the purchase opportunity is not triggered until the owner decides to sell the property. Maryland's right of first purchase is triggered only by a proposed transfer,[6] although other notice requirements are triggered by other termination actions. The District of Columbia provides a general right of first purchase for tenants, triggered by proposed sale or transfer of interest by the owner, regardless of whether the property is subsidized or not;[7] for proposed sales of federally subsidized properties, the right of first refusal extends to the city.[8] Illinois law, formerly triggered only by intended sale or disposition (thus leaving uncovered conversion where owners retain title), was amended in 2004 to reach all proposed conversions as well.[9] San Francisco uses a proposed sale or transfer as the trigger for purchase rights; a proposed prepayment triggers other procedures and protections, whereas a Section 8 contract expiration or opt-out at its original expiration date triggers no rights.[10] Laws using a sale trigger usually do a poor job of preserving housing, since owners retain the ability to convert the property to market-rate first and escape statutory coverage, either by converting and holding the property or delaying any sale until after conversion.

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[3] *See, e.g.*, Md. Ann. Code, Hous. & Comm. Dev. § 7-102 (West 2006); Me. rev. Stat., Title 30-A, §§ 4972 and 4973 (2006); R.I. Gen. Laws § 34-45-4(5) and 34-45-7 (as amended 2006); D.C. Stat. § 42-2851.03 and 42.2851.02(6) (2006); Denver Mun. Code § 27-46 (2006) (definitions of "federal" and "local" preservation projects); Portland City Code § 30.01.030 (2006) (definitions of "federal" and "local" preservation projects). San Francisco covers properties with Section 8 contracts, but only those where owners are seeking to terminate prior to the full original term. San Francisco Admin. Code § 60.4(a) and (y) (2006).

[4] *See, e.g.*, 310 Ill. Comp. Stat. § 60/4 (2006) (as amended by SB 2329, enacted July 2004); Cal. Govt. Code § 65863.11(a) (incorporating definition of "assisted housing development" in § 65863.10(a)(3) (as amended by SB 1328 (2004), effective July 1, 2005)) (2006); NYC Admin. Code § 26-801 (2006). *Compare* Tex. Govt. Code Ann. §§ 2306.185(f) & 2306.853 (2006) (notice requirements for prepayments and opt-outs, but not LIHTC properties with expiring use restrictions); Tex. Govt. Code Ann. §§ 2306.6702(a)(5) & 2306.803 (2006) (developments with expiring LIHTC restrictions considered "at risk" for purposes of allocating future credits and other resources).

[5] *Compare* Cal. Govt. Code § 65863.11(a)(1) (incorporating definition of "assisted housing development" in § 65863.10(a)(3)(F) through (M) (2006) and NYC Admin. Code § 26-801(c)(1) (2006), *with* 20 Ill. Comp. Stat. § 3805/8.1 (2001) (only covering prepayment of certain state-financed loans).

[6] Md. Ann. Code, Hous. & Comm. Dev. § 7-102(a)(4) and (b) (2006) (statute apparently covers only "protected actions" and any sale, conveyance or transfer that is part of a protected action, or follows within one year).

[7] D.C. Stat. §§ 42-3404.02 and 3404.08 (2006).

[8] *Id*. § 42-2851.04.

[9] *Compare* current 310 Ill. Comp. Stat. § 60/4 (2006) (as amended by SB 2329, enacted July 2004) with former 310 Ill. Comp. Stat. § 60/4 (2002).

[10] San Francisco Admin. Code § 60.9 (2006).

California has taken another approach. In addition to using conversions as the trigger, California's law was amended in 2004 to extend its "right to make a purchase offer" provisions 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 the project's eligibility for prepayment or termination.[11]

To maximize preservation of affordable housing and subsidies, the trigger for the purchase opportunity should be broadly defined to include any conversion event (*e.g.*, termination of federal assistance or restrictions), not merely sale or transfer. This is the approach taken by Maine, California, Illinois, New York City and Rhode Island.[12] In Maine, for example, the triggering event is the sale, transfer or *other action that would result in termination of the financial assistance*;[13] in California, the statutory rights are triggered by the owner's decision to take any action that would terminate the federal assistance or by the lapse of federal, state or local restrictions, as well as by any proposed sale or transfer within five years prior to termination of assistance or termination or lapse of restrictions.[14] Illinois, New York City, and Rhode Island all cover situations where owners seek to terminate assistance or restrictions;[15] like California, Illinois also clearly covers those situations where the restrictions are expiring without owner action.[16] In Maryland, while notice rights and other procedural protections are broadly triggered by either a proposed transfer or threatened prepayment or termination,[17] the right of first purchase is triggered only by a proposed transfer.[18] Texas has a similarly broad trigger for its requirements, but creates no direct purchase right.[19] Denver and Portland's notice and city purchase offer requirements are both triggered by an owner's decision to opt-out of a project-based Section 8 contract, as well as owner actions to terminate other state and local affordability arrangements.[20]

Nature of the Rights Created

The kind of purchase opportunity created by state or local preservation law directly determines the community's ability to affect the future use of the property. These rights vary substantially, and jurisdictions use different terminology in granting them to tenants, nonprofits, municipalities, or others. The purchase opportunity created by current state or local laws typically takes one of several different forms:

- a "right of first refusal," permitting a designated purchaser to acquire title by matching another existing offer,
- a "right to make an offer," with no obligation on the owner's part to sell, and
- a "right to purchase," requiring the owner to sell to a designated preservation purchaser at market value in lieu of converting the property to market-rate.

Common among older laws is the classic right of first refusal, requiring owners to provide a bona fide offer of sale to specified preservation purchasers that have a first right to purchase, whenever the existing owner proposes a sale to another party. Maryland law provides a "right of first purchase," but only upon a sale or conveyance that is a "protected action," permitting eligible entities the right to buy the property and match any subsequent offers.[21] Upon a proposed sale in conjunction with a proposed intended prepayment or any contract termination, San Francisco law creates a similar purchase right for specified entities.[22] Other laws may use "right of first refusal" labels, but in fact establish a purchase right because they are triggered by proposed conversions, not just sales.[23]

Some jurisdictions go beyond providing a right of first refusal to match another purchase offer to also require any owners seeking to convert to provide notice and make certain project information available to enable prospective preservation purchasers to make an offer to purchase. For example, California requires any owner proposing to convert a covered property to market rate (as well as those

[11]Cal. Govt. Code § 65863.11(c) (2006).
[12]Me. Rev. Stat. Ann., Title 30-A, § 4973 (1999); Cal. Govt. Code § 65863.11(b) (2006); 310 Ill. Comp. Stat. § 60/4 (2006); NYC Admin. Code § 26-802 (impending conversion) and 26-803 (proposed sale) (2006); R.I. Gen. Laws § 34-45-7 (as amended 2006).
[13]Me. Rev. Stat. Ann., Title 30-A, § 4973(1) (2006).
[14]Cal. Govt. Code § 65863.11(b) and (c) (2006).
[15]310 Ill. Comp. Stat. § 60/4 (2006); NYC Admin. Code §§ 26-801(f) (definition of conversion), 26-802 (impending conversion) and 26-803 (proposed sale) (2006); R.I. Gen. Laws § 34-45-7 (as amended 2006).
[16]310 Ill. Comp. Stat. §§ 60/3(i) and 60/4 (2006).
[17]Md. Ann. Code, Hous. & Comm. Dev. §§ 7-201 and 7-202 (2006).
[18]Md. Ann. Code, Hous. & Comm. Dev. § 7-203(b) (2006).
[19]Tex. Govt. Code Ann. §§ 2306.185(f), 2306.852, 2306.853 (2006).
[20]Denver Mun. Code §§ 27-47 (federal properties), 27-49 (state and locally supported properties) (2006); Portland City Code §§ 30.01.050 (federal properties), 30.01.080 (state and locally supported properties) (2006).
[21]Md. Ann. Code, Hous. & Comm. Dev. §§ 7-102, 7-203 (b) and 7-204 (2006) (this includes those sales or conveyances that are made in conjunction with a protected action (prepayment or contract termination), or within one year thereafter).
[22]San Francisco Admin. Code § 60.8 (2006) (all full-term contract expirations are covered by the reference to § 60.9).
[23]For example, although nominally providing eligible entities with a "right of first refusal" to buy the property or match third-party offers, Rhode Island's recently amended provision effectively establishes a purchase right because it is triggered not just by a proposed sale or other disposition, but also by an owner's intended federal mortgage prepayment or Section 8 contract termination. R.I. Gen. Laws § 34-45-8 (2006). Although prepayments that would terminate affordability restrictions were covered by the prior law, and owners were required to offer to sell at that time, the 2006 amendments added contract terminations and established the appraised market value price in new subsections (b) and (c).

selling within five years of expiration or eligibility for termination) to notify specified entities of an opportunity to submit an offer to purchase; for those filing a conversion notice, during the following 180 days, the owner may not accept an offer to purchase from any other entity.[24] Where a qualified purchaser makes an unaccepted offer during this 180-day period, the owner must provide the qualified entity with a right of first refusal to match the terms of any other sale offer accepted during a second 180-day period.[25] However, California's right for specified prospective purchasers to submit a non-binding purchase offer imposes no general duty on an owner to sell.[26]

Other laws seek to prescribe lesser involvement where sales are not proposed. Texas law simply gives the state time to "attempt to locate a buyer who will conform to the development restrictions" provided by the law.[27] Denver and Portland just prevent owners from taking any action during the required notice period that would "preclude the city or its designee from succeeding to the contract or negotiating with the owner for purchase,"[28] explicitly referencing the city's eminent domain power.

The most effective means of controlling the future use of the property is through establishment of true purchase rights for any threatened conversions, which exist only in Maine, Illinois, New York City and Rhode Island.[29] Maine's broad "other action" trigger granting the State Housing Authority a "right of first refusal" to purchase the property at its current appraised value[30] effectively operates as a preemptive option, not a right of first refusal. Illinois' 2004 statutory amendments create purchase rights for tenants and their chosen partners when an owner proposes to sell or terminate the existing federal subsidy programs or restrictions.[31] New York City requires owners to notify tenants of any proposed action that would result in conversion of the assisted rental housing, which must advise tenants of their purchase rights, as established by other sections of the law.[32] Owners must also notify tenants of any proposed purchase offers to which the owner intends to respond, so that tenants can exercise their rights of first refusal to purchase.[33] Recent amendments to the Rhode Island law similarly establish purchase rights for tenants and other specified entities when an owner seeks to convert the development by prepaying the mortgage or terminating the Section 8 contract, as well as for a proposed sale that would terminate the subsidies or restrictions.[34]

Who Has the Opportunity to Purchase?

State or local laws provide purchase opportunity rights to tenant organizations, nonprofits and public agencies, or other prospective purchasers (including for-profit entities) that commit to specified preservation terms. Illinois law, for example, provides the right to purchase to tenants associations or their designees,[35] presumably recognizing that any tenants association may lack the capacity to execute a purchase or raise the necessary funds, or may lack either the will or the capacity to operate the property as owner. Thus, many laws grant the purchase opportunity rights to a broader variety of preservation entities. California offers its "right to make a purchase offer" to many different prospective purchasers, including the resident tenants association, local nonprofits and public agencies, regional or national nonprofits and public agencies, and profit-motivated purchasers, so long as the entity is capable and committed to maintaining the low-income use for at least thirty years, including renewal of available rent subsidies.[36] Maryland provides its "right of first purchase" to the local housing authority, the local jurisdiction, and to any state-registered group representing the tenants, any registered nonprofit low-income developer, or other registered persons with low-income housing experience that are unrelated to the owner,[37] so long as they commit to specified extended use terms equal to the original use restrictions, but no less than twenty years.[38] Maine provides its purchase right only to a public agency, the Maine State Housing Authority.[39] Rhode Island provides the purchase right to the tenants association, the

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[24]Cal. Govt. Code § 65863.11 (c), (g)(1) and (i) (2006).
[25]Cal. Govt. Code § 65863.11(*l*) (2006).
[26]The California statute does create limited exceptions to the owner's ability to reject offers in two circumstances where the right to make an offer is triggered by another sale offer: (1) upon a proposed sale within five years prior to eligibility for termination or expiration of restrictions, or (2) upon a proposed sale taking place within the second six-month period after proposed conversion notice was given, when the owner rejected an offer from a qualified entity within the first six months. Cal. Govt. Code § 65863.11(c) and (*l*) (2006). At least in the latter case, under the express language of subsection (*l*), the right to make an offer effectively becomes a right of first refusal to purchase that the owner must accept. In the former case, it remains unclear whether the owner's duty can be satisfied simply by permitting qualified entities to make an offer (presumably an offer matching the terms of the proposed sale), or whether the owner must accept one if made.
[27]Tex. Govt. Code Ann. § 2306.185(f) (2006).
[28]*E.g.*, Denver Mun. Code § 27-47(e) (federal properties) (2006); Portland City Code § 30.01.050(E) (2000).
[29]Aside from these state and local laws, for developments subsidized by the Rural Development agency of the United States Department of Agriculture under the Section 515 Rural Rental Housing program, federal law requires that owners who decline incentives and seek RD approval of a proposed prepayment must, if prepayment cannot be approved because of certain adverse impacts specified by federal law, first offer to sell the property at market value to a preservation purchaser. 42 U.S.C. § 1472(c). If no offer is forthcoming within 180 days, the owner may prepay and convert.
[30]Me. Rev. Stat. Ann., Title 30-A, § 4973(2) (2006).
[31]310 Ill. Comp. Stat. § 60/5 (2006) (as amended by SB 2329, enacted July 2004).
[32]NYC Admin. Code §§ 26-802 (2006) (notice of impending conversion, which must recite rights under § 26-806 (right of first opportunity to purchase) and 26-805 (right of first refusal)).
[33]NYC Admin. Code § 26-803 (2006) (notice of bona fide offer).
[34]R.I. Gen. Laws §§ 34-45-7 and 34-45-8 (2006).
[35]310 Ill. Comp. Stat. § 60/5 (as amended by SB 2329, July 2004).
[36]Cal. Govt. Code § 65863.11 (d) and (e) (2006).
[37]Md. Ann. Code, Hous. & Comm. Dev., § 7-204(a) (2006).
[38]*Id*. § 7-208.
[39]Me. Rev. Stat. Ann., tit. 30-A, § 4973(2) (2006).

state housing agency, the local housing authority, and the local municipality, in that order of priority.[40] The District of Columbia provides its right of first refusal to both the city and the tenants upon a proposed sale of federally subsidized property.[41] New York City grants the rights of first purchase and first refusal to tenants associations, and other "qualified entities" experienced in the management of affordable housing if designated by at least 60% of the residents.[42]

Procedural Protections

Purchase opportunities for housing threatened by sale or conversion are advanced by specific procedural requirements and enforcement mechanisms for prospective purchasers. Due to fluctuating requirements or other deficiencies in federal notice laws, many state and local laws require the owner to give the tenants and others ample notice of the potential loss of assistance or restrictions, as well as additional information about the impact of the proposed conversion and available rights. In particular, purchase opportunity laws also often require owners to provide additional information useful for exercising specified rights, such as information about the development and the tenants, together with prescribed remedies for violations.

Notice

Additional notice provisions are a staple of purchase opportunity legislation. Typically, state and local laws supplement the notice requirements of federal law, providing significant variations on issues such as length, recipients, and content. As explained *infra*, many of the states and localities creating purchase opportunities also require separate notices or other documents detailing the terms of any sale offer or purchase right for designated parties, rather than combining these requirements with the threatened conversion notice.[43]

Rhode Island requires two years' notice of any intent to sell, lease, otherwise dispose of, or prepay the mortgage on any subsidized property, to each tenant, the tenants association, the state housing agency, the local housing authority, and the city; the notice must also be filed in the local land records.[44] A similar two-year notice is required for terminations of Section 8 assistance, but the owner must provide it only to the state agency, which must then promptly post it in the development and provide it to the tenants association.[45] The offer of sale with detailed terms must be provided at least one year before termination of the Section 8 contract.[46] San Francisco requires eighteen months' notice of prepayments or mid-term Section 8 opt-outs, and twelve months' notice of Section 8 contract expirations.[47]

Purchase opportunities for housing threatened by sale or conversion are advanced by specific procedural requirements and enforcement mechanisms for prospective purchasers.

California requires two notices—a one-year notice with specific content to tenants, the state housing department, the public housing authority (PHA) and local government of any proposed termination of subsidies or restrictions, and another notice of at least six months, to both tenants and public entities, that includes proposed new rents and other important information about the threatened conversion.[48] The owner must also provide a separate notice of the right to make a purchase offer to qualified entities that have directly contacted the owner or are on a list maintained by the state.[49]

Texas also requires a one-year notice to the state housing department prior to sale or threatened conversion.[50] Illinois also requires owners to provide at least twelve months' notice to the tenants, local government, PHA and the state housing agency, prior to any sale or other proposed conversion of the property's affordable use,[51] and New York City imposes a similar requirement, which also serves to provide some of the information needed for a prospective purchaser to commence due diligence.[52]

Although requiring owners to provide a one-year notice of pending Section 8 contract expirations to the

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[40]R.I. Gen. Laws §§ 34-45-7(3) and 34-45-8(e) (as amended, 2006).
[41]D.C. Stat. §§ 42-3404.02 and 3404.08 (2006) (tenants), 42-2851.04 (city).
[42]NYC Admin. Code §§ 26-801(n) and 26-809 (2006).
[43]*Compare, e.g.*, the statutes for California, Rhode Island, Maryland, and Illinois, which create separate requirements, *with* NYC Admin. Code § 26-802 (2006) (generally one notice concerning impending conversion providing specific information about the development, unless owner receives a bona fide offer to purchase, which triggers a separate notice). Note that in many jurisdictions, administrative regulations may augment the required content of these notices.
[44]R.I. Gen. Laws § 34-45-6 (2006) (apparently the drafters inadvertently omitted an "or" in the statute with respect to prepayments).
[45]*Id.*, § 34-45-5 (2006).
[46]*Id.*, § 34-45-8(b) (2006). The offer must be provided at an unspecified time prior to a prepayment or sale. *Id.*, § 34-45-8(a) (2006). The detailed terms are specified in § 34-45-8(c).
[47]San Francisco Admin. Code § 60.5 (prepayments), § 60.9 (expirations) (2006).
[48]Cal. Govt. Code §§ 65863.10 (b), (c), and (d) (2006). The law requires more specific content for the second notice required for public entities, and additional notice of subsequent significant changes in the information.
[49]Cal. Govt. Code §§ 65863.11(g) and (h) (2006).
[50]Tex. Govt. Code Ann. § 2306.185(f) (2006).
[51]310 Ill. Comp. Stat. § 60/4(a) (2006, as amended by SB 2329, July 2004). Illinois law also requires owners of certain state-financed properties to provide nine months' notice of intended prepayments, and to offer such properties for sale to the tenants or their designee. 20 Ill. Comp. Stat. § 3805/8.1 (2006).
[52]NYC Admin. Code § 26-802 (2006).

city and the tenants,[53] both Portland and Denver require owners intending to opt-out of long-term contracts to give 210 days' notice, and 150 days for opting out of one-year contract extensions.[54] Maine requires the shortest notice—owners must provide ninety days' notice to the tenants, the State Housing Authority and the local PHA, prior to any contract of sale, transfer or other termination action.[55] More time obviously provides potential purchasers a greater chance to develop a viable preservation purchase offer for the property, since it takes substantial time to perform necessary due diligence and secure funding for a purchase.

Although creating no specific purchase opportunity, many states and localities require notice to tenants and state and local government prior to conversion (and sometimes prior to sales).

Although creating no specific purchase opportunity, many states and localities require notice to tenants and state and local government prior to conversion (and sometimes prior to sales). In 2006, Connecticut adopted a one-year notice requirement for tenants, the state and the local government prior to the expiration or termination of any rental subsidy, mortgage prepayment, or sale, transfer or lease of the property; the state agency must post the notice on its website within ten days.[56] The state of Washington requires owners to serve a written notice to each household, local government, PHA, and the state, at least twelve months prior to any anticipated expiration of rental assistance or prepayment.[57] Colorado has taken the most deferential approach—only directing the state to "encourage" owners to submit a notice to the state 120 days before converting, and requiring the state to maintain a database of properties filing notice and authorizing it to coordinate preservation purchases.[58]

Access to Information

Many of these laws also require owners to provide tenants and others with information needed for evaluation of the possible purchase. Illinois[59] and California[60] require that the owner provide access upon request to the rent rolls, vacancy rates, operating expenses, capital improvements, project reserves and financial and physical inspection reports. California requires the owner's initial notice of purchase opportunity to state that such information is available. Illinois requires owners to comply with tenants association requests for such information after receiving the tenants' notice of intent to purchase. New York City requires much of the same information to be included in the original notice of the proposed conversion.[61] Rhode Island requires that the owner's offer of sale inform recipients that similar information is available.[62] The District of Columbia requires each offer of sale to state that the owner will promptly provide such information to the tenant, while also including a summary of the tenants' rights and sources of technical assistance, as published by the city.[63] San Francisco requires that such information be made available to any interested parties at least fourteen days prior to the required public hearing, which is no later than forty-five days after the owner gives notice of his intent to prepay or terminate prematurely.[64] Providing as much information as possible to potential preservation purchasers as early in the process as possible fosters quicker and better planning for purchase and financing.

Purchase Price

Once some form of purchase opportunity is triggered, the law may specify a method for determining the purchase price. For rights of first refusal or rights to make an offer, no price need be specified, since a right of first refusal by definition matches another existing bona fide offer, and a right of offer is just that—requiring no set price other than what the buyer can pay and believes the owner might accept. For example, in California, the right to make an offer sets no limit on the owner's asking price, as the owner is not obligated to accept any offer submitted unless it matches one already accepted from a nonqualified purchaser.[65] However, in jurisdictions establishing a purchase right, the issue of establishing price takes center stage.

Under the newly revised Rhode Island law, the price in the offer of sale can be no higher than the fair market value, as determined by the average of two independent qualified appraisals, with one appraiser drawn from the state agency's list.[66] In Illinois, after the tenants association makes known its intent to purchase, if the parties cannot agree on a price within sixty days of the notice of

[53]Denver Mun. Code § 27-47 (2006); Portland City Code § 30.01.050 (2006).
[54]Denver Mun. Code § 27-47 (2006); Portland City Code § 30.01.050(B) (2006).
[55]Me. Rev. Stat. Ann., Title 30-A, § 4973(1) (2006).
[56]Conn. Gen. Stat. § 8-68c (b) (2006).
[57]Wash. Rev. Code § 59.28.040 (2006).
[58]Colo. Rev. Stat. § 24-32-718 (2006).
[59]310 Ill. Comp. Stat. § 60/6(b) (2006).
[60]Cal. Govt. Code § 65863.11(h) (2006).
[61]NYC Admin. Code § 26-802 (2006).
[62]R.I. Gen. Laws § 34-45-8(c) (2006).
[63]D.C. Stat. § 42-3404.03 (2006).
[64]San Francisco Admin. Code §§ 60.6 (prepayments or premature terminations) and 60.9 (Section 8 contract expirations) (2006).
[65]The statute permits, but does not require, either the owner or the qualified offeror to request that the fair market value of the property be determined by an independent appraiser, but the appraisal is nonbinding on both parties. Cal. Govt. Code § 65863.11(k) (2006).
[66]R.I. Gen. Laws § 34-45-8(c)(1) (2006).

intent to purchase, the market valuation is determined by two independent appraisers, one paid by the owner, the other paid by the tenants association.[67] If the appraisers do not agree, the parties can take the average or jointly hire a third, binding appraisal.[68] San Francisco provides a complex formula to reach a "fair return price" that may not exceed the appraised value based on highest and best use.[69] In New York City, after the tenants or their designee have given notice of their intent to purchase, the city will convene a panel consisting of an appraiser selected by the owner, another by the tenants, and a third by mutual agreement, or by the city if there is no mutual agreement, which then determines the property's appraised value.[70] Maryland's "right of first purchase" statute requires the property to be offered at appraised fair market value—with dispute resolution steps similar to Illinois—unless someone else has made a higher bona fide offer, which the qualified entity can match.[71]

Other Issues

Other important provisions in state and local purchase opportunity laws include public hearings on the proposed conversion,[72] remedies for owner violations,[73] exceptions from coverage (for other preservation transactions),[74] definition of what constitutes a "transfer or sale," time periods in which to make offers, the assignability of rights, any relationship to the eminent domain power, preemption of federal law, and the waivability of rights conferred. Jurisdictions have addressed these issues in many different ways, each having a slightly different impact on the legislation's goals.

Legal Issues Raised by State and Local Purchase Opportunity Laws

State and local purchase opportunity laws raise several possible legal issues, including primarily federal and state preemption, and regulatory takings. Although issues of state preemption center upon the distribution of legislative power between state and local governments that lie beyond our scope, a few courts have addressed the related issue of whether state and local governments have authority to legislate in this area under the federal Supremacy Clause by enacting either a notice or purchase opportunity laws. Several have found that state and local legislation in this area is neither expressly or impliedly preempted.[75] Only one court has found to the contrary.[76]

Although purchase opportunity laws creating either a right of first refusal or a right of first purchase potentially raise issues of regulatory takings under the United States Constitution's takings clause, they should pass constitutional standards because they assure just compensation to owners in the form of matching another sales price or providing appraised fair market value.[77] Additionally, the "public use" requirement for takings appears satisfied.[78]

Because of the stakes, there is little doubt that these legal issues will continue to be litigated as tenants seek to enforce any rights that have been created to preserve their homes.[79] ■

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[67]310 Ill. Comp. Stat. § 60/7(b) (2006).

[68]*Id*.

[69]San Francisco Admin. Code § 60.8(h) and (i) (2006).

[70]NYC Admin. Code § 26-804 (2006).

[71]Md. Ann. Code, Hous. & Comm. Dev. § 7-205 (2006).

[72]San Francisco Admin. Code §§ 60.6 (prepayments or premature terminations) and 60.9 (Section 8 contract expirations) (2006).

[73]California law permits injunctive relief. Cal Govt. Code §§ 65863.10(j) and 65863.11(p) (2006). San Francisco prescribes detailed civil remedies for noncompliance, including treble damages, attorney's fees for a civil suit, and $5000 civil penalties. San Francisco Admin. Code §§ 60.11 and 60.125(b) (2006).

[74]*See, e.g.*, Cal Govt. Code § 65863.13 (2006); Md. Ann. Code, Hous. & Comm. Dev. § 7-102(d) (2006); R.I. Gen. Laws § 34-45-9(b) (2006); NYC Admin. Code § 26-812 (2006); 310 Ill. Comp. Stat. § 60/8 (2006).

[75]Kenneth Arms Tenant Assoc. v. Martinez, 2001 U.S. Dist. LEXIS 11470, No. Civ. S-01-832 LKK/JFM (E.D. Cal. Order July 3, 2001) (citing HUD legal opinion in rejecting preemption challenge to California notice law as applied to non-LIHPRHA prepayments); College Gardens Preservation Comm. v. Eugene Burger Mgmt. Corp., No. 03 AS02608 (Cal. Super. Ct., motion to dissolve injunction denied Nov. 19, 2003) (rejecting preemption challenge to California notice law, even after *Forest Park*). *See also* Topa Equities Ltd. v. City of Los Angeles, 342 F.3d 1065 (9th Cir. 2003) (local rent control law neither expressly or impliedly preempted by federal law, as applied to properties where owner prepaid HUD-subsidized mortgage in 1998); Parkridge Investors Ltd. Partnership v. Farmers Home Admin., 13 F.3d 1192, 1199 (8th Cir. 1994) (federal rural housing preservation statute requiring owners to first offer to sell property at market value to preservation purchaser not a taking); Greenfield Country Estates Tenants' Ass'n v. Deep, 666 N.E.2d 988 (Mass. 1996) (statutory right of first refusal for manufactured housing tenants not a regulatory taking).

[76]Forest Park II v. Hadley, 336 F.3d 724 (8th Cir. 2003) (finding Minnesota notice law expressly and impliedly preempted by federal law).

[77]Because the Supreme Court has made clear that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 105 S. Ct. 3108, 3120 (1985), if just compensation is provided, no unconstitutional taking occurs. Even in an inverse condemnation proceeding where a regulatory taking is found, the remedy is providing just compensation. Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2461-62 (2001).

[78]Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2329-31 (1984) (reviewing large-scale state condemnation of fee interests underlying leaseholds for resale by state to lessees); Kelo v. City of New London, 125 S.Ct. 2655 (2005) (upholding redevelopment project as valid "public use").

[79]*E.g.*, Mother Zion Tenant Ass'n v. Donovan, No. 402239/06 (N.Y. Supreme Court, pending Nov. 2006) (seeking enforcement of NYC Tenant Empowerment Act, Local Law 79, in face of city and owner claims of federal and state preemption and unconstitutionality).

Rights of First Refusal, to Make Offer, or to Purchase Preservation Properties — State and Local Laws

National Housing Law Project (rev. November 2006)

STATE OR CITY	TYPES OF HOUSING COVERED	TRIGGERING EVENT FOR EXERCISING RIGHT	NATURE OF RIGHTS TRIGGERED	WHOSE RIGHT	PROCEDURAL PROTECTIONS
ILLINOIS: 20 Ill. Comp. Stat. § 60/3 (as amended 2004)	all HUD-subsidized housing, RD § 515 & 514, LIHTC, certain state subsidized	prepayment or termination of subsidy or restriction	right to purchase	tenant association & partners	• 12-month notice to tenants & public agencies • tenant access to info • price appraisal mechanism
MARYLAND: Md. Ann. Code, Hous. & CD §§ 7-101 *et seq.*	all HUD-subsidized housing, RD § 515, § 514, § 8 expiring contracts	intended sale or disposition of property (any action that may terminate subsidy also triggers notice)	right of first refusal	local housing authority, group representing tenants, nonprofits	• not less than 1-year or more than 2-year notice to locality, tenant association, state • notice is triggered by any action that may terminate subsidy • price appraisal mechanism
CALIFORNIA: Cal. Govt. Code § 65863.10, § 65863.11, § 65863.13 (as amended in 2004 and 2005)	all HUD-subsidized housing, RD § 515, § 514, § 8 expiring contracts, LIHTC, other state and local subsidized	any action that would terminate subsidy	offer to purchase (right of first refusal if sale within 5 years prior to subsidy expiration or eligibility for conversion or if offer made and another accepted)	tenant association, nonprofit, some for-profits, public agencies	• 1-year notice to tenants, state, local housing authority, local government prior to termination or prepayment • 6-month notice to tenants, public entities with new rents, etc. • tenant and prospective purchaser get access to information • civil injunction remedy for violation
MAINE: Maine Rev. Stats. Ann. Title 30-A, § 4972 and § 4973	all HUD-subsidized housing, RD § 515, § 514, § 8 expiring contracts	sale or any action that would terminate subsidy	apparent purchase right by state HA ("right of first refusal to purchase")	state housing authority	• 90-day prior notice to tenants & state and local housing authorities; state HA written response creates additional 90 days • civil penalty of up to $2500
TEXAS: Texas Govt. Code Annotated §§ 2306.185(f) *et seq.*, 2306.801 *et seq.*	all HUD-subsidized housing, RD § 515, § 514, § 8 expiring contracts	sale or any action that would terminate subsidy	time for state to locate potential buyer	state housing agency	1-year notice to state, at least 90 days to tenants
RHODE ISLAND: Rhode Island Gen. Laws §§ 34-45-4 *et seq.* (esp. -7 & -8), as amended by ch. 67 (2006)	all HUD-subsidized housing, RD § 514, § 515	sale, disposition, or prepayment that would change assisted use or terminate any restrictions; condo conversion; termination of contract	owner offer of sale, right to purchase	tenant association, state housing agency, local PHA, or city	• 2-year notice prior to sale, disposition, termininationor prepayment to tenants association, state housing agency, local PHA, & city • offer of sale 1-year prior to Sec. 8 contract termination, and at unspecified time prior to prepayment or sale • prospective purchaser access to information in offer of sale and upon request • offer of sale sets price based on 2 appraisals • right of first refusal to match third party offers

STATE OR CITY	TYPES OF HOUSING COVERED	TRIGGERING EVENT FOR EXERCISING RIGHT	NATURE OF RIGHTS TRIGGERED	WHOSE RIGHT	PROCEDURAL PROTECTIONS
DENVER, CO: Denver Mun. Code §§ 27-46 *et seq.*	all HUD-subsidized housing, RD § 515, § 514, § 8 expiring contracts	opt-out or sale	time for city to negotiate for purchase	city	• 1-year notice to city, tenants for § 8 contract expirations • 210 days for long-term contract expirations • 150 days for 1-year extensions
SAN FRANCISCO, CA: San Francisco Admin. Code §§ 60.1 *et seq.*	all HUD-subsidized housing, § 8 contracts, if owner seeks to terminate prior to full term	intended sale or disposition of property	right of first refusal	city, tenants association, nonprofit	• 18-month notice to city and tenants for prepayment or termination • 12-month for § 8 contract expirations • tenant access to info • fair price analysis • public hearings • civil remedies for violations
PORTLAND, OR: Portland City Code §§ 30.01.030 *et seq.*	all HUD-subsidized housing, RD § 515, § 514, § 8 expiring contracts	opt-out or sale	time for city to negotiate for purchase	city	• 1-year notice to city, tenants for § 8 contract expirations • 210 days for long-term contract expirations • 150 days for 1-year extensions
NEW YORK CITY, NY: Local Law 79 (2005), NYC Admin Code §§ 26-801 to 26-810	all HUD-subsidized housing, § 8 expiring contracts, LIHTC, other state and local subsidized, where majority of units have eligibility & rent restrictions	threatened conversion action (prepayment or contract termination), or third-party sale	right to purchase	tenants association representing 60%, assignable to qualified designees	• 1-year prior notice to tenants association or tenants, and to city • prospective purchaser access to information in notice • tenants must give notice of intent to exercise purchase right within 60 days • price based on 3-appraiser panel • then 120 days to submit purchase offer • civil money penalties and attorney fees
DISTRICT OF COLUMBIA: D.C. Stat. §§ 42-2851.01-.05	all HUD-subsidized housing, § 8 expiring contracts	intended sale of assisted property **if** conversion threatened, but not just conversion threat	city right to purchase, assignable	city, via Mayor	• city must give statement of interest within 30 days of owner's notice offering sale • *note: tenants have right of first refusal upon sale or discontinued rental use under DC Stat. § 42-3404*

Notes: (1) *This chart covers only those provisions of state or local laws which create specific rights concerning possible transfers to preserve a property's subsidized status.* Other provisions may create additional procedural protections (such as advance notice) where subsidies or other restrictions are proposed for termination. (2) Statutory provisions may change, ***please check for updates***.

HUD Issues Final Rule for the Demolition or Disposition of Public Housing

The Department of Housing and Urban Development (HUD) has published a final rule governing the demolition or disposition of public housing developments[1] that finally implements changes made to Section 18 of the Housing Act of 1937[2] by the Quality Housing and Work Responsibility Act of 1998 (QHWRA)[3]. The key statutory changes implemented by the new regulation:

- relieve HUD of the obligation to review and approve demolition applications, allowing it, instead, to approve such applications based on "truthful" certifications of relevant factors by public housing agencies (PHAs);
- eliminate the one-for-one replacement requirement for public housing units that are demolished or disposed;
- limit the opportunity of residents to purchase public housing developments slated for demolition;
- establish a *de minimis* exception to the requirement that PHAs secure HUD approval for all demolitions;
- authorize the consolidation of occupancy in buildings in order to improve living conditions; and
- eliminate the applicability of the Uniform Relocation Act (URA) to the demolition and disposition of public housing.[4]

The final rule makes several changes to the demolition and disposition rules as they were first proposed in 2004.[5] Some of those changes were recommended by members of the Housing Justice Network (HJN) when they commented on the proposed regulations.[6] Other HJN recommendations were ignored or rejected.

Applicability of the New Rules

The final regulations limit the applicability of the new rules by exempting certain development types from their coverage. This includes HOPE VI redevelopment proposals, conversions slated for demolition but not disposition, certain proposals for conversion of public housing units to homeownership units, and for dispositions related to mixed-finance developments.[7] The first three of these exemptions are consistent with independent statutory provisions governing HOPE VI developments, conversions, and public housing resident homeownership programs.[8] The exclusion of units slated for homeownership was also brought forward from the previous demolition disposition rules as was the exemption for mixed-finance developments.[9]

Severely Distressed Units

The final rule is also not applicable to demolitions (not dispositions) of severely distressed units carried out in accordance with the mandatory or voluntary conversion program.[10]

Mixed-Finance Developments

Prior to QHWRA, the development of mixed-finance developments was authorized by regulations.[11] At the time, the demolition or disposition regulations exempted mixed-finance developments from the Section 18 disposition requirements when the sale occurred prior to the determination of the actual mixed-project development costs. In addition, Section 18 did not apply to (1) the reversion of a mixed-finance project to a PHA; (2) instances where an owner sought to dispose of mixed-finance public housing units to entities other than PHAs; (3) demolition of mixed-finance units; or (4) instances where owners sought to operate the mixed-finance units in a way that was inconsistent with public housing occupancy requirements after the development costs had been determined.

In QHWRA, Congress included new authorization for mixed-finance developments. It contained no language exempting mixed-finance developments from the requirements of Section 18.[12] Nonetheless, when HUD

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[1]71 Fed. Reg. 62,354 (Oct. 24, 2006) (effective November 24, 2006).
[2]42 U.S.C. § 1437p (West 2003).
[3]Pub. L. 105-276 (Oct. 21, 1998).
[4]*Id*. Another part of Section 18 was removed pursuant to QHWRA. That section prevented a PHA from taking any steps to demolish public housing without HUD approval. Despite the statutory change the language is retained in the regulations, so that HUD may track units for funding purposes. The introductory comments state that no private right of action is established by this language. 71 Fed. Reg. 62,354 (Oct. 24, 2006).
[5]69 Fed. Reg. 75,188 (Dec. 15, 2004).
[6]The Housing Justice Network comments on the Proposed Rule on the Demolition or Disposition of Public Housing Projects, Feb. 14, 2005, are available at http://www.nhlp.org/html/pubhsg/Comments%20to%20FR%204598%20on%20LH.PDF.
[7]71 Fed. Reg. 62,354 (Oct. 24, 2006) (to be codified at 24 C.F.R. § 970.3(b)(11) and (12)). Hereinafter all citations will to the 2007 Code of Federal Regulation cites.
[8]42 U.S.C. § 1437v(g) (West 2003) (HOPE VI demolition pursuant to revitalization is not subject to § 1437p); *Id*. § 1437z—5(h)(2) (Required conversion of distressed public housing is not subject to § 1437p); 24 C.F.R. § 972.230(a)(2006). For the homeownership programs, *see e.g.,* 42 U.S.C. § 1437z—4(l) (West 2003) (resident homeownership program is not subject to §1437p).
[9]50 Fed. Reg. 50,894 (Dec. 13, 1985) *amended* by 60 Fed. Reg. 3,716 (Jan. 18, 1995) and 61 Fed. Reg. 19,719 (May 2, 1996), § 970.2.
[10]*See* 42 U.S.C. §§ 1437v(g) and 1437z—5(h)(2) (West 2003)
[11]24 C.F.R. Part 941, Subpart F (2006).
[12]The statute does permit a PHA to elect to exempt a mixed-finance project from payments in lieu of taxes (PILOT) and the provisions regarding need and cooperation agreements. 42 U.S.C. § 1437z—7(f) (West 2003).

proposed the new demolition disposition regulations, it exempted certain mixed-finance developments from the rules. Some commentators to the proposed rules argued that demolition or disposition related to mixed finance should be expanded. They complained that the process of obtaining approval of a mixed-finance plan was "already heavily regulated and time-consuming."[13] In the final regulations, HUD agreed with those commentators. It stated that "section 18 of the 1937 Act and this regulation do not apply to public housing property to be used for mixed-finance developments."[14] Accordingly, the final regulation makes two separate exceptions for dispositions related to mixed-finance developments.[15]

Unfortunately, the new final rule may also be interpreted as ambiguous with respect to the extent of the mixed-income disposition exemption. The rule states that certain dispositions for mixed finance are exempt, but the introductory language is not very precise. For example, it is not clear whether the rule also exempts in certain situations a demolition pursuant to a mixed-finance proposal. Many mixed-finance developments anticipate demolition and while the new owner might want a clear and developable site, the demolition may be undertaken by the new owner and may occur after the disposition to the new owner. In that case, does the demolition or disposition rule apply? If the disposition for mixed finance reduces the number of public housing units subject to an Annual Contribution Contract (ACC), does Section 18 apply in this context?[16] The answers to these questions are important because they determine whether the resident and public consultation requirements of Section 18 are applicable to the dispositions. It is also important because HUD cannot approve an application for demolition or disposition if it has information and data that is clearly inconsistent with the certification made by the housing agency.[17]

Plans to develop mixed-finance public housing should be part of the PHA Annual Plan process.[18] The plans for these types of developments, as referenced in the PHA Annual Plan, are minimal.[19] To the extent that the mixed-finance development would require the use of capital funds, the information may be hidden in the attachments to the PHA's Annual Plan that address the use of capital funds.[20]

These issues regarding mixed-finance developments are increasingly important now that PHAs are subject to the asset management rules and Congress has chosen not to provide them adequate operating subsidy funding.[21] Due to the funding shortages, it is likely that PHAs will seek to convert developments to mixed-finance projects in order to deal with the funding shortfalls.

De Minimis Demolitions

The new rules also do not apply to *de minimis* demolitions, defined as demolitions carried out over a five-year period of the lesser of five units or 5% of the PHA's stock. To qualify for the *de minimis* exclusion the remaining space must be used for resident needs or be beyond repair.[22]

The Application for Demolition or Disposition

Proposals for the demolition or disposition of public housing must be approved by HUD unless they fall within one of the regulatory exemptions. Developments that are to be demolished must meet the statutory obsolescence criteria and there cannot be a reasonable program or modification that is cost effective that will allow the return of the project to a useful life. When only a portion of a development is to be demolished, the PHA's demolition application must show that the remaining portion of the development can be operated viably.

The indicia for determining obsolescence are set forth in the regulations and are not significantly different from those included in the prior regulations.[23] As for determining whether the development can be brought back to a useful life, the new rule establishes a standard that states that HUD generally will not consider modifications to a development to be cost effective if their cost exceeds 62.5% of total development costs (TDC) for elevator structures or 57.14% of the TDC for other structures.[24] When dispositions are proposed, the PHA must certify that retention of the development is not in the best interest of the residents or the PHA. Examples, which track the former rule, are included in the final rule.[25]

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[13]71 Fed. Reg. 62,354, 62,355 (Oct. 24, 2006).
[14]*Id*.
[15]24 C.F.R. § 970.3(11) and (12) (2007).
[16]The mixed-finance developments that have been approved by HUD require that a PHA must develop at least the same number of public housing units as were approved by HUD as part of the PHA's proposal. The public housing units must be maintained as public housing for at least forty years, which may be extended for another ten years after the period in which the PHA received operating subsidies. 24 C.F.R. § 941.610(a)(8) (2006).
[17]42 U.S.C. § 1437p(b) (West 2003). Section 18 also provides for relocation benefits, but the Uniform Relocation Act (URA) is applicable to mixed-finance developments. 24 C.F.R. §§ 941.207, 941.602 (2006) (the regulation for mixed-finance developments currently provides that displacement should be minimized and URA benefits provided).
[18]HUD Policy Alert, Annual Plan (Jan. 2, 2002) available at http://www.hud.gov/utilities/intercept.cfm?/offices/pih/programs/ph/hope6/mfph/policy_alerts/annual_plan-2002.pdf.
[19]HUD form 50075, PHA Plans PHA Plans (expires 08/31/2009)), Section 7.B., Template available at http://www.hud.gov/offices/pih/pha/templates/.
[20]*Id*. Required Attachments.
[21]*See San Francisco Advocates Respond to Operating Subsidy Crisis*, 36 Hous. L. Bull. 197 (Oct. 2006).
[22]24 C.F.R. § 970.27 (2007). The prior regulations exempted the demolition or disposition of such units from the one-for-one replacement requirement. *See* 24 C.R.F. § 970.11(j) (2005).
[23]24 C.F.R. § 970.15 (2007).
[24]*Id*. § 970.15(b)(10).
[25]*Id*. § 970.17.

The new regulations require PHAs to certify that their demolition or disposition proposal has been described in the PHA annual plan and timetable in accordance with 24 C.F.R. Part 903 and that the Annual Plan description is "identical to the application submitted."[26] Several commentators to the proposed regulations objected to this provision. In the final regulations, HUD responded by citing the purposes of the annual plan,[27] and stating that it did not believe that the process was duplicative or burdensome and noted that "a PHA may amend the [Annual] plan and submit significant changes to HUD."[28]

High performing and small PHAs, which are authorized to submit streamlined Annual Plans, are exempt from making the same certification regarding the identical nature of the Annual Plan and the application for demolition or disposition. The HJN comments objected to this exemption.[29] HUD responded that

> PHAs that are small or high performers are not entirely exempt from certifying their demolition plans. Those PHAs that are eligible to submit a streamlined plan are required to submit a certification listing the policies the PHA has revised since submission of its last Annual Plan, including those involving demolition and disposition. HUD believes that this certification is appropriate for PHAs using the streamlined process.[30]

Thus, with respect to the disposition or demolition plans for small or high performing PHAs, it appears that HUD will rely on the more general certification that accompanies their Annual Plan. Residents, advocates and the public who wish to review the certifications will have to compare the certification submitted with the Annual Plan with the application for demolition or disposition. It is not clear from the regulations whether the certification and the application must be identical.

Interestingly, the new regulations acknowledge that a PHA may seek HUD approval to rescind a demolition or disposition that has received prior approval.[31]

Review and Approval Process

HUD will disapprove any application for demolition or disposition if the application is "clearly inconsistent with" the PHA Plan or any information that HUD has related to the justification for the demolition or disposition.[32] In addition, applications will be denied if they are not developed in consultation with residents, the Resident Advisory Board, or appropriate government officials.[33] PHAs must submit evidence of resident consultation and copies of any written comments with any evaluation that the PHA has made of the comments.[34]

In its comments to the proposed regulations, HJN requested that HUD establish more specific standards for the required resident consultation in order to ensure meaningful and consistent compliance with the relevant provisions of Section 18.[35] HUD did not adopt the HJN suggestion and simply responded that "PHAs should have flexibility in this area."[36]

The demolition or disposition of a public housing development, including *de minimis* demolitions, is subject to HUD environmental regulations. As proposed, "unknown" future reuses would have been exempt from this requirement. HJN urged HUD to provide examples of whether future uses are known or unknown by including the description that was in the introductory comments to the proposed regulations in the final rule. HUD adopted this suggestion.[37]

Relocation of Residents

The URA does not apply to demolition or disposition of public housing, but the statute does provide for certain notices and relocation requirements. The final rule states that, if applicable, residents must be relocated on a non-discriminatory basis in comparable housing in an area that is generally not less desirable.[38] The proposed rule referenced the relocation obligations that applied if CDBG funds were used for demolition or disposition.[39] In its comments, HJN stated that this language was too narrow and urged HUD to expand the reference to include HOME funds and to reference the one-for-one replacement obligation that accompanies the use of these funds. HUD adopted the HJN suggestion in the final rule.[40]

The final rule also provides that the relocation plan must include reasonable accommodations for persons

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[26] *Id*. § 970.7(a)(1).

[27] "The Annual Plan's purpose is to provide a framework for local accountability and an easily identifiable source by which public housing residents, participants, and other members of the public may locate basic PHA policies, rules, and requirements; the PHA's mission for serving the needs of low-income families; and the PHA's goals and objectives to enable the PHA to reach that mission." 71 Fed. Reg. at 62,357 (Oct. 24, 2006).

[28] *Id*.

[29] The HJN comments state that Section 18 of the U.S. Housing Act, 42 U.S.C. § 1437p(a)(3), requires such certifications by PHAs seeking to demolish or dispose of public housing without exception. Section 5A of the U.S. Housing Act, 42 U.S.C. §§ 1437c-1(d)(8) and 1437c-1(i)(2), expressly requires HUD to review descriptions of demolition and disposition activities and timetables in annual plans.

[30] 71 Fed. Reg. 62,354, 62,357 (Oct. 24, 2006).

[31] 24 C.F.R. § 970.7(b) (2007).

[32] *Id*. § 970.29.

[33] *Id*.

[34] *Id*. § 970.9(a).

[35] 42 U.S.C. § 1437p(b)(2)(A) (West 2003).

[36] 71 Fed. Reg. at 62,360.

[37] *Compare* 69 Fed. Reg. 75,188, 75,191 (Dec. 15, 2004) *with* 24 C.F.R. § 970.13(b) (2007).

[38] 24 C.F.R. § 970.21(a)(2007).

[39] 69 Fed. Reg. 75,191 (Dec. 15, 2004) (§ 970.21(c)(2)).

[40] 24 C.F.R. § 970.21(c)(2) (2007).

who need them.[41] The rule defines comparable housing and limits its availability to persons with a disability who are displaced from a unit with accommodations and need similar accommodations in the replacement unit.[42] The language regarding comparable housing may be confusing and misinterpreted as a limitation on reasonable accommodation requests by individuals with disabilities who need special features in their relocation unit but who are not currently living in a unit with such features.

Because the final rule contains ambiguities, it is expected that issues and questions will arise with respect to their implementation.

Replacement Housing

The proposed rule provided that any replacement public housing built on the original site or in the neighborhood must have significantly fewer units than the number that are to be demolished.[43] HJN commented that the proposed rule omitted certain statutory language that gave the impression that replacement units may be built on site only if the number of such units is significantly fewer than the number of demolished units. The HJN comments argued that it would be entirely consistent with the statute for a PHA to rebuild an equal or greater number of units on-site if such development is consistent with applicable law, including site and neighborhood selection criteria.[44] The HJN comments urged that PHAs should have the option to do so. HUD adopted the HJN suggestion. HUD did not, however, explain the change in the regulation other than to admit that the regulation now mirrors the statute.[45]

Reports

The final rules require PHAs to provide HUD with information about completion of demolition contracts, execution of sales or lease contracts, use of proceeds of sales and amounts expended for closing costs. HJN urged an expansion of the reporting requirement to include information about resident relocation outcomes. HUD declined to adopt this suggestion and noted that with respect to relocation the rule appropriately implements the limited relocation provisions of the statute.[46]

Residents' Right to Purchase a Development Slated for Disposition

The final rule also provides that under certain circumstances a PHA seeking to dispose of a development must offer it to an eligible resident organization or nonprofit acting on behalf of the residents. An eligible resident organization is defined by reference to 24 C.F.R. Part 964.[47] By limiting the resident organization definition to existing organizations and ones that meet the requirements of Part 964, which requires the organization to be recognized by a PHA, some resident organizations will be unnecessarily disqualified. Also, because of the extremely short resident response times (thirty days to express an interest and sixty days to submit an offer), it is unlikely that many resident organizations or nonprofits will be able to submit viable offers to take over a development.

Conclusion

QHWRA eliminated substantial resident protections in the public housing demolition and disposition process. The final demolition and disposition rule, while better than the proposed rule, unfortunately implements changes mandated by QHWRA. Because the final rule contains ambiguities, it is expected that issues and questions will arise with respect to their implementation. ■

[41] *Id*. §§ 970.7(a)(6) and 970.21(e)(2).
[42] *Id*. §§ 970.21(a) and (e)(1)(iii).
[43] 69 Fed. Reg. 75,191 (Dec. 15, 2004) (§ 970.31).
[44] The language of the statute, 42 U.S.C. § 1437p(d), created a limited exception to site and neighborhood selection rules for the development of public housing. 24 C.F.R. § 941.202 (2006). The draft version of § 1437p(d) was specifically described as a "Site and Neighborhood Standards Exemption." 144 Cong. Rec. H 5743, H5792 (July 17, 1998) (statement of Rep. Lazio).
[45] 71 Fed. Reg. 62,354, 62,361 (Oct. 24, 2006).
[46] *Id*. at 62,358 (referencing the use of vouchers and a proposal to track families for at least three years). *See also* 42 U.S.C. § 1437p(a)(4)(A)(iii) (West 2003) which references a relocation obligation to offer comparable housing.
[47] 24 C.F.R. § 970.9(c)(2007).

The National Housing Law Project wishes a very happy, healthy, and peaceful New Year to all of the readers of the *Housing Law Bulletin*. May we advance housing justice for all those who we represent and work for.

Courts Reluctant to Enforce Section 3

After several years of judicial inactivity involving Section 3, the fall of 2006 saw two unpublished federal court opinions addressing the issue of whether a Section 3 resident and/or business has a private right of action to seek enforcement of Section 3.[1] Unfortunately, both opinions conclude that there is no such right. In *McQuade*, the court reached its decision with little-to-no discussion of the underlying issues; however, in *Williams*, the court was more revealing.

Background of Section 3 and Private Enforcement

The Department of Housing and Urban Development's (HUD) Section 3 program is intended to provide economic and employment opportunities to low-income individuals.[2] Specifically, Section 3 requires recipients of certain forms of HUD funding to provide job training, employment, and contracting opportunities to very low- and low-income residents and eligible businesses.[3] Unfortunately, Section 3 has generally failed to meet these worthwhile goals, due in large part to a lack of program monitoring and enforcement. And while earlier cases interpreting Section 3 often inferred that the statute provides individuals with a private right of action to seek redress for Section 3 violations;[4] under current Supreme Court precedent, such results have been less forthcoming.[5]

Private Enforcement of Federal Laws: Implied Private Right of Action vs. Section 1983

As an initial matter, while the constitutional considerations associated with an implied private right of action and a Section 1983 claim are often conflated, there are distinct differences between the two. When dealing with an implied private right of action, the burden is on the plaintiff to establish that Congress either expressly or implicitly created a private right of action.[6] In contrast, in a Section 1983 action, the defendant has the burden of establishing that Congress has intended to preclude use of Section 1983.[7] On other aspects of the tests, whether the statute creates enforceable rights for Section 1983 purposes or substantive rights for implied right of action purposes, the considerations are essentially the same. In light of the Supreme Court's current interpretations of an implied private right of action and Section 1983 principles, this article will separately review each of the standards and the applicable case law.

Implied Private Right of Action

When courts are asked to determine whether a particular statute confers a private right of action to an aggrieved individual, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."[8] With regard to Section 3, although Congress may have failed to provide an express private right of action for individuals seeking relief for violations, potential plaintiffs could reasonably argue than an implied private right of action could be inferred using the Court's rationale in *Sandoval*.

In *Sandoval*, the Court was asked to determine whether private individuals may sue to enforce disparate-impact regulations promulgated under Section 602 of Title VI of the Civil Rights Act of 1964. In reaching its conclusion, the Court stated that while it is well settled that private individuals may sue to enforce regulations promulgated under Section 601 of Title VI, private individuals cannot enforce regulations promulgated under Section 602.[9] The relationship between Sections 601 and 602 is fairly straightforward. Section 601 states a basic principle and Section 602 authorizes agencies to develop detailed plans for defining the contours of the principle and ensuring its enforcement. Despite the symbiotic relationship between Sections 601 and 602, the Court reasoned that the dissimilar textual focuses lead to dissimilar enforcement rights. Specifically, the Court stated that, "[s]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons."[10] Therefore, Section 602 does not provide individuals with a private right of action because "[i]t focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating."[11]

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[1] McQuade v. King County Hous. Auth., 2006 WL 3040060 (C.A.9 (Wash) Oct. 25, 2006); Williams v. HUD, 2006 WL 2546536 (E.D.N.Y. Sept. 1, 2006).
[2] 12 U.S.C.A. § 1701u(b) (2006).
[3] *Id*. § 1701u(c)-(d).
[4] *See, e.g.*, Ramirez, Leal & Co. v. City Demonstration Agency, 549 F.2d 97 (9th Cir. 1976); Drake v. Couch, 377 F. Supp. 722 (M.D. Tenn. 1971), *aff'd*, 471 F.2d 653 (6th Cir. 1973); and Milsap v. HUD, 1990 U.S. Dist. LEXIS 13954 (D. Minn. 1990).
[5] *See, e.g.*, Gonzaga University v. Doe, 536 U.S. 273 (2002); and Alexander v. Sandoval, 532 U.S. 275 (2001).
[6] *Gonzaga* at 284-285.
[7] *Id*.
[8] *Sandoval* at 286.
[9] Section 601 states, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2006). In contrast, Section 602 authorizes federal agencies "to effectuate the provisions of [§ 601]…by issuing rules, regulations, or orders of general applicability." *Id*. § 2000d-1.
[10] *Sandoval* at 289.
[11] *Id*.

The *Sandoval* rationale suggests that a prerequisite to establishing an implied right is the determination of whether the underlying statute creates a substantive right in favor of plaintiffs. Substantive rights, as contrasted with statutory goals or administrative obligations, are presumptively enforceable because the creation of the right itself implies that Congress intended it to be enforceable by the holder of the right. In terms of Section 3, aggrieved plaintiffs can point to several clauses that signal Congress's intent to create substantive rights in favor of plaintiffs. For example, the Section 3 statute expressly states that it is the policy of Congress to ensure, to the greatest extent feasible, that low- and very low-income persons are provided with training, employment, and contracting opportunities generated by HUD financial assistance for housing and community development programs.[12] Therefore, even though the statute does not provide plaintiffs with an absolute right to the before-mentioned training, employment, and contracting opportunities, the statute does provide plaintiffs with certain preferential training, employment, and contracting rights.

Unfortunately, even if plaintiffs can successfully demonstrate that the Section 3 statute contains rights-creating language, the plaintiffs must also demonstrate that the statute manifests an intent to create not just a private *right* but also a private *remedy*. "Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."[13] With regard to Section 3, this later requirement will likely be outcome determinative because the statute is silent on the question of a private remedy. Consequently, the plaintiffs' most realistic chance for private enforcement will be through a Section 1983 cause of action.

Section 1983

The Civil Rights Act, 42 U.S.C. § 1983, has long been the primary vehicle for challenging state or local governmental actions that violate federal laws that do not contain an explicit private right of action. However, in the past few years, and especially since *Gonzaga*, the Supreme Court has made it increasingly difficult to sustain Section 1983 claims based on federal statutes and regulations.

Section 1983 provides in relevant part: "Every person who, under color of any statute…subjects, or causes to be subjected, any citizen of the United States…to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…." In *Blessing*, the Court set forth three factors for determining whether a statute creates a federal right.[14] "First, Congress must have intended that the provision in question benefit the plaintiff…Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence… Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms."[15]

The Sandoval *rationale suggests that a prerequisite to establishing an implied right is the determination of whether the underlying statute creates a substantive right in favor of plaintiffs.*

In *Gonzaga*, the Supreme Court addressed the *Blessing* factors as they pertained to a student's ability to sue a private university for damages under the Family Educational Rights and Privacy Act of 1974 pursuant to Section 1983.[16] The *Gonzaga* Court reasoned that *Blessing* had inadvertently led plaintiffs to believe that Section 1983 conferred enforceable rights so long as the plaintiff fell within the general zone of interest that the statute was intended to protect. Consequently, the *Gonzaga* Court concluded, without necessarily overturning *Blessing*, in order for a plaintiff to sustain a Section 1983 action it must be demonstrated that the federal statute unambiguously confers an individually enforceable right on the class of beneficiaries to which the plaintiff belongs.[17] In other words, the statute in question must contain explicit "right- or duty-creating language."[18] This "right- or duty-creating language" analysis is no different from the initial inquiry in an implied right of action case. Therefore, under either scenario, plaintiffs must identify statutory language that explicitly depicts Congress' intent to create substantive rights in favor of plaintiffs; if no such language exists it will be assumed that no such right exists.[19]

Therefore, despite the relatively clear language of Section 1983, many courts in the post-*Gonzaga* era have become

[12]12 U.S.C.A. § 1701u(b) (2006).
[13]*Sandoval* at 286.
[14]Blessing v. Freestone, 520 U.S. 329 (1997).
[15]*Blessing* at 340-341.
[16]The specific Family Educational Rights and Privacy Act provision at issue provides: "No federal funds shall be made available…to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information…) of students without the written consent of their parents to any individual, agency, or organization." Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g(b)(1)(2002).
[17]*Gonzaga* at 283-284.
[18]*Gonzaga* at 284 n.3 (quoting Cannon v. University of Chicago, 441 U.S. 677, 690 n.13 (1979)).
[19]*Gonzaga* at 283-284.

increasingly unreceptive to Section 1983 and other related claims, specifically in terms of their "right-creating language" analysis. Meanwhile, Section 1983 remains one of the few weapons that is still available to advocates who seek to force states to provide federally mandated benefits to our nation's most disadvantaged populations.

The *Williams* Decision

In *Williams*, Plaintiff, Donald Williams, a resident of the Arverne Public Housing Project since August 2001, brought suit against Defendants, the New York City Housing Authority (NYCHA) and Selectric Electric Contracting Co., Inc., an NYCHA contractor performing work in the Edgemere/Arverne Public Housing Project.[20] Mr. Williams applied for a laborer position with Selectric in August, September, and October of 2001; however, Mr. Williams was never hired even though he had preferential Section 3 eligibility and was promised an apprentice position under the Section 3 program. Adding insult to injury, in October 2001, Selectric hired two laborers who were not public housing residents. Shortly thereafter, Mr. Williams filed an administrative complaint against NYCHA, maintaining that Selectric violated the Section 3 program when it denied him employment in favor of non-Section 3 residents. HUD denied the claim, finding that there were no "new" hires after October 2001 when Mr. Williams was eligible for Section 3 certification.[21] After the denial of his administrative complaint, Mr. Williams sought judicial relief alleging that the defendants violated 12 U.S.C. § 1701u (the Section 3 statute), which is enforceable pursuant to 42 U.S.C. § 1983.

In step with the framework noted above, the *Williams* court analyzed whether the Section 3 statute has a clear individual focus that unambiguously confers a privately enforceable right. On the first point, the Court concluded that the statute's detailed, multi-level scheme of preferences suggests an individualized, rather than an aggregate, focus. And unlike other statutes found unenforceable by the Supreme Court, the requirement focuses on individual entitlement, rather than a policy or procedure creating the entitlement. However, on the second point, the court concluded that the statute did not convey an unambiguous right to enforce the hiring preference. Specifically, the court concluded that even though the Section 3 statute evinces more of a congressional intent of enforceability than the statute at issue in *Gonzaga*, the court will not recognize a private right of action because, "Plaintiff has provided this court with no reason to find a putative right to a hiring preference in section 1701u [the Section 3 statute] enforceable." The court's conclusion suggests that even if plaintiffs can establish the existence of an individual substantive right, they must also identify statutory language that allows them to individually enforce that right. This rationale appears to contradict the burden of proof standards set forth in *Gonzaga*.

In *Gonzaga*, the Court stated, "Once plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983."[22] However, in *Williams*, the court interpreted *Gonzaga* to mean that even though Mr. Williams demonstrated that Section 3 conveyed him an individual right to a hiring preference, Mr. Williams, not the defendants, still had to demonstrate that the statute created an individual right to enforce the hiring preference.[23] The court's rationale appears to nullify the presumptive enforceability of Section 1983 and evidences a growing, and arguably unsubstantiated, hostility towards actions premised on Section 1983.

Conclusion

Although the *Williams* decision is disappointing, it may provide advocates with the additional support they need to effectuate legislative reform around this very issue. Earlier this spring, Congresswoman Velázquez introduced legislation that would amend Section 3 to provide for greater monitoring, reporting, and compliance. At the time it was argued that there was no need to include rights-creating language in the proposed legislative amendment because such rights were already provided for under Section 1983. Given the result in *Williams*, this proposition is clearly flawed. ■

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[20]HUD was also a party to the suit but, by stipulation, HUD was dismissed as a defendant. Accordingly, the action proceeded with NYCHA and Selectric as defendants.

[21]In this regard it is unclear why Mr. Williams did not bring an Administrative Procedure Act claim against HUD. The court noted that, "HUD's administrative denial of Plaintiff's complaint is undoubtedly subject to judicial review under the Administrative Procedure Act (APA)…HUD is required to ensure that housing authorities and contractors make 'best efforts' to give employment opportunities to public housing residents like Plaintiff. While HUD is not a current party to this case, Plaintiff's allegation that HUD denied his administrative complaint is certainly subject to review, on the grounds of arbitrariness and capriciousness, regarding its finding of the date he became a public housing resident." *Williams* at *8.

[22]*Gonzaga* at 285.

[23]It appears that a plaintiff seeking to assert a claim under Section 1983 must point to language such as, "Any person adversely affected by any final action or failure to act by State or local government or any instrumentality thereof that is inconsistent with this subparagraph may…commence an action in any court of competent jurisdiction." City of Rancho Palos Verdes, Cal. v. Abrams, 544 U.S. 113,117 (2005).

2006 Housing Justice Meeting

Bryson Award and Housing Justice Award Recipients

The Housing Justice Network (HJN) had its twenty-first meeting in Washington D.C. on October 23 and 24. The gathering drew over 200 participants from all over the country.

The day before the meeting, NHLP conducted a one-day basic federal housing training, geared primarily to new housing attorneys. The eight-hour training featured NHLP staff attorneys as well as two guest trainers: **Fred Fuchs** of RioGrande Legal Services and **Mac McCreight**, of Greater Boston Legal Services. More than seventy people were in attendance for the training and over half stayed for the two-day HJN Meeting.

As in 2004, the meeting featured two plenary sessions and a reception. This year's meeting packed thirty-seven informational workshops into the two-day schedule, forcing participants to make hard choices. Workshop topics covered a broad spectrum of low-income housing issues. These included sessions on more common topics and issues such as the Public Housing and Voucher programs, the Low-Income Housing Tax Credit program, the preservation programs of the Department of Housing and Urban Development and the United States Department of Agriculture, and fair housing. The added number of workshops allowed HJN participants to be exposed to new topics and issues, such as Linking Eviction Defense to Education Rights, Saving Manufactured Home Parks, and the Section 3 Employment Program.

The meeting provided an opportunity to recognize excellence in the field, and to present exceptional advocates to an audience of peers and colleagues who have benefited from their work.

NHLP gave out four awards at the October meeting: the David B. Bryson Memorial Award, two Housing Justice Network awards, and a special award to legal services advocates of the Gulf region for their efforts on behalf of those affected by the Katrina and Rita disasters.

Advocates at the HJN National Meeting roundly applauded **Fred Fuchs of Texas RioGrande Legal Services** as Anita Bryson and Jim Grow of NHLP presented him with the **2006 David B. Bryson Memorial Award**. The award was established in memory of NHLP staff member David Bryson whose dedicated efforts to advance the housing rights of low-income people and many accomplishments in housing law are legendary. In granting to him the David Bryson award, Fred's colleagues saluted his many years of successful advocacy as an attorney for the Legal Aid Society of Central Texas, now Texas RioGrande Legal Aid. His work has earned him an esteemed reputation among Texas advocates and colleagues throughout the larger world of legal services and among adversaries and judges as well. His peers have benefited from his contributions to HJN, which have included extensive articles, experienced advice to members of the network list serves, and training for advocates in Texas and nationwide. He has made invaluable contributions to NHLP's Tenants' Rights Manual, revising sections on evictions and subsidy terminations.

Kate Walz of the Sargent Shriver Poverty Law Center and **Julie Becker** of Legal Aid Society of the District of Columbia were each honored with the **Housing Justice Award**. This award, created in 2004, was established to recognize new and impressive talent in the field of affordable housing and low-income housing rights. It is also meant to underscore the importance of uniting direct service work with local, state, or federal policy advocacy.

Kate has worked with the Shriver Center since 1991 and engaged in a wide variety of housing issues including major litigation concerning public housing and voucher desegregation, terminations due to changes in voucher funding formulas, and project-based Section 8 preservation. She has provided indispensable legal support for numerous statewide working groups on source-of-income legislation and other important tenant rights, including repair and deduct.

Julie is a tireless advocate for many tenants in the District of Columbia, maintaining a regular caseload of eviction defense work while advocating for policy changes through the city council, meeting with the local housing authority on policies and procedures, and serving on the local Landlord Tenant Court's Rules Committee. Much of Julie's work has focused on the local public housing authority's regulations and practices, including issues such as voucher payment standards and earned income disregards, as well as drafting alternative policies. She has pursued important appellate work to use local eviction protections to block voucher terminations.

HJN created **a special award** in appreciation and admiration of the steadfast dedication, courage, and commitment demonstrated by **legal services attorneys throughout the Gulf region** in the year following the devastating hurricanes. Catherine Bishop of NHLP presented the award to **Laura Tuggle of New Orleans Legal Assistance Corporation**, who accepted on behalf of the Gulf region advocates, saluting the magnitude of the challenges which the advocates have faced and their resolve in assisting low-income people of the Gulf to reestablish their lives and communities.

NHLP would like to thank our keynote luncheon speaker, **John Relman** of Relman and Associates, who gave a forceful speech on impact litigation and the strategic need to seek linkages between fair housing, civil rights, and legal services cases. We also want to thank HJN funders and supporters **AARP Foundation Litigation**, which generously underwrote our Sunday night reception and printed all of our training materials, as well as the firms of **Wilmer Cutler Pickering Hale & Dorr** and **Reno and Cavanaugh**. ■

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 NHLP.

Eviction — Retaliation; State Courts — Private Right of Action

Wilson v. Jefferson, 2006 WL 2920093 (Conn. App. Oct. 17, 2006). Relying on legislative history, the Appellate Court of Connecticut held, *inter alia*, that a state statute prohibiting retaliatory eviction, C.G.S.A. § 47a-20, did not create a private right of action.

Public Housing — Eviction

New York City Housing Authority (South Jamaica Houses) v. Jackson, (N.Y.Sup.App.Term, Nov. 17, 2006) 13 Misc.3d 141(A), 2006 WL 3437858, 2006 N.Y. Slip Op. 52265 (Unpublished). Court set aside lower court order enforcing stipulation to vacate public housing unit, entered into by surviving son of resident mother, for failure to register with the housing authority. The stipulation was negotiated on behalf of son, who has a mental disability, by a court-appointed guardian ad litem. Subsequently, guardian, appointed under New York's Mental Health Law, sought to set aside the stipulation and order on the ground that the stipulation was entered into inadvisably because son had a right to remain in the unit. New guardian claimed that housing authority had knowledge of son living with his mother, failed to take any action to remove him, and that his mother's failure to register him, given her illness, should not be held against son. The court agreed. One judge dissented.

HUD Subsidized Housing — Prepayment Tenants' Right to Intervene

Brook Village North Assoc. v. Jackson, 2006 WL 3307439 (N.D.Ill. Nov. 13, 2006). Court denied residents the right to intervene as defendants in lawsuit initiated by Section 236 owner against the Department of Housing and Urban Development (HUD) and FannieMae for refusing to accept the owner's prepayment offer. Court denied, without prejudice, tenants' motion for mandatory and discretionary intervention on the ground that their interest in the litigation is adequately represented by HUD and there was no showing by the residents that they had private right to bring counterclaim against the owner to enforce their right to receive rent supplement payments. Court, however, invited residents to renew motions for intervention if they could show that they had standing to bring counterclaim.

Fair Housing — Generally

Chicago Lawyers' Committee for Civil Rights Under Law v. Craigslist, 2006 WL 3307439 (N.D.Ill. November 14, 2006). Court held that Communications Decency Act barred actions against operator of website that allegedly published housing advertisements that indicated preference, limitation, or discrimination, or intention to make preference, limitation, or discrimination, on basis of race, color, national origin, sex, religion, and familial status, when such actions would require treating the website operator as publisher of third-party content.

Fair Housing — Generally Insurance — Attorney Fees

Combs v. State Farm Casualty & Fire Co., 49 Cal. Rptr. 3d 917 (Cal. App. 2006). The California Court of Appeal concluded that a state statute, CAL. INS. CODE § 533, providing that an insurer is not liable for a loss based on a willful act of the insured precluded indemnification by an insurer of an attorney fee award based on unlawful housing discrimination.

Fair Housing — Zoning

Hallmark Developers v. Fulton County, 2006 WL 2884414 (11th Cir. Oct. 12, 2006). The Eleventh Circuit affirmed summary judgment in favor of Fulton County, Georgia, in a suit by a housing developer challenging on fair housing grounds the denial of a rezoning application. The Eleventh Circuit ruled that the district court did not err in concluding that the developer had failed to produce sufficient evidence of bias to support a discriminatory intent claim. The Eleventh Circuit also ruled that the district court did not err in rejecting as speculative expert testimony regarding future pricing and purchasers offered in support of a disparate impact claim.

Housing Choice Voucher Program — Termination

Eddings v. Dewey, 2006 WL 2850646 (E.D. Va. Oct. 2, 2006). The federal district court for the Eastern District of

[1]http://www.westlaw.com.
[2]http://www.lexis.com.
[3]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.

Virginia held that a housing authority need not consider extenuating circumstances before terminating Housing Choice Voucher assistance, pursuant to 24 C.F.R. § 982.552(c)(1)(i), for failure of voucher tenant to inform the housing authority of a change in household composition as required under 24 C.F.R. § 982.551(h)(3).

Dowling v. Bangor Hous. Auth. 2006 WL 3411856 (Me., Nov. 28, 2006). The Maine Supreme Court upheld the housing authority's termination of Housing Choice Voucher Assistance for the voucher holder's participation in a side payment agreement with her landlord. It rejected the voucher holder's argument that the administrative hearing officer's consideration of hearsay evidence violated the voucher holder's due process rights on the ground that the resident failed to object to the evidence during the administrative hearing and on the ground that HUD regulations allowed the consideration of hearsay evidence. It found that the evidence introduced at the hearing supported the conclusion that the resident committed fraud as defined by HUD regulations.

Immigration

Lozano v. City of Hazelton, 2006 WL 3085510 (M.D. Pa. Oct. 31, 2006). The federal district court for the Middle District of Pennsylvania issued a temporary restraining order barring enforcement of city ordinances aimed at discouraging undocumented persons from residing in Hazelton, Pennsylvania. ■

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 Development (RD)) issued in October and November of 2006. 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 Proposed Rules

71 Fed. Reg. 68,403 (Nov. 24, 2006)
Public Housing Operating Fund Program; Revised Transition Funding Schedule for Fiscal Year 2008 Through Fiscal Year 2012

Summary: This proposed rule would modify HUD's regulations for transition funding under the Operating Fund Program. The Operating Fund Program, as revised by a September 19, 2005, final rule, adopted a new formula for determining the payment of operating subsidy to public housing agencies (PHAs). Transition funding is based on the difference in subsidy levels between the new formula and the formula in effect prior to the implementation of the September 19, 2005, final rule. As a result of the new formula, PHAs may experience either an increase or decrease in the amount of funding that they receive. For PHAs experiencing a decline in operating subsidy as a result of the new formula, the September 19, 2005, final rule phases in the reduction over a period of years. This proposed rule would revise the schedule for those PHAs that will experience a decline in funding, by extending the transition phase-in period an additional year.

Comment Due Date: January 23, 2007.

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

71 Fed. Reg. 68,407 (Nov. 24, 2006)
Public Housing Operating Fund Program; Revised Transition Funding Provision for Federal Fiscal Year 2007

Summary: This proposed rule would modify HUD's regulations for transition funding under the Operating Fund Program. The Operating Fund Program, as revised by a September 19, 2005, final rule, adopted a new formula for determining the payment of operating subsidy to public housing agencies (PHAs). Transition funding is based on the difference in subsidy levels between the new formula and the formula in effect prior to the implementation of the September 19, 2005, final rule. As a result of the new formula PHAs may experience either an increase or decrease in the amount of funding that they receive. This proposed rule would revise the transition-funding schedule for those PHAs that will experience a decline in funding. For Federal Fiscal Year 2007 only, the transition funding percentage loss for all PHAs will be capped at 5% of the difference between the two funding levels.

Comment Due Date: December 26, 2006.

71 Fed. Reg. 58,993 (Oct. 5, 2006)
Revisions to the Public Access to HUD Records Under the Freedom of Information Act (FOIA) Regulations

Summary: This proposed rule would clarify and explain the procedures to be followed by requesters seeking a waiver or a reduction of fees under the Freedom of Information Act (FOIA). This proposed rule describes the information that must be included in an FOIA request and the demonstrations that must be made in order for a waiver or reduction in fees to be granted. This proposed rule would also revise the FOIA fee schedule, clarify the time at which HUD will begin processing an FOIA request, and modify HUD's policy on the use of outside contractors to fulfill FOIA requests. HUD is undertaking this effort in order to make the regulations governing fee waivers more informative and helpful in accordance with the President's recently issued Executive Order 13392, "Improving Agency Disclosure of Information."

Comment Due Date: December 4, 2006.

HUD Federal Register Interim Rule

71 Fed. Reg. 61,865 (Oct. 19, 2006)
Extension of Minimum Funding Under the Indian Housing Block Grant Program

***Summary*:** This interim rule provides authority for Indian tribes to receive a minimum grant amount under the need component of the Indian Housing Block Grant (IHBG) Formula for Fiscal Year (FY) 2007. The minimum funding provision currently in effect in HUD's regulations limited authority for receipt of a minimum grant amount to FY 2006. HUD and Indian tribes, through negotiated rulemaking procedures, developed and published a proposed rule to address ways to improve and clarify the IHBG Formula regulations, including the minimum funding provisions. The reinstatement of the authority for minimum grant amounts in FY 2007 will avoid hardship to the affected tribes until the revised minimum funding provisions contained in the negotiated rule are issued as a final rule and become effective.

Effective Date: November 20, 2006.

Comment Due Date: December 18, 2006.

HUD Federal Register Final Rules

71 Fed. Reg. 64,421 (Nov. 1, 2006)
Disposition of HUD-Acquired Single Family Property; Good Neighbor Next Door Sales Program

Summary: This final rule establishes regulations for HUD's new Good Neighbor Next Door (GNND) Sales Program. The requirements for the new program are closely modeled on those for HUD's Officer Next Door (OND) and Teacher Next Door (TND) Sales Programs. The GNND Sales Program replaces and builds upon the success of these two existing sales programs. The purpose of the GNND Sales Program is to improve the quality of life in distressed urban communities by encouraging law enforcement officers, teachers, and firefighters/emergency medical technicians, whose daily responsibilities represent a nexus to the needs of the community, to purchase and live in homes in these communities. This final rule follows publication of a September 8, 2005, proposed rule and takes into consideration the public comments received on the proposed rule.

Effective Date: December 1, 2006.

71 Fed. Reg. 65,321 (Nov. 7, 2006)
Disposition of HUD-Acquired Single Family Property; Disciplinary Actions Against HUD-Qualified Real Estate Brokers

Summary: This final rule establishes the basis and procedures for removing real estate brokers from HUD's qualified selling broker list and for prohibiting removed brokers from using HUD's systems to participate in the sale of HUD-owned, single family properties. This rule is similar to existing removal rules for Federal Housing Administration appraisers, consultants, and nonprofit organizations, and provides HUD a more expeditious disciplinary procedure for real estate brokers than the suspension and debarment procedures that would otherwise be applicable. This final rule follows publication of a September 17, 2004, proposed rule, and takes into consideration the public comments received on the proposed rule.

Effective Date: December 7, 2006.

71 Fed. Reg. 62,353 (Oct. 24, 2006)
Demolition or Disposition of Public Housing Projects; Final Rule

Summary: This final rule revises HUD's regulations governing demolition or disposition of public housing projects. This rule establishes the general and specific requirements for HUD approval of demolition or disposition applications, relocation of residents, resident participation in the form of consultation and opportunity to purchase a public housing project, the replacement of units, and a new authority for a public housing agency to demolish a small number of its units without a formal application under certain circumstances, referred to as "de minimis" demolition. This final rule follows a December 15, 2004, proposed rule and makes several changes in response to public comment.

Effective Date: November 24, 2006.

71 Fed. Reg. 59,261 (Oct. 6, 2006)
Affordable Housing Program Amendments; Final Rule

Summary: The Federal Housing Finance Board is amending its Affordable Housing Program regulation to remove prescriptive requirements, clarify certain operational requirements, provide additional discretionary authority in certain areas, remove certain authorities, and otherwise streamline and reorganize the regulation.

Effective Date: January 1, 2007.

HUD Federal Register Notices and Announcements

71 Fed. Reg. 66,184 (Nov. 13, 2006)
Announcement of Funding Awards for the Service Coordinators in Multifamily Housing, Fiscal Year 2005

Summary: This announcement notifies the public of funding decisions made by the Department in a competition for funding under the Super Notice of Funding Availability for the Service Coordinators in Multifamily Housing program. This announcement contains the names of the awardees and the amounts of the awards made available by HUD.

71 Fed. Reg. 66,960 (Nov. 17, 2006)
Announcement of Funding Awards for the Section 811 Supportive Housing for Persons With Disablilities Program, Fiscal Year 2005

Summary: This announcement notifies the public of funding decisions made by the Department in a competition for funding under the Super Notice of Funding Availability for the Supportive Housing for Persons With Disabilities Program. This announcement contains the names of the awardees and the amounts of the awards made available by HUD.

71 Fed. Reg. 67,625 (Nov. 22, 2006)
Notice of HUD-Held Multifamily and Healthcare Loan Sale (MHLS 2006-2)

Summary: This notice announces HUD's intention to sell certain unsubsidized multifamily and healthcare mortgage loans, without Federal Housing Administration (FHA) insurance, in a competitive, sealed bid sale (MHLS 2006-2). This notice also describes generally the bidding process for the sale and certain persons who are ineligible to bid. The Bidder's Information Package will be made available to qualified bidders on or about October 31, 2006. Bids for the loans must be submitted on the bid date, which is currently scheduled for December 6, 2006. HUD anticipates that awards will be made on or before December 7, 2006. Closings are expected to take place on December 13, 2006.

71 Fed. Reg. 67,894 (Nov. 24, 2006)
Announcement of Funding Awards for the Assisted Living Conversion; Program Fiscal Year 2005

Summary: This announcement notifies the public of funding decisions made by the Department in a competition for funding under the Super Notice of Funding Availability for the Assisted Living Conversion Program. This announcement contains the names of the awardees and the amounts of the awards made available by HUD.

71 Fed. Reg. 57,991 (Oct. 2, 2006)
Notice of Certain Operating Cost Adjustment Factors for 2007

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, 2007.

71 Fed. Reg. 57,994 (Oct. 2, 2006)
Multifamily Mortgage Insurance Premiums; Withdrawal of Proposal to Increase MIPs for FY2007

Summary: HUD issued a notice on June 28, 2006, announcing for public comment proposed changes in the mortgage insurance premiums (MIP) for Federal Housing Administration (FHA) multifamily mortgage insurance programs whose commitments will be issued or reissued in Fiscal Year (FY) 2007. The notice allowed thirty days for public comment. Approximately 359 comments were received by the comment due date, and the comments, including a letter signed by 121 members of the U.S. House of Representatives and twenty-six United States Senators, were overwhelmingly opposed to the MIP increases proposed for a number of HUD's multifamily housing mortgage insurance programs. Based on consideration of the concerns raised in the comments, HUD has decided not

to proceed with implementation of the MIP increases for FY 2007. Instead, the FY 2006 MIPs, issued on August 30, 2005, will remain in effect for FY 2007. However, FHA will continue to evaluate alternative pricing strategies to maintain the integrity of the fund and achieve policy goals.

Effective Date: October 1, 2006.

71 Fed. Reg. 58,871 (Oct. 5, 2006)
Notice of a Computer Matching Program Between the Department of Housing and Urban Development (HUD) and the Social Security Administration (SSA)

Pursuant to the Computer Matching and Privacy Protection Act of 1988, as amended, and the Office of Management and Budget's (OMB) Guidance on the statute, HUD is updating its notice of a matching program involving comparisons between income data provided by 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, primarily through public housing agencies and owners and agents (POAs). Indian tribes and tribally designated housing entities (TDHEs) are not a mandatory component of the computer matching program. Participation by Indian tribes and TDHEs is discretionary; however, they may receive and use Social Security (SS) and Supplemental Security Income (SSI) matching information provided by HUD. This notice provides an overview of computer matching for HUD's rental assistance programs and describes HUD's program for computer matching of its tenant data to SSA's SS and SSI income benefits data.

Effective Date: Computer matching is expected to begin thirty days after publication of this notice in the Federal Register, unless comments are received which will result in a contrary determination, or forty days from the date a computer matching agreement is signed, whichever is later.

Comments Due Date: November 6, 2006.

71 Fed. Reg. 59,515 (Oct. 10, 2006)
Announcement of Funding Awards—Fiscal Year 2003; Resident Opportunity and Self-Sufficiency Programs

Summary: This announcement notifies the public of funding decisions made by the Department for funding under the Fiscal Year 2003 (FY 2003) Notice of Funding Availability for the Resident Opportunity and Self Sufficiency Programs for FY 2003. This announcement contains the consolidated names and addresses of those award recipients selected for each state.

71 Fed. Reg. 60,163, 60,165, 60,168, 60,168, 60,173 and 60,179 (Oct. 12, 2006).
Notices of Revocation and Redelegation of Authority

*Summary***:** On August 11, 2003, various Assistant Secretaries issued an up-to-date comprehensive delegation of authority for various programs and offices. These notices were published on August 20, 2003. These notices amend those redelegations of authority to reflect changes that have occurred since that time.

Effective Date: September 15, 2006.

71 Fed. Reg. 61,496 (Oct. 18, 2006)
Announcement of Funding Award—FY 2006; Healthy Homes and Lead Hazard Control Grant Programs

Summary: This announcement notifies the public of funding decisions made by the Department in competitions for funding under the Office of Healthy Homes and Lead Hazard Control Grant Programs Notices of Funding Availability. This announcement contains the name and address of the award recipients and the amounts to be awarded.

71 Fed. Reg. 61,498, 64,199, 61,500, (Oct. 18, 2006)
Redesignation of Order of Succession

Summary: In these notices, various Assistant Secretaries designate the Order of Succession for their offices. These Orders of Succession supersede the Orders of Succession previously published by these Assistant Secretaries.

Effective Dates: June 14, 15, 20, July 13, and September 8, 2006.

71 Fed. Reg. 61,595 (Oct. 18, 2006)
Regulatory Waiver Requests Granted for the Second Quarter of Calendar Year 2006

Summary: Section 106 of the Department of Housing and Urban Development Reform Act of 1989 requires HUD to publish quarterly Federal Register notices of all regulatory waivers that HUD has approved. Each notice covers the quarterly period since the previous Federal Register notice. This notice contains a list of regulatory waivers granted by HUD during the period beginning on April 1, 2006, and ending on June 30, 2006.

71 Fed. Reg. 61,991 (Oct. 20, 2006)
Funding Awards for the Housing Choice Voucher Family Self Sufficiency Program for Fiscal Year 2003

Summary: This announcement notifies the public of funding decisions made by the Department for funding under the Fiscal Year (FY) 2003 Notice of Funding Availability for the Family Self Sufficiency Funding for FY 2003. This announcement contains the consolidated names and addresses of those award recipients selected for funding based on the rating and ranking of all applications and the allocation of funding available for each state.

71 Fed. Reg. 62,278 (Oct. 24, 2006)
Funding Awards for the Housing Choice Voucher Family Self Sufficiency Program for Fiscal Year 2004

Summary: This announcement notifies the public of funding decisions made by the Department for funding under the Fiscal Year (FY) 2004 Notice of Funding Availability for the Family Self Sufficiency Funding for FY 2004. This announcement contains the consolidated names and addresses of those award recipients selected for funding based on the rating and ranking of all applications and the allocation of funding available for each state.

71 Fed. Reg. 62,371 (Oct. 24, 2006)
Additional Waivers Granted to and Alternative Requirements for the State of Mississippi Under Public Law 109-148; Notice

Summary: This notice describes the additional waivers for the disaster recovery grants made to the State of Mississippi under the appropriations act.

Effective Date: October 30, 2006.

71 Fed. Reg. 63,333 (Oct. 30, 2006)
Announcement of Funding Awards for the Section 202 Supportive Housing for the Elderly Program Fiscal Year 2005

Summary: This announcement notifies the public of funding decisions made by the Department in a competition for funding under the Super Notice of Funding Availability for the Section 202 Supportive Housing For the Elderly Program. This announcement contains the names of the awardees and the amounts of the awards made available by HUD.

71 Fed. Reg. 63,337 (Oct. 30, 2006)
Allocations and Waivers Granted to and Alternative Requirements for CDBG Disaster Recovery Grantees Under Chapter 9 of Title II of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006

Summary: This notice advises the public of the allocations for grant funds for Community Development Block Grant disaster recovery grants for the purpose of assisting in the recovery in the most impacted and distressed areas related to the consequences of Hurricanes Katrina, Rita, and Wilma in the Gulf of Mexico in 2005. As described in the Supplementary Information section of this notice, HUD is authorized by statute to waive statutory and regulatory requirements and specify alternative requirements for this purpose, upon the request of the state grantees. This notice also describes the application and reporting waivers and the common alternative requirements for the grants made under the subject appropriations act.

Effective Date: November 6, 2006.

71 Fed. Reg. 63,340 (Oct. 30, 2006)
Extension of Period of Submission for Notices of Intent and Fungibility Plans in Accordance With HUD's Implementation Guidance for Section 901 of the Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006

Summary: On July 28, 2006, HUD published a notice entitled, "Implementation Guidance for Section 901 of the Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006." This notice extends the period for eligible public housing agencies (PHAs) located within the most heavily impacted areas of Louisiana and Mississippi that are subject to a declaration by the President of a major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act in connection with Hurricanes Katrina or Rita to submit Notices of Intent and Fungibility Plans in accordance with the July 28, 2006, notice. Section 901 of the supplemental appropriations act authorizes PHAs to combine assistance provided under sections 9(d) and (e) of the United States Housing Act of 1937 (Act) and assistance provided under Section 8(o) of the Act, for the purpose of facilitating the prompt, flexible, and efficient use of funds provided under these sections of the Act to assist families who were receiving housing assistance under the Act immediately prior to Hurricane Katrina or Rita and were displaced from their housing by the hurricanes. In addition to extending the PHA submission deadline, this notice removes the restriction that the combined funding may not be spent for uses under the housing choice voucher (HCV) program. If approved by HUD, the combined funding may now be used for eligible purposes under the HCV program. Any use of combined funds under the HCV program must also be in accordance with the requirement to assist those families who were receiving housing assistance under the public housing or HCV program immediately prior to Hurricane Katrina or Rita and were displaced from their housing by the hurricane. A PHA that already has an approved Fungibility Plan may request HUD approval to change the Plan in order to use the combined funds for HCV program eligible purposes. As provided in the July 28, 2006, Federal Register notice, PHAs must submit to HUD requests for approval of any substantial deviations from the approved Fungibility Plan, and HUD will respond to such requests within ten calendar days.

Dates: Eligible PHAs must submit their Notices of Intent and Fungibility Plans no later than November 21, 2006.

71 Fed. Reg. 64,069 (Oct. 31, 2006)
Notice of Opportunity to Register Early and Other Important Information for Electronic Application Submission via Grants.gov; Notice

Summary: The purpose of this notice is to provide instructions and advice to potential applicants applying

for funding under HUD's competitive grant programs that are available through Grants.gov. This notice provides information to help applicants better understand the electronic submission process. To facilitate the Fiscal Year 2007 federal grant application process, prospective applicants for HUD funding should immediately begin the registration process or renew their registration from prior years. HUD believes that by facilitating a better understanding of the electronic submission process, applicants will be able to more easily make the transition to electronic application submission.

Dates: Early registration commences with the issuance of this notice and ends when HUD publishes its SuperNOFA.

HUD Mortgage Letters

Mortgagee Letter 2006-29 (Dec. 6, 2006)
Louisiana Road Home Program

Summary: The State of Louisiana has now finalized an action plan for use of Federal Community Development Block Grant disaster funds to assist homeowners who suffered flood and/or wind damage to their residences from Hurricanes Katrina and/or Rita. This mortgagee letter provides guidance regarding grant program issues specific to FHA-insured loans.

Mortgagee Letter 2006-28 (Nov. 20, 2006)
Mortgage and Foreclosure Rights of Servicemembers under the Servicemembers Civil Relief Act (SCRA)

Summary: This Mortgagee Letter provides information regarding a new legal requirement to notify homeowners in default of the mortgage and foreclosure rights of servicemembers and their dependents under the Servicemembers Civil Relief Act. It also provides guidance regarding the implementation of SCRA requirements in servicing FHA-insured mortgages. This guidance supersedes prior Mortgagee letters ML 2003-04, Soldiers and Sailors Civil Relief Act and ML 01-22, The Effect of the Soldiers and Sailors Civil Relief Act of 1940 on FHA Insured Mortgages. However, the guidance provided in ML 91-20, Effect of the Soldiers and Sailors Civil Relief Act of 1940 on FHA Insured Mortgages remains valid with respect to the calculation of Section 235 subsidy.

HUD Community Planning and Development Notices
Timely Distribution of State CDBG Funds (Nov. 2, 2006)

Summary: This notice replaces CPD Notice 94-26 and reiterates HUD's policy and standards for the timely distribution of Community Development Block Grant funds by states. The notice also provides a summary report of the states' performance in meeting the timely distribution requirements established by regulation for the five program years 2000 through 2004.

Expires: November 2, 2007.

Rural Development (Formerly RHS) Administrative Notice

RD AN No. 4217 (1980-D) (Sept. 26, 2006)
Single Family Housing Guaranteed Loan Program, Lender Charges and Fees

Summary: The purpose of this AN is to clarify Agency requirements under RD Instruction 1980-D, Section 1980.324(a) for routine charges and fees that lenders may charge borrowers. The Agency wishes to prevent lenders from charging excessive fees for guaranteed loans and to protect low- and moderate-income borrowers from paying excessive loan fees, or borrowing funds for fees that are not reasonable and customary. This AN does not apply to maximum interest rate requirements. Maximum interest rates should be handled according to RD Instruction 1980-D, Section 1980.320.

Expiration Date: September 30, 2007. ■

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