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Housing Law Bulletin

Volume 36 • February 2006

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New Federal Legislation for Disaster Relief

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***HUD Ordered to Waive FOIA Fee for
Legal Services Organization***

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SYLVIA M. BRENNAN

1965-2006

After a courageous struggle with cancer, our dear friend and colleague Sylvia Brennan passed away in the presence of her family on Saturday, January 28, 2006, in Fairfax, Virginia.

A remarkable advocate, Sylvia's steadfast commitment to universal justice was fueled by an energetic spirit, an engaging personality and formidable will. Her local work improved housing conditions for thousands of low-income tenants and homeowners, and her support work advanced the rights of thousands of others. But most of us will dearly miss her friendship.

After graduating from American University and the Columbus School of Law at Catholic University, Sylvia joined Legal Services of Northern Virginia in 1992 to work on housing and consumer issues in the Alexandria office, eventually managing both that office and the Housing Law Program. She was also active in several local civic organizations and public commissions, including the local bar association.

Clients and colleagues all benefitted from Sylvia's skilled assistance and counsel, which earned extraordinary respect, even among adversaries. Her former colleagues recounted that her hallmark was making weak arguments sound convincing to many kinds of decision-makers, which came naturally to her in the passion of her convictions. While the rumor that she never lost a case wasn't true, she apparently regularly forgot such experiences within 24 hours. Anyone that met her can fully appreciate the challenge presented by a much younger Sylvia to the sisters trying to maintain the structure of the parochial school that she attended.

After joining NHLP to staff our Washington, D.C. office in May of 2003, Sylvia advanced a variety of NHLP initiatives, notably our D.C. Public Housing Resident Empowerment project, challenging public housing com-



munity service requirements and unjust trespass policies, promoting asset building among residents of public housing, and training peers in public interest advocacy.

Sylvia was devoted to her family, her faith, her friends and her work. Volleyball was a major preoccupation, along with hiking, fishing, rafting and anything to do with water. She was blessed with countless friends, who were attracted by her generous and magnetic spirit, her laughter and optimism, and her sheer love of life.

As her husband Steve has reflected: "Sylvia taught us all how life should be lived. If we all follow her example and spread the joy of living with our loved ones, our children, our family and friends, even

strangers we may meet, then this world will be a much better place and Sylvia's spirit will live on forever."

Our friend and colleague Wayne Sherwood has reminded us: "To honor Sylvia, please keep the Spirit of Truth, Justice and Hope alive. Respond to temporary setbacks with raucous, irreverent laughter, a twinkle in your eyes, and a determination to keep on, as she always did."

A funeral mass was held on February 4 in celebration of Sylvia's life at Blessed Sacrament Church in Alexandria. Her cousin, Father Ed Nedder, gave a wonderful homily connecting Sylvia's life and faith. Her sister Lisa's eulogy filled in a portrait that was later completed by the many family and friends offering poignant memories and loving thoughts at the reception.

Sylvia is survived by an incredible family that includes her husband Steve, her mother and father Liz and Stan, her sister Lisa and brother Stan, and the nieces and nephews to whom she was totally devoted. She also lives as part of all of us. Sylvia and her family have asked that memorial contributions be made in Sylvia's name to the National Housing Law Project, 614 Grand Avenue, Suite 320, Oakland, California 94610.

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Cover: William Byron Rumford, Sr. Plaza, Berkeley, California.

A 43-unit LIHTC development with one-, two- and three-bedroom units. Owned by South Berkeley Community Housing Development Corporation.

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District Court Concludes HUD May Be Liable for Baltimore Segregation

In the latest episode of *Thompson v. United States Department of Housing and Urban Development*, a long-running federal case in Baltimore holding the Department of Housing and Urban Development (HUD) liable for violations of the Fair Housing Act,¹ the United States district court has recently denied HUD's motion for summary judgment on issues raised by the remedial phase of the case, and the case will now proceed to trial.² The court's decision addressed a host of important issues for advocates involved in housing and civil rights litigation, reviewed below.

The Prior Proceedings

Prior to the Supreme Court's 1954 ruling in *Brown v. Board of Education*, federal and local government agencies within Baltimore, not unlike many American cities, were plagued with institutionalized racism—the targets of which were usually African Americans. Effects of this institutionalized racism persist today. In 1995, African-American residents of Baltimore City public housing initiated a class action lawsuit asserting various constitutional and statutory claims against the City of Baltimore, the Housing Authority of Baltimore City ("HABC" or "Local Defendants") and HUD ("Federal Defendants"). Specifically, the plaintiffs alleged that the defendants' maintenance of a segregated affordable housing system violated the Fair Housing Act (FHA) and other civil rights and housing statutes, and their constitutional equal protection rights.

In June 1996, the parties entered into a Partial Consent Decree to settle certain claims concerning the demolition of particular developments and replacement housing obligations. The remaining issues, plus issues later raised by the Partial Consent Decree, then proceeded to trial for determination of liability, where the court held that:

1. The Local Defendants had no liability.
2. HUD was liable for violating its duty to affirmatively further fair housing under the FHA, 42 U.S.C.

¹On January 6, 2005, the court issued its "Liability Decision," published as *Thompson v. United States Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005) (hereinafter *Liability Decision*). For a thorough analysis of the Liability Decision, see NHLP, *HUD Liable for Failing to Address Baltimore's Segregated Housing System*, 35 HOUS. L. BULL. 70, 71 (2005).

²*Thompson v. United States Dep't of Hous. & Urban Dev.*, No. MJG-95-309 (D. Md. Jan. 10, 2006) (order denying Federal Defendant's motion for summary judgment and permitting Federal Defendant to reopen the record to present evidence and arguments pertaining to liability under § 3608(e)(5)) (hereinafter *Summary Judgment Decision*).

§ 3608(e)(5). While the court found no proof presented of intentional discrimination by HUD, the court specifically faulted HUD's failure adequately to consider a regional approach to desegregating public housing.

3. A decision on plaintiffs' equal protection claim against HUD would be deferred until after the trial on remedies.³

Several months later, HUD sought summary judgment on several pending remedial phase issues, giving rise to the decision that is the subject of this article. Specifically, HUD again challenged the court's original finding that it had violated the FHA. In the alternative, HUD argued that, even if the court's liability finding was correct, no remedy was available under the Administrative Procedure Act (APA).⁴

Challenging the FHA Violation

HUD's primary contention was that it cannot be liable for an FHA violation because of its limited role with regard to public housing in Baltimore.⁵ HUD essentially argued that because it did not directly build public housing, it had no obligation or opportunity to develop public housing in any particular location in the region. Because Congress assigned this role to state and local agencies, not to the federal government, HUD could not be faulted for its failure to perform that role.

Consistent with its prior opinion, the court rejected this argument, due to HUD's control over federal housing funding for the region and its authority to set conditions for those funds. Because of HUD's ability to influence Baltimore's local housing policies, the court concluded that the FHA required HUD to at least consider regional approaches when exercising its considerable leverage over public housing in a manner that did not perpetuate the historical segregation patterns in public housing. This ruling remains important to advocates addressing housing and civil rights issues: federal agencies can be held statutorily liable for FHA violations when they have considerable influence over a state or local government's policies and practices and fail to use this influence to reduce, or at a minimum not perpetuate, racial segregation.

Nevertheless, in order to insure that it was fully informed on all the issues presented, the court allowed HUD to reopen the record and present additional evidence

and arguments pertaining to the § 3608 affirmatively furthering claim. The court may then later reconsider its decision.

The APA and Remedy Preclusion

The earlier Liability Decision concluded that plaintiffs could pursue their statutory claims against HUD under the APA, which permits claims by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."⁶ However, HUD contended that even if the court was correct in concluding that it had violated the FHA, the remedies sought were precluded by Supreme Court precedents interpreting the APA. Moreover, under the circumstances, HUD further argued that the plaintiffs' constitutional claims were also subject to certain APA limitations. As described below, the court rejected both of these preclusion arguments.

HUD argued that because it did not directly build public housing, it had no obligation or opportunity to develop public housing in any particular location in the region.

First, seeking to narrow the scope of the APA, HUD asserted that the Supreme Court's decision in *Norton v. South Utah Wilderness Alliance* (hereinafter *SUWA*) precluded the requested remedy.⁷ In *SUWA*, the Court held that a "claim under 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take."⁸ HUD urged *SUWA* as a bar to plaintiffs' § 3608 affirmatively furthering claim that had been brought under the APA, asserting that APA review is only proper upon a showing that the agency failed to take a discrete action—and no such showing was made here.⁹ In HUD's view, plaintiffs' § 3608 claim was precluded under the APA because it was a broad programmatic challenge, not a discrete agency action.

Rejecting HUD's interpretation, the court concluded that it could properly proceed under § 706(2) of the APA. The court recognized that the cumulative effect of HUD's practice of not adopting a regional approach to desegregation perpetuated long-term and region-wide segregation in Baltimore. As such, the court explained that judicial

³See generally *Liability Decision*, *supra* note 1.

⁴See generally 5 U.S.C. §§ 701-706 (2006).

⁵HUD also argued that Plaintiffs' Pretrial Memorandum did not assert a § 3608(e)(5) claim against them, and therefore they were not given adequate notice to defend against such a claim. The court rejected this argument, noting that Plaintiffs' Pretrial Memorandum made several references to both the FHA claim and the regionalization issue. Moreover, because HUD never objected to consideration of regional approaches during the trial and, in fact, engaged the issue on its merits, the court was well within its discretion to consider the claim.

⁶5 U.S.C. § 702 (2006).

⁷*Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004).

⁸*SUWA*, 542 U.S. at 64.

⁹See 5 U.S.C. §§ 706(1) or 706(2) (2006).

review was "appropriate ... because HUD's liability under § 3608(e)(5) was based on HUD's actions and long-term patterns."¹⁰ Consequently, "[t]he instant lawsuit is, in essence, one to 'set aside' HUD's practice in regard to decision making, a practice that constituted an abuse of HUD's discretion. This conclusion accords with the APA, which defines 'agency action' to include a 'failure to act.'"¹¹ Moreover, this conclusion is consistent with other decisions finding that *SUWA* does not prevent a court from reviewing whether HUD has met its statutory duty to affirmatively further fair housing.¹²

HUD also contended that because the plaintiffs' constitutional claims arose under the APA, these claims were subject to purported APA limitations as well. Specifically, HUD argued that (a) plaintiffs lacked a non-statutory basis for their constitutional claim; (b) sovereign immunity bars any independent constitutional claim; and (c) because plaintiffs have alternate remedies available, the APA bars assertion of direct constitutional claims.¹³ Here, too, the court rejected each of HUD's arguments, holding that plaintiffs' constitutional claims were not constrained by any APA limitations.

First, the court concluded that because plaintiffs had presented a potentially valid constitutional equal protection claim under the Fifth Amendment and because that claim was not precluded by either the APA or the FHA, that claim could be pursued independent of the APA. HUD may thus be held liable for both statutory and constitutional violations.¹⁴ Moreover, for this type of constitutional claim, the plaintiffs need not establish HUD's discriminatory intent because, "[w]hile an affirmative discriminatory act must be purposeful, there is no similar 'intent' element concerning the abdication of duties stemming from past discriminatory acts."¹⁵ Therefore, "[i]f HUD failed to meet its constitutional obligation to remove vestiges of prior *de jure* segregation from the Baltimore Region there could be liability even without a present discriminatory intent."¹⁶

In addition, the court rejected HUD's sovereign immunity and alternative remedy arguments. First, with regard to sovereign immunity, the court pointed out that APA Section 702 provides a general sovereign immunity waiver for all claims against the federal government

¹⁰Summary Judgment Decision, *supra* note 2, at *10.

¹¹*Id.* at *11.

¹²*Id.* at *13 (quoting *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898 (8th Cir. 2005)).

¹³*Id.* at *17.

¹⁴*Id.* at *18 (citing cases).

¹⁵*Id.* at *19 (quoting *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979)).

¹⁶*Id.* at *20.

Available February 2006

Publication Announcement

A Right to Housing: Foundation for a New Social Agenda

Edited by Rachel G. Bratt, Michael E. Stone
and Chester Hartman • Temple University Press
448 pages • \$40.00 paper/\$99.50 cloth

In the 1949 Housing Act, Congress declared "a decent home and a suitable living environment for every American family" our National Housing Goal. Today, more than half a century later, upwards of 100 million people in the United States live in housing that is physically inadequate, unsafe, overcrowded, or unaffordable.

The contributors to *A Right to Housing* consider the key issues related to America's housing crisis, including income inequality and insecurity, segregation and discrimination, the rights of the elderly, as well as legislative and judicial responses to homelessness. The book offers a detailed examination of how access to adequate housing is directly related to economic security.

The 18 articles (all written or updated specially for this volume) include:

David B. Bryson: *The Role of the Courts and a Right to Housing* (updated by Florence Roisman)

Chester Hartman: *The Case for a Right to Housing*

Nancy A. Denton: *Segregation and Discrimination in Housing*

Susan Saegert and Helene Clark: *Opening Doors: What a Right to Housing Means for Women*

Michael E. Stone: *Housing Affordability: One-Third of a Nation Shelter-Poor*

Peter Dreier: *Federal Housing Subsidies: Who Benefits and Why?*

Peter Marcuse and Dennis Keating: *The Permanent Housing Crisis: The Failures of Conservatism and the Limitations of Liberalism*

Emily Paradise Achtenberg: *Federally Assisted Housing in Conflict: Privatization or Preservation?*

Robert Wiener: *Privatizing Rural Rental Housing*

John Emmeus Davis: *Between Devolution and the Deep Blue Sea: What's a City or State To Do?*

Rachel G. Bratt: *Housing and Economic Security*

Rob Rosenthal and Maria Foscarinis: *Responses to Homelessness: Past Policies, Future Directions and a Right to Housing*

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where equitable relief is requested, including constitutional claims such as plaintiffs' Fifth Amendment claim.¹⁷ Second, the court quickly dismissed HUD's alternative remedy argument—that the existence of alternative remedies precludes relief for constitutional violations brought under the APA—finding it unsupported in statutory text or case law.¹⁸ Moreover, to counter HUD's related argument that HUD's compliance with its constitutional duties was unreviewable under the APA per the holding in *Heckler v. Chaney*,¹⁹ the court relied on its earlier ruling rejecting the same HUD contention concerning its statutory duties and the general presumption favoring judicial review of constitutional claims.²⁰

The court directly challenged the premise of HUD's contention that segregation was limited to Baltimore City.

Scope of Available Remedies

Finally, the court addressed HUD's contention that the only available remedy was a "remand" to HUD. In the court's view, HUD was arguing essentially that the court was powerless to order HUD to do or consider anything, an effective immunity from the court's equitable powers.²¹ The court stated that it has equitable powers to develop remedies appropriate to the statutory and constitutional violations found, including violation of the FHA duty to affirmatively further fair housing and any constitutional duty to remedy prior intentional segregation.

Moreover, rejecting HUD's attempt to limit the scope of the remedy to the alleged location of the illegal acts in Baltimore City, the court directly challenged the premise of HUD's contention that segregation was limited to that location:

The Federal Defendants' argument is based upon the false premise that the original segregation was limited to Baltimore City. Indeed, the essence of the segregation was to keep African-American residents of public housing in the Baltimore Region concentrated in black ghettos within Baltimore City and out of white neighborhoods in the

city and the counties. The absence of a substantial number of African-American public housing residents in the counties is an indication of the presence, not the absence, of race based segregation in the Baltimore Region.²²

Given the facts here, including HUD's jurisdiction over the metropolitan region, the court reiterated the propriety of a remedy reaching beyond the city border.²³

What's Next

The court has permitted HUD to reopen the record to present evidence and arguments pertaining to its liability under the FHA affirmatively furthering claim under § 3608(e)(5). The court may then reconsider its liability finding. Should the court again conclude that HUD is liable, the remedial phase trial will take evidence on what actions should be required to ensure that HUD considers a regional approach to public housing desegregation. In addition, the court will hear evidence of any prior consideration of regional approaches by HUD, or its failure to do so. This evidence will also influence the court's ultimate decision on plaintiffs' constitutional claim that HUD's prior actions were motivated by intentional racial discrimination, potentially creating even more expansive remedies.

Conclusion

Thompson demonstrates the obdurate behavior and ornately contrived legal sophistry that the federal government will employ in order to avoid responsibility for racial discrimination in its housing programs. It also shows the skill and persistence of effective advocacy to counter HUD's seemingly endless supply of diversionary tactics, and to create for the court an alternative vision of what is possible, and what the law requires. Because the Baltimore situation is not unique among metropolitan areas throughout the country, many await news on *Thompson's* next chapter. ■

¹⁷*Id.* at *22.

¹⁸*Id.* at *25.

¹⁹470 U.S. 821 (1985).

²⁰*Summary Judgment Decision*, *supra* note 2, at 26.

²¹*Id.*

²²*Id.* at *30-31.

²³*Id.* at *31. Also in this context the court rejected HUD's attempt to obtain summary judgment by obtaining a favorable "unitary status" determination for the region, as is now done in some school desegregation cases, where a court finds that the vestiges of prior discrimination have been eradicated to the extent practicable. *Id.* at 32-34.

Court Orders HUD to Waive FOIA Fee for Legal Services Organization

By Anthony Ha*

A federal district court in Pennsylvania recently ordered HUD to waive all fees for the production of documents requested by Community Legal Services (CLS) under the Freedom of Information Act (FOIA).¹ The court's decision granting summary judgment to CLS establishes an important, although not binding, precedent for groups that seek to obtain information from the government under FOIA.

Background

The Philadelphia Housing Authority (PHA) began the Moving to Work (MTW) Demonstration Program in 2002. Under an agreement with the Department of Housing and Urban Development (HUD), PHA could obtain waivers from HUD of regulations that would have otherwise governed its public housing and voucher programs. When HUD granted a waiver, PHA was required to report back to HUD about PHA's activities. The program changes allegedly made by PHA under MTW, some of which required HUD waivers, included not deducting child-care expenses from gross income when calculating rent payments; setting a seven-year lifetime limit for most voucher participants; demolition of PHA's public housing stock, with only partial replacement; and only making available 700 of the 2,800 housing subsidy vouchers for which PHA received funding in 2003. CLS alleged that PHA also failed to provide "detailed and timely information" to the public about these changes.

On July 23, 2004, CLS—a nonprofit public interest organization providing free legal services to low-income Philadelphia residents—made an FOIA request to HUD for twenty-four types of documents exchanged by HUD and PHA relating to MTW. CLS also made a request that HUD waive the fees associated with production of these documents. CLS later submitted more information relating to the fee waiver. HUD denied CLS's waiver request and classified CLS as an "Other Requester" under 24 C.F.R. § 15.110(b)(5). HUD estimated its search and duplication costs at \$1,418.10.

CLS appealed HUD's decision, which HUD denied. CLS filed suit to challenge HUD's denial of its fee waiver request. On May 6, 2005, both HUD and CLS filed motions for summary judgment.

The Court's Decision

The "basic purpose" of FOIA is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."² FOIA's fee waiver provision directs agencies to provide documents at a reduced rate or free of charge if "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."³ HUD's implementing regulation reiterates this fee waiver provision.⁴ The district court cited legislative history indicating that the fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters."⁵

The district court looked to *Forest Guardians v. United States Department of the Interior* for the legal test for determining a requester's eligibility for a fee waiver. In *Forest Guardians*, the Tenth Circuit broke down the statutory language into three basic eligibility considerations: (1) whether the subject matter of the request concerns "operations or activities" of the government; (2) whether the requested information is likely to contribute to "public understanding" of those operations or activities; and (3) whether the information is likely to contribute "significantly" to public understanding.⁶ CLS and HUD agreed that CLS's request satisfied the first requirement, so the court's decision focused on factors two and three.

HUD claimed that the information CLS requested would not contribute to public understanding because the target audience was too small and CLS had failed to describe "concrete measures" for disseminating the information. The court rejected both of HUD's claims on this point.

First, CLS argued that although the group's work is unlikely to reach a very general audience, a large segment of Philadelphia's low- and moderate-income families would be interested in the information requested under FOIA. The court found that "[g]iven the broad scope of the

*Anthony Ha is an urban studies student at Stanford University and an intern at NHLP.

¹*Community Legal Services, Inc. v. United States Dep't of Hous. and Urban Dev.*, 2005 WL 3481317 (E.D. Pa. Dec. 19, 2005). FOIA is codified at 5 U.S.C. §§ 552 *et seq.* (2005).

²*NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

³5 U.S.C. § 552(a)(4)(A)(iii) (2005).

⁴24 C.F.R. § 15.110(h) (2005).

⁵132 CONG. REC. S14, 270-01 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy).

⁶*Forest Guardians v. United States Dep't of the Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

MTW Program and the changes PHA has already made, CLS's claim appears likely to be correct."⁷

Second, the district court noted that CLS had demonstrated the ability to reach a reasonably broad segment of the interested public, an ability enhanced by the organization's stature in the community.⁸ The court also rejected HUD's claim that CLS's client group was narrow, as CLS's Housing Unit advised and represented approximately 1200 families annually in new cases, and CLS estimated that it was likely to consult with roughly 10% (approximately 7200 individuals) of PHA's tenants and voucher participants over a given period. The court found that CLS's plans—which include “[p]reparing and disseminating leaflets and brochures; [c]ommunicating with members of the news media who are likely to publish; [c]ommunicating with public officials who are interested in the welfare of PHA tenants and Section 8 participants,” as well as giving public housing law trainings and maintaining an informative website—satisfactorily described multiple methods of dissemination.

For these reasons, the court concluded that the requested information was likely to contribute to public understanding.

The court concluded that the requested information was likely to contribute to public understanding.

Regarding the related issue of whether the information was likely to contribute significantly to public understanding, the court considered four factors: current availability of information, newness of the information sought, whether the FOIA request is a pretext for discovery, and the organization's ability to synthesize the information. Concerning each of these factors, the court concluded that the information sought by CLS would contribute significantly to public understanding.

⁷The court cited *Carney v. United States Department of Justice*, 19 F.3d 807, 814 (2d Cir. 1994), in which the Second Circuit rejected as “not realistic” the Department of Justice's position that a requester needed to disseminate the information to “a large cross-section of the public.”

⁸The court cited *Forest Guardians*, 416 F.3d 1180 (10th Cir. 2005), in which the Tenth Circuit was satisfied that the requesting nonprofit organization published an online newsletter and intended to establish a website containing the requested information. *Forest Guardians v. United States Dep't of the Interior*. The court also cited *Judicial Watch, Inc. v. United States Department of Justice*, 185 F. Supp. 2d 62 (D.D.C. 2002), where the court found it sufficient that the requesting nonprofit organization named “several mechanisms” for disseminating information, including “allowing reporters to inspect the documents, ‘blast faxing’ press releases, maintaining a website and appearing on radio and television programs.”

Disclosures are more likely to be significant if the general population cannot already access the information.⁹ As noted earlier, CLS said that PHA had failed to provide timely, detailed information about the MTW Program to the public, and HUD made no claim that the information sought was readily available. Thus, the information requested seemed to be currently unavailable to the public.

Information is also more likely to be significant if it is not so outdated as to lose currency or relevance.¹⁰ The court found that although members of the interested public might know about the existence of the MTW Agreement and PHA's MTW Program, the CLS request would still clarify important facts about both, and thus was likely to reveal new information.

As HUD pointed out, an FOIA request is “not to be used as a traditional means of discovery available to a litigant.”¹¹ However, CLS did not have any pending claims relating to the information sought, and the court rejected HUD's argument that CLS's use of the information in advising clients—nearly all of whom could be affected by PHA's MTW programs—suggested a litigious motive. The court said that the wide applicability of the information supported CLS's claim that there was a non-litigious public interest in the information, given that the group's services included counseling. The court also wrote: “Under HUD's position, it would be extremely difficult for any public interest law firm to obtain a fee waiver unless it requested information unrelated to its areas of practice and expertise. This result seems perverse and contrary to the legislative intent to construe the fee waiver liberally in favor of non-commercial requesters.”¹²

HUD also argued that CLS had failed to show how the “extremely complex” information would benefit the public. The court was not convinced that the information—which included reports, financial statements, policy statements, rent default notices, Resident Service and Satisfaction Surveys, annual audits, performance assessments, proposals, lease forms, and correspondence—could be considered “extremely complex,” because “[c]omprehensiveness does not equal complexity.” The court also found that CLS had shown both the intent and the capacity to evaluate and synthesize the information in a way that would benefit the public.

Thus, the court concluded that the requested information would contribute significantly to public understanding.

⁹See, e.g., *Judicial Watch, Inc. v. United States Dep't of Justice*, 185 F. Supp. 2d 62 (D.D.C. 2002); *Ettinger v. Fed. Bureau of Investigation*, 596 F. Supp. 877 (D. Mass. 1984).

¹⁰*Community Legal Services*, 2005 WL 3481317, at *5 (discussing *Forest Guardians*: “The Tenth Circuit found that although the existence of the policy was well-known, the details of the policy in practice were not.”).

¹¹*Id.* at *6 (distinguishing *McClellan Ecological Seepage Situation v. Carucci*, 335 F.2d 1282, 1287 (9th Cir. 1987)).

¹²*Id.*

Conclusion

Advocates requesting information from the government through FOIA who surmount agency-cited exceptions to disclosure often face the additional barrier of a substantial fee request. Nonprofit organizations that serve a large segment of the interested public, demonstrate an ability to disseminate information, and seek information that is currently unavailable, new to the interested public, not a pretext for discovery, and can be synthesized for public benefit, should be able to use the CLS decision to strengthen their claim to an FOIA fee waiver. ■

New Federal Legislation for Disaster Relief

In December 2005, Congress approved two major pieces of legislation that will benefit low-income families with housing needs affected by Hurricanes Katrina, Rita and Wilma. The Department of Defense and Emergency Supplemental Appropriations Act of 2006 (Gulf Supplemental)¹ reallocates previously appropriated funding² to provide vouchers for formerly federally assisted families and those homeless in the areas affected by the hurricanes, increases Community Development Block Grant (CDBG) funds to the affected states, while emphasizing preservation of the existing federally assisted housing and providing additional assistance for low-income families in rural areas.³ A second bill providing for additional low-income housing tax credits (LIHTC) to affected areas, the Gulf Opportunity Zone Act of 2005, was also enacted in December.⁴

¹Pub. L. No. 109-148, 119 Stat. 2680 (2005).

²The vast majority of the funds, \$23.4 billion, is reallocated from funding previously appropriated for FEMA disaster relief. See H.R. Rep. No. 109-359, tit. III, ch. 4 (2005) (conference report).

³To the extent that these funds are designated "an emergency requirement," the funds are not subject to the 1% across-the-board funding cuts for domestic discretionary programs, which were also contained in the Department of Defense appropriations act for FY 2006.

⁴Pub. L. No. 109-135, 119 Stat. 2577 (2005).

The Gulf Supplemental

Vouchers

The Gulf Supplemental provides \$390 million to HUD for voucher assistance for families who, prior to hurricanes Katrina or Rita (Wilma is not included), were homeless or living in housing assisted by the Department of Housing and Urban Development (HUD).⁵ These funds will remain available until September 2007. Providing these families with vouchers will be substantially more advantageous for most than the Katrina Disaster Housing Assistance Program (KDHAP), which was created by HUD under a Federal Emergency Management Agency (FEMA) mission statement to serve these same families. Unlike Gulf Supplemental vouchers, KDHAP assistance was only available for eighteen months, the maximum subsidy was limited to the local HUD-published Fair Market Rent, and the cost of utilities was excluded.⁶ Moreover, there were problems with the portability of KDHAP assistance.

For the families eligible for this new voucher funding, HUD may also waive income eligibility requirements and tenant contributions for up to eighteen months, which means that eligible families could also take advantage of a major benefit provided to KDHAP participants. In providing this additional voucher funding, Congress anticipated that families will return to the devastated areas and that those areas will be rebuilt, by affirming that eligible families receiving assistance "shall be eligible to reoccupy their previous assisted housing, if and when it becomes available."⁷

CDBG Funding

The Gulf Supplemental also reallocates prior FEMA funding to provide \$11.5 billion in CDBG funds "for necessary expenses related to disaster relief, long term recovery, and restoration of infrastructure in the most impacted and distressed areas [including areas affected by Katrina, Rita or Wilma.]"⁸ On January 25, 2006, HUD Secretary Jackson announced that the specific state allocations are as follows: Alabama, \$74 million; Florida, \$83 million; Louisiana, \$6.2 billion; Mississippi, \$5 billion; and Texas,

⁵The HUD-assisted housing includes public housing, Section 8 (including vouchers), Sections 801 (housing for the disabled) or 811 (housing for the elderly) of the Cranston-Gonzalez National Affordable Housing Act, Housing Opportunities for People with AIDS (HOPWA), or housing assisted under the Stewart B. McKinney Homeless Assistance Act. Pub. L. No. 109-148, 119 Stat. 2680, 2779 (2005).

⁶Katrina Disaster Housing Assistance Program (KDHAP) Operating Requirements, PIH 2005-36, at 3, 9 (Dec. 1, 2005). See NHLP, *HUD Releases Details on Disaster Housing Program*, 35 HOUS. L. BULL. 223 (2005).

⁷Pub. L. No. 109-148, 119 Stat. 2680, 2779 (2005).

⁸*Id.*

\$74 million.⁹ The CDBG funds will be administered by entities designated by the governors of each affected state, and each state must submit a plan for HUD approval specifying how the funds will be spent.¹⁰

At least 50% of the new CDBG funds “must benefit primarily persons of low and moderate income unless the Secretary otherwise makes a finding of compelling need.” Each plan must include “the proposed use of all funds, including criteria for eligibility and how the use of these funds will address long-term recovery and restoration of infrastructure”¹¹ Other than the general income targeting requirement, the legislation provides little additional guidance on how and for whom the funds should be spent.¹²

*At least 50% of the new CDBG funds
“must benefit primarily persons of low and
moderate income unless the Secretary
otherwise makes a finding of compelling need.”*

Governor Haley Barbour of Mississippi has proposed to use most of the Mississippi funds for homeowners living outside the floodplain, and therefore not insured by the National Flood Insurance Program, to repair their damaged homes. This proposal to prioritize homeowners, especially those outside the floodplain, has been supported by Donald Powell, Federal Coordinator for Gulf Coast Rebuilding.¹³ However, in a HUD press release, Powell is also quoted as follows

This program allows state leaders—who are closest to the people—to decide exactly how this grant money should be spent. Housing is an extremely important priority for long-term rebuilding of the region and will help ensure the economic vitality of the Gulf. In particular, we hope these funds are used to help meet the tremendous housing needs of people and families along the Gulf Coast.¹⁴

⁹Press Release, No. 06-011, Jackson Announces Distribution of \$11.5 Billion In Disaster Assistance to Five Gulf Coast States Impacted by Hurricanes (Jan. 25, 2006), available at <http://www.hud.gov/news/release.cfm?content=pr06-011.cfm>.

¹⁰Pub. L. No. 109-148, 119 Stat. 2680, 2779-80 (2005).

¹¹*Id.*

¹²The legislation provides that the Secretary of HUD may waive any statute or regulation upon the request of the state “that such waiver is required to facilitate the use of such funds or guarantees, and a finding by the Secretary that such waiver would not be inconsistent with the overall purpose of the statute.” *Id.* at 2780.

¹³Editorial, WASH. POST (Jan. 29, 2006).

¹⁴HUD Press Release, No. 06-011, *supra* note 9.

As of the end of January, Louisiana had not yet announced a plan for the use of its new funds. Plans from each of the affected states ought to recognize the importance and need to provide funding for rental housing that is affordable to the lowest-income families.

Preservation of HUD-Assisted Housing in Disaster Areas

While providing assistance to families affected by hurricanes Katrina and Rita in the Gulf Supplemental, Congress also instructed HUD to “preserve all housing within the area . . . that received project-based assistance.”¹⁵ The Joint Explanatory Statement portion of the conference report added that the obligation to preserve is “to the maximum extent possible considering costs and feasibility.”¹⁶ In addition, Congress instructed HUD to report to the Appropriations Committee by April 1, “on the status of all such housing, including costs associated with any repair or rehabilitation.” Advocates should take full advantage of these important directives in ensuring preservation and replacement of affected HUD-assisted housing in the Gulf region.

Fungibility of Public Housing and Voucher Funds

For PHAs in the disaster areas of Louisiana and Mississippi, HUD may, in calendar year 2006, authorize the combination of public housing operating funds, capital funds and voucher funds. The purpose of the time-limited fungibility authority is to assist families who were displaced by the hurricanes.¹⁷

Rural Housing

The Gulf Supplemental extends additional funds to the Rural Housing Service (RHS)¹⁸ to assist the 2005 hurricane disaster areas by authorizing it to make and guarantee new single-family home loans, restructure existing single-family home loans, make home repair grants, and, for a six-month period, convert deep rental subsidies, allocated to RHS rental developments that have been damaged by the 2005 hurricanes, to vouchers for use by residents of the disaster areas. A brief description of each of these and several other authorities contained in the appropriations follows.

Direct and Guaranteed Single-Family Housing Loans

The appropriations authorizes \$1.469 billion for RHS to make, restructure, and guarantee single-family home

¹⁵Pub. L. No. 109-148, 119 Stat. 2680, 2781 (2005) (§ 902, Administrative Provisions, describes HUD project-based assistance as in note 5, *supra*).

¹⁶H.R. Rep. No. 109-359, tit. I, ch. 9 (2005) (conference report).

¹⁷Pub. L. No. 109-148, 119 Stat. 2680, 2781 (2005) (§ 901, Administrative Provisions).

¹⁸The Rural Housing Service is an agency within the Department of Agriculture. Its programs are administered in the field by Rural Development, a division of the department.

loans under the Section 502 and 504 loan programs.¹⁹ Of that amount, \$175,593,000, is reserved for direct Section 502 loans²⁰ while \$1,293,103,000 is reserved for Section 502(h) guaranteed loans.²¹ The balance of \$34,188,000 is set aside for Section 504 home repair loans.²²

*The Gulf Opportunity Zone Act of 2005
provides a substantial increase in LIHTC
and bond financing to a newly created
Gulf Opportunity Zone.*

Home Repair Grants

A total of \$20 million is appropriated for Section 504 home repair grants for very low-income households whose homes were damaged by the 2005 hurricanes.²³ Significantly, unlike the regular Section 504 grants, which are restricted to households whose head is sixty-two years or older, there are no age restrictions with respect to these grants.

Authority to Transfer Funds and to Reimburse Prior Expenditures

Although the appropriations bill specifically reserves funds for the various programs, it also gives the Secretary of Agriculture authority to transfer funds between accounts.²⁴ In addition, it authorizes the Secretary to use the funds to reimburse accounts that the Secretary used previously for hurricane disaster assistance if the use of the funds is authorized by the appropriations bill.²⁵ In effect, it allows for the reimbursement of national accounts that have been used by RHS to respond to the disasters prior to passage of this appropriations bill.

Conversion of Rental Assistance to Rural Vouchers

For a period of six months from the date of enactment of the appropriations bill, RHS is authorized to convert any rental assistance funds allocated to a property located in the disaster area that was damaged by the hurricanes to a rural rental voucher for use on behalf of persons who resided in the disaster-affected counties at the time of the hurricanes.²⁶

Guaranteed Single-Family Home Loan Program

Because RHS' guaranteed loan authority is restricted for the construction of new homes or the purchase of existing homes, the appropriations bill authorizes RHS, for a six-month period, beginning with the date of enactment, to guarantee loans for the repair or rehabilitation of any single family dwelling and to refinance any RHS-guaranteed single-family home loan.²⁷

Waiver of Rural Area Restrictions

For a six-month period, commencing with the date of enactment, the appropriations bill also authorizes RHS to waive the rural area restrictions applicable to all programs funded through the Rural Development Mission Area.²⁸ In effect, this allows RHS to make or guarantee loans in areas that are not rural. It is not clear why RHS would use this authority other than to assist borrowers who have existing RHS loans that are no longer in rural areas.

FEMA

In the conference report for the Gulf Supplemental, after expressing concern with the lack of guidance on housing assistance, the conferees instruct FEMA to issue, within two weeks of the statute's enactment, "guidance used to determine continued eligibility for housing assistance, ... [including] the extension of assistance if the recipient is unable to afford local housing at the Fair Market Rent level."²⁹ As of the end of January, FEMA had still not issued the required guidance. In addition, the conferees also expressed concern about the Small Business Administration's slow pace of approving disaster loan applications and encouraged the SBA to act more quickly. Again the Committee on Appropriations requested a report on the "specific ways it will expedite the disaster loan approval process, improve information flow to disaster loan applicants, and expand the disaster loan program to assist the widest population possible."³⁰

Gulf Opportunity Zone Act of 2005

On December 21, 2005, the President signed the Gulf Opportunity Zone Act of 2005.³¹ This law provides a substantial increase in LIHTC and bond financing to a newly created Gulf Opportunity Zone, consisting of the portions of the areas of Alabama, Louisiana, and Mississippi devastated by Hurricane Katrina.³² The Act provides for additional annual credit allocations to Louisiana, Mississippi and Alabama of \$18 "times the relevant Gulf opportunity

¹⁹Pub. L. No. 109-148, 119 Stat. 2680, 2746 (2005).

²⁰42 U.S.C.A. §1472 (West 2003).

²¹*Id.* § 1472(h).

²²*Id.* § 1474.

²³Pub. L. No. 109-148, 119 Stat. 2680, 2746 (2005).

²⁴*Id.* at 2749.

²⁵*Id.*

²⁶*Id.*

²⁷*Id.*

²⁸*Id.*

²⁹H.R. Rep. No. 109-359, tit. 1, ch. 4 (conference report).

³⁰*Id.* at tit. 1, ch. 8.

³¹Pub. L. No. 109-135, 119 Stat 2577 (Dec. 21, 2005).

³²The Act defines for each hurricane a Gulf Opportunity Zone and a disaster area. Pub. L. No. 109-135, 119 Stat. 2577, 2578-9 (2005) (to be codified at 26 U.S.C.A. § 1400M).

zone population. The Center on Budget Policy and Priorities estimates that from 2006 to 2008, the law will provide approximately \$57 million in added LIHTC for Louisiana, \$35 million for Mississippi, and \$15 million in Alabama. In addition, for 2006 only, the Act provides for \$3.5 million in LIHTC each for Texas and Florida.³³ Importantly, the Act designates the newly defined Gulf opportunity zone and zones designated as disaster areas due to Rita and Wilma as "difficult development areas."³⁴ In such areas, the eligible basis of a new building and the eligible rehabilitation costs for an existing building may be increased by 30%.³⁵ Thus the tax credits may cover more of the cost of the unit, allowing the tax credits to make the units more affordable.

Unfortunately, the Act requires that the special tax credits must be allocated to developments in the year in which they are given to the state. The regular LIHTC rules allow credits to be carried over into later years under some circumstances.³⁶ The time limit on the use of the LIHTC will place a lot of pressure on states to put the LIHTC into use. The legislation also makes a modification to the income limits for rural jurisdictions in the Gulf opportunity zone, i.e. the Katrina area.³⁷ ■

³³*Id.* at 2579 (to be codified at 26 U.S.C.A. § 1400N(c)(2)).

³⁴*Id.* at (§ 1400N(c)(3)). See also 26 U.S.C.A. § 42(d)(5)(C)(iii)(I) (West, WESTLAW through P.L. 109-169 (excluding P.L. 109-162,109-163) approved 01-11-06).

³⁵26 U.S.C.A. § 42(d)(5)(C)(i) (West, WESTLAW through P.L. 109-169 (excluding P.L. 109-162,109-163) approved 01-11-06).

³⁶*Id.* § 42(h)(3)(C) and (D).

³⁷Pub. L. No. 109-135, 119 Stat 2577, 2578 (Dec. 21, 2005) (to be codified at 26 U.S.C.A. § 1400N(c)(4)).

Save the Dates

Housing Justice Network Meeting October 22-23, 2006

National Housing Training October 21, 2006

Please join us for the next meeting of the Housing Justice Network (HJN) in Washington, D.C. The meeting will bring housing advocates together to discuss and review issues on which HJN working groups have been concentrating, learn about critical housing issues, and formulate new plans.

The HJN meeting will be preceded by a one-day basic federal housing training sponsored by the National Housing Law Project. Low-income housing advocates are invited to both events. Details will be made available over the next several months.

Interested in helping plan the HJN meeting? Contact Gideon Anders at ganders@nhlp.org.

District Court Infers Private Right to Enforce Enhanced Voucher Statute

Late last year in a resounding victory for residents of federally assisted housing, the United States District Court for the Eastern District of New York found congressional intent to create a private right of action to enforce the enhanced voucher provisions of the United States Housing Act, 42 U.S.C. § 1437f(t). The case, *Estevez v. Cosmopolitan Associates LLC*, 2005 WL 3164146 (E.D.N.Y. Nov. 28, 2005), involved a challenge by residents of a Section 8 Moderate Rehabilitation landlord's refusal to accept enhanced vouchers.

In 2003, Defendant Cosmopolitan Associates opted out of its Project-Based Section 8 contract. Plaintiff tenants were issued enhanced vouchers by the New York City Department of Housing Preservation and Development, which Cosmopolitan accepted. In June 2005, Cosmopolitan informed the plaintiffs that it would not offer new enhanced leases and demanded that the tenants pay full contract rents for their units.¹

The tenants filed suit, alleging that Cosmopolitan's actions violated 42 U.S.C. § 1437f(t). The tenants also moved for a preliminary injunction to bar Cosmopolitan from refusing to renew their leases and require it to accept their enhanced vouchers. The district court granted the tenants' motion in its November 2005 decision.²

Enhanced Vouchers

The enhanced voucher provision of the United States Housing Act authorizes the issuance of enhanced vouchers to residents of HUD-assisted housing upon the occurrence of certain "eligibility events," such as a decision of a development owner to opt out of a project-based Section 8 housing assistance payments (HAP) contract. The basic purpose of enhanced vouchers is to prevent involuntary displacement of assisted housing residents.

Enhanced vouchers are largely equivalent to typical tenant-based housing choice vouchers except that the payment standards for these vouchers may be higher (up to the contract rent of the resident's formerly HUD-assisted unit).³ In addition, the statute provides that with an enhanced voucher an "assisted family may elect to remain in the same project in which the family was residing

¹*Estevez v. Cosmopolitan Assocs. LLC*, 2005 WL 3164146, at *2 (E.D.N.Y. Nov. 28, 2005).

²*Id.* at *1. Plaintiffs were represented by Oda C. Friedheim and Judith Goldiner of the Legal Aid Society, New York.

³See generally NHLP, HUD HOUSING PROGRAMS: TENANTS' RIGHTS § 15.4.2.4 (3d ed. 2004).

on the date of the eligibility event for the project”⁴ The plaintiffs in *Estevez* contended that Cosmopolitan’s refusal to renew their leases and accept their enhanced vouchers violated the “elect to remain” provision of the statute.

Cosmopolitan also argued that the plaintiffs had no private right of action to enforce § 1437f(t).

District Court’s Implied Right of Action Analysis

In its consideration of the plaintiffs’ preliminary injunction motion, the district court examined the familiar factors: likelihood of irreparable injury to the plaintiffs if the injunction is not granted and the plaintiffs’ likelihood of success on the merits of their claims. Cosmopolitan effectively conceded that the plaintiffs faced a likelihood of irreparable injury.⁵ Regarding likelihood of success, the district court, examining the text of § 1437f(t) and the legislative history prior to the provision’s enactment in 1999, rejected various arguments raised by Cosmopolitan and concluded that Cosmopolitan’s course of action violated the statute.⁶

However, Cosmopolitan also argued that the plaintiffs had no private right of action to enforce § 1437f(t). The court resolved this issue by applying the four-factors implied right of action test set forth by the Supreme Court in *Cort v. Ash*.⁷ Emphasizing, *inter alia*, that § 1437f(t) contains “specific and enforceable requirements,” that private enforcement was consistent with the statutory

scheme,⁸ and that vouchers are not an area traditionally relegated to state law, the district court “f[ou]nd that Congress intended to create a private right of action under § 1437f(t).”⁹

Conclusion

The *Estevez* decision is an important victory both for the plaintiffs in the case and for residents of HUD-assisted developments throughout the country. The decision is all the more noteworthy for the successful showing regarding private enforceability requirements, which courts have increasingly applied more rigidly in recent years. ■

New York City Enacts Preservation Purchase Law

Resoundingly overriding a mayoral veto by a 44-3 vote, the New York City Council has adopted legislation that requires private owners exiting federal affordable housing programs to provide purchase rights for tenant associations or their designees. Enacted as Local Law 79 after an eighteen-month community campaign, the Tenant Empowerment Act amends the city’s administrative code to give tenants time-limited purchase opportunities when landlords seek market-rate conversion of federally assisted housing.¹ New York City thus joins Illinois² in restricting owner choice as the determining factor in whether subsidized privately owned affordable rental homes will be preserved.

State and Local Right of First Refusal Laws

In the absence of a mandatory and robust federal preservation program, state and local right of first refusal laws, or similar laws, address the threat that owners will choose

⁴42 U.S.C.A. § 1437f(t)(1)(B) (West 2003).

⁵*Estevez* at *3.

⁶*Id.* at *7 (“Cosmopolitan may not refuse to accept plaintiffs’ enhanced vouchers or attempt to evict plaintiffs on grounds of non-payment of the voucher portion of the rent.”).

⁷422 U.S. 66 (1975). The district court restated the four factors as follows:

(1) whether the plaintiff is one of the class for whose “especial” benefit Congress enacted the statute, “that is, does the statute create a federal right in favor of the plaintiff”; (2) whether there exists “any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one”; (3) whether it remains “consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff”; and (4) whether the cause of action is “one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law.”

Estevez at *7 (citing *Cort*, 422 U.S. at 78).

⁸The court also noted that § 1437f(t) does not expressly provide for administrative enforcement. *Id.* at *9.

⁹*Id.* at *9-10.

¹Tenant Empowerment Act, New York, N.Y., Local Law 79 (Aug. 17, 2005), available at http://www.nycouncil.info/pdf_files/bills/law05079.pdf. The Act (formerly Intro. No. 186-A) creates a new Chapter 9, entitled “Right of First Refusal and First Opportunity to Purchase,” in Title 26 (§§ 26-801 to 26-810) of the Administrative Code of the City of New York. Citations to the Act herein will be to these Administrative Code sections.

²See NHLP, *Illinois Establishes Tenant Purchase Option for Properties*

to convert properties to market-rate use when governmentally imposed use restrictions or subsidy contracts expire, thereby eliminating affordable housing.³ For much of the decade beginning in 1988, Congress had adopted mandatory federal preservation programs to preserve affordable developments with mortgages subsidized by the Department of Housing and Urban Development (HUD) by providing additional financial incentives to owners and supporting purchases by nonprofits and tenant organizations.⁴ However, starting in 1996, Congress retreated from this commitment, authorizing owners to prepay mortgages and convert to market-rate use, while cutting funding for preservation.⁵ Although the federal preservation program was never repealed, Congress eliminated preservation funding starting in Fiscal Year 1998, providing only replacement vouchers for tenants.⁶ Federal laws governing properties with project-based Section 8 contracts permit most owners to withdraw from the program when their fixed-term contracts expire.⁷ Similarly, units supported under the Low-Income Housing Tax Credit (LIHTC) program also contain time-limited rent and occupancy restrictions, although most LIHTC units produced after 1989 carry restrictions of at least thirty years.⁸ Now, for all of these federal affordable housing programs, at the end of the assistance contract or the original restricted use period, most owners can convert properties to market-rate operations, absent other restrictions imposed by federal, state, or local laws or agreements.

State or local right of first refusal laws are one such restriction, although they vary widely in scope, requirements and mechanics. The purchase opportunity created by current state or local right of first refusal laws comes in many different forms—from a true “right of first refusal,”

which permits a designated purchaser to acquire title by matching another offer when the owner seeks to sell the property, to a “right to make an offer,” with no obligation on the owner’s part to sell. Several jurisdictions have considered, and Illinois and New York City have now enacted, a tenant or tenant-assignee right to purchase for preservation via a statutory option, triggered by an owner’s proposal to convert to market-rate use, similar to the purchase authority given the state housing agency in Maine to prevent conversions.⁹

The New York City Tenant Empowerment Act

According to the legislative findings, one in ten federally subsidized housing units in New York City has been or is in the process of being removed from the city’s affordable housing stock.¹⁰ In addition, the federal government has eliminated or substantially reduced funding for affordable housing-preservation programs, all at a time when the city is experiencing an extremely strong rental market with accelerating rents. The Act establishes a detailed framework, described below, to create opportunities for the preservation of affordable housing when owners threaten to withdraw.

Assisted Housing Covered by the Act

The Act reaches threatened conversions of “assisted rental housing,”¹¹ generally defined as privately owned multifamily buildings or groups of buildings where a majority of units are subject to federal, state or local income eligibility restrictions with rents regulated or assisted by a public agency pursuant to a contract designed to implement project-based affordability. Thus covered are a variety of federal, state and local affordable housing programs, notably including federal programs such as project-based Section 8 and many of the HUD-subsidized mortgage programs such as Section 236 and 221(d)(3) BMIR, Sections

Terminating Federal Programs, 34 Hous. L. Bull. 129, 150 (2004) (reviewing S.B. 2329, the Federally Assisted Housing Preservation Act, 310 Ill. Comp. Stat. Ann. 60/1 *et seq.* (2005), creating tenant purchase right upon threatened conversion for numerous additional affordable housing programs).

³NHLP, *Rights of First Refusal in Preservation Properties: Worth a Second Look*, 32 Hous. L. Bull. 1, 1 (2002).

⁴E.g., Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRA), Pub. L. No. 101-625, tit. VI, 104 Stat. 4079, 4249 (1990) (codified at 12 U.S.C.A. §§ 4101 *et seq.* (West 2001)).

⁵Pub. L. No. 104-120, § 2(b), 110 Stat. 834 (1996); Pub. L. No. 104-134, § 101(e), tit. II, 110 Stat. 1321 (1996) (paragraph entitled “Annual Contributions for Assisted Housing”); Pub. L. No. 104-204, 110 Stat. 2874 (1996); Pub. L. No. 105-65, 111 Stat. 1343 (1997); Pub. L. No. 105-276, § 219, 112 Stat. 2487 (1998) (authority for prepayments of “eligible low-income housing” upon giving HUD, tenants and local government at least 150 but no more than 270 days’ written notice).

⁶See Pub. L. No. 105-65, 111 Stat. 1343, 1355-56 (1997).

⁷See Section 524 of the Multifamily Assisted Housing Reform and Affordability Act of 1997, as amended, 42 U.S.C.A. § 1437f note (West Supp. 2005) (“Multifamily Housing Assistance”).

⁸26 U.S.C.A. § 42 (West, WESTLAW through P.L. 108-236, approved 6-15-04).

⁹30-A ME. REV. STAT. ANN. §§ 4972, 4973 (West, WESTLAW though end of 2005 session).

¹⁰New York, N.Y., Local Law 79, § 1 (Aug. 17, 2005) (referring to JAMES DEFILIPPIS, COMMUNITY SERVICE SOCIETY, KEEPING THE DOORS OPEN: HUD-SUBSIDIZED HOUSING IN NEW YORK CITY, CSS POLICY BRIEF #13, at 1 (2003), available at: <http://www.cssny.org/pubs/policybrief/policybrief.pdf>).

¹¹Section 26-801(c) defines “assisted rental housing” as “privately-owned multiple dwelling or group of dwelling units managed under the same ownership in which the majority of units are subject to federal, state, or local income eligibility restrictions in which rents for such units are controlled, regulated, or assisted by a government agency in order to make them affordable on a project-based basis.” The section then enumerates specifically included federal, state and local programs, without limitation, such as any program created, administered or supervised by the city under Article II or Article IV of the private housing finance law (excluding those occupied before 1974); any project providing project-based assistance under Section 8 of the United States Housing Act of 1937; and mortgage insurance programs under sections 202, 207, 221, 232, 236, or 811 of the National Housing Act (12 U.S.C. §§ 1701 *et seq.*). Specifically excluded are buildings receiving benefits under Section 421-a of the New York Real Property Tax Law.

202 and 811, and units subsidized under the Low-Income Housing Tax Credit program, in addition to any other federal, state and local programs falling within the broad definition.

Initial Notice of Intent to Convert

The Act's preservation opportunity is triggered by an initial notice from the owner, which could be either a notice of impending conversion¹² or, where a third-party sale is contemplated outside of the Act's framework, a notice of bona fide offer to purchase.¹³ At least twelve months prior to converting assisted housing, an owner must provide notice of that intention to the tenant association or, if no tenant association exists, to each tenant.¹⁴ The notice must include:¹⁵

- the name and address of the owner and its principals;
- the address of the property and applicable affordable housing programs;
- the nature of the proposed conversion action and its anticipated date;
- the law or regulation authorizing the action;
- the total number and type of affected dwelling units;
- the current rent schedule and the anticipated post-conversion rents;
- the prior year's income and expense reports and mortgage loan balance;
- the two most recent inspection reports from HUD's Real Estate Assessment Center, the City or its Department of Housing and Preservation (HPD);
- a statement approved by HPD advising the tenants of the first opportunity to purchase or of the right of first refusal (triggered by an impending sale); and
- other information required by HPD.

Owners who intend to maintain the property as assisted rental housing or to sell to purchasers who intend to do so are exempt from the Act's requirements.¹⁶ In the latter case, the purchaser must inform HPD about how the housing will be retained as affordable.

During the twelve-month notice period for proposed conversions, the owner may not sell or contract to sell the property, but may engage in discussions to do so.¹⁷ During

this period, owners may decide not to proceed with a proposed conversion by withdrawing the notice, subject to any contract rights, but must give notice of withdrawal to the tenants and HPD.¹⁸ After withdrawal, any new effort to convert would require a new notice.

In some situations, notice obligations will be triggered not by an owner's unilateral intention to convert, but instead by an owner's intention to consider a third party's bona fide purchase offer. In such a case, the owner must provide notice to the tenant association and HPD of the offer's key provisions within fifteen days,¹⁹ so that the tenants can exercise their right of first refusal as described below.

The Purchase Right or Right of First Refusal

The tenants' purchase right triggered by either of these notices works as follows:

In order to exercise its purchase rights, the tenant association must notify the owner and HPD of its intention to do so within sixty days of receiving the owner's notice.²⁰ In the case of a threatened conversion, this tenants' notice then triggers an appraisal process, under which HPD convenes an advisory panel to determine an appraised market value for the property within thirty days of the tenant notice.²¹ The panel includes an appraiser selected by the owner and another selected by the tenant association, and a third selected by mutual agreement, by the other two designated appraisers, or by HPD if there is no agreement.²² Each bears its own costs and the cost of the third one is split. HPD must promulgate rules for timely appraisals. The statutory appraisal process may be waived if the owner and tenant association mutually agree upon a price for the property. Unless the owner agrees on a lesser price, the owner must sell the property at the appraised value or the bona fide offer price.²³

After the panel's notice of appraised value is issued, or when the tenants receive notice of the bona fide third-party offer, the tenant association must submit a purchase offer within 120 days.²⁴ HPD may extend these time periods if necessary. Failure to submit an offer by the 120-day deadline constitutes a waiver of the statutory rights, and the owner may proceed unaffected.²⁵

¹⁸*Id.* § 26-802(e).

¹⁹*Id.* § 26-803(a).

²⁰*Id.* § 26-806(a) (right of purchase for proposed conversion); Section 26-805(a) (right of first refusal for proposed sale).

²¹*Id.* § 26-804(a). In the case of a proposed sale, where the tenants have a right of first refusal to match the proposed offering price, no appraisal is needed.

²²*Id.* § 26-804(b).

²³*Id.* §§ 26-805(e), 26-806(d).

²⁴*Id.* § 26-805(b)-(c), 26-806(b). HPD must also make the appraised value publicly available within fifteen days of the panel's determination. *Id.* § 26-804(d).

²⁵*Id.* §§ 26-805(g), 26-806(e).

¹²NEW YORK, N.Y., ADMIN CODE § 26-802 (2005).

¹³*Id.* § 26-803.

¹⁴*Id.* § 26-802(a) and (b).

¹⁵*Id.* § 26-802(b).

¹⁶*Id.* §§ 26-802(d) and 26-803(b).

¹⁷*Id.* § 26-802(c).

Other Requirements

Tenant association. To qualify as a tenant association and exercise statutory purchase rights, an association must represent at least 60% of the occupied units in the property.²⁶

Assignability of purchase rights. In order to permit tenants to partner with other experienced entities with the capacity and access to the financial resources for acquisition and rehabilitation, tenants may assign their statutory rights of first refusal or first opportunity to purchase to a "qualified entity." This can be either a nonprofit or for-profit entity experienced in managing affordable housing that is designated by the tenants of at least 60% of the property's occupied units.²⁷ This qualified entity may then exercise those rights in accordance with the statutory requirements. The tenants' association must provide both the owner and HPD with notice of the assignment within sixty days of receiving the owner's initial notice,²⁸ the same time period for giving notice of its intent to exercise its statutory purchase rights.

Continuing affordability. The Act obligates a purchasing tenant association, including all successors in interest, to maintain the property as affordable, defined as rents within 30% of gross income or the prior rent restrictions.²⁹

Restrictions post-conversion. When a conversion does occur, an owner must allow current tenants to remain in their units for six months from the conversion date or until leases expire, whichever is longer. An owner may relocate a tenant to a comparable unit with comparable rent, if the tenant agrees.

Sanctions. Violations of the Act create liability for a civil penalty of \$5,000 per month per unit (capped at \$100,000 per unit), in addition to any other damages, as well as for any fees and costs incurred in bringing an enforcement action.

Conclusion

The Tenant Empowerment Act creates an important opportunity for increased housing preservation. Local advocates now face the challenge of identifying acquisition and rehabilitation funding sources, identifying appropriate properties, identifying and building the capacity of tenants and other preservation partners, and obtaining the necessary technical assistance for transactions. The City must also defend the law against a constitutional challenge recently filed by owners.³⁰ NHLP will report further developments in future issues of the *Bulletin*. ■

²⁶*Id.* § 29-801(q). If more than one group lays claim to such status, HPD makes a determination as it does for other purposes. *Id.*

²⁷*Id.* §§ 26-809, 26-801(n).

²⁸*Id.* § 26-809(b).

²⁹*Id.* §§ 26-808, 26-801(a).

³⁰*Real Estate Bd. of New York, Inc. v. Council of the City of New York*, No. 114459 (Sup. Ct., filed Oct. 2005) (motion to dismiss complaint pending).

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.

Administrative Law — Agency Discretion; Fair Housing — Affirmative Duty to Further

M&T Mortgage Corp. v. Better Homes Depot, Inc., 2006 WL 47467 (E.D.N.Y. Jan. 9, 2006). In a lengthy decision, a federal district court denied HUD's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim against it, asserted via the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, for failure affirmatively to further fair housing as required under the Fair Housing Act, 42 U.S.C. § 3608(e)(5). The third-party plaintiff homebuyer alleged that HUD was aware of a predatory lending scheme that targeted minority homebuyers, but nonetheless "rubber-stamp[ed]" National Housing Act, 12 U.S.C. §§ 1708-1709, mortgage insurance applications. In denying HUD's motion, the court, *inter alia*, rejected HUD's argument that its mortgage insurance decisions were committed to agency discretion by law and therefore unreviewable.

Eviction — Generally; Fair Housing — Generally; Hurricane Katrina

Bailey v. Lawler-Wood Hous., LLC, 2006 WL 148949 (E.D. La. Jan. 17, 2006). A federal district court denied defendant New Orleans landlord's motion to dismiss plaintiff tenants' class action claims related to their eviction from their homes following Hurricane Katrina. Plaintiffs asserted claims based on wrongful eviction and the Fair Housing Act, 42 U.S.C. § 3604. In concluding, *inter alia*, that Plaintiffs had adequately pled a fair housing discriminatory impact claim, the court noted that Plaintiffs alleged that "defendants' actions had a disproportionate impact on African-Americans."

¹<http://www.westlaw.com>.

²<http://www.lexis.com>.

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

Eviction — One-Strike and Related Policies

Scarborough v. Winn Residential L.L.P., 2006 WL 59518 (D.C. Jan. 12, 2006) (not released). In this case involving the eviction of a Section 8 Moderate Rehabilitation tenant for possession of unlicensed firearms by a guest, the District of Columbia Court of Appeals held that District of Columbia Rental Housing Act provisions, D.C. Code § 42-3505.01(b), requiring landlords to provide tenants thirty days' notice to correct lease violations do not apply to criminal activity. Citing, *inter alia*, *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002), 24 C.F.R. § 5.852, and 42 U.S.C. § 1437f (d)(1)(B)(iii), the court further concluded that public housing authorities are not required "to weigh additional considerations opposing and favoring eviction before pursuing lease termination."

Federal Courts — Private Right of Action; Grievance Hearings; Housing Choice Voucher Program

Fields v. Omaha Hous. Auth., 2006 WL 176629 (D. Neb. Jan. 23, 2006). Denying Defendant public housing authority and official's motion for summary judgment, a federal district court, *inter alia*, allowed Plaintiff Housing Choice Voucher holder and child's 42 U.S.C. § 1983 claims to enforce United States Housing Act, 42 U.S.C. § 1437d(k), provisions regarding grievance hearing requirements to proceed. However, the court granted Defendants' motion as to Plaintiffs' § 1983 claim that Defendants violated their income review policy and 42 U.S.C. § 1437f(o)(5)(B). The court concluded that § 1437f(o)(5)(B) "does not . . . contain any indication that Congress intended it to confer enforceable rights on plaintiffs."

Federal Courts — Ripeness; Public Housing — Eviction

Williams v. Hernandez, 2006 WL 156411 (S.D.N.Y. Jan. 18, 2006). A federal district court dismissed for lack of subject matter jurisdiction a *pro se* plaintiff public housing resident's various federal statutory and constitutional claims against defendant public housing authority officials related to a potential termination of tenancy. Following *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969), the court concluded that because Defendants had only written to Plaintiff regarding a meeting to discuss a possible termination, Plaintiff's claims were not ripe and granted Defendants' motion to dismiss.

Lead-Based Paint

Williams v. Ciboro, 2006 WL 176532 (Ohio Com. Pl. Jan. 13, 2006). Deciding cross-motions for summary judgment in

a lead paint disclosure case, the Court of Common Pleas of Ohio concluded, *inter alia*, that plaintiff minors did not have standing to assert a claim under the Residential Lead-Based Paint Hazard Reduction Act (RLPHRA), 42 U.S.C. §§ 4851 et seq. Citing 42 U.S.C. § 4852d(b)(3), the court ruled that the civil liability provisions of the RLPHRA applied only to purchasers and lessees. ■

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD) and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued in January of 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 Final Rules

71 Fed. Reg. 2,112 (Jan. 12, 2006) Renewal of Expiring Section 8 Project-Based Assistance Contracts

Summary: This final rule governs renewal of Section 8 project-based assistance contracts, except renewal as part of a restructuring plan in the Mark-to-Market program. Currently, contracts are being renewed under the authority of an interim rule that became effective October 11, 1998, and later statutory changes.

Effective Date: February 13, 2006.

¹http://www.access.gpo.gov/su_docs.

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

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

⁴<http://www.rdinit.usda.gov/regis>.

HUD Federal Register Proposed Rule

71 Fed. Reg. 2,126 (Jan. 12, 2006) Renewal of Expiring Section 8 Project-Based Assistance Contracts

Summary: This proposed rule would revise current HUD regulations that govern the renewal of expiring Section 8 project-based assistance contracts. Specifically, the proposed rule would amend the regulations to include tenant protections in the case of a contract that is not renewed, and establish rent levels when an expiring contract is renewed. Certain other changes to these regulations are being made by a final rule, also published in today's Federal Register.

Comments Due Date: March 13, 2006.

HUD Federal Register Notices

71 Fed. Reg. 602 (Jan. 5, 2006) Public Housing Operating Fund Variable Coefficients for Public Housing Operating Fund Project Expense Levels; Correction

Summary: On December 28, 2005, HUD published a notice to provide supplemental information to public housing agencies and members of the public regarding HUD's method of calculating public housing operating subsidy in accordance with the Public Housing Operating Fund Program regulation at 24 CFR Part 990. HUD inadvertently left out appendices A–C from that publication. This notice republishes the December 28, 2005, notice in its entirety and includes the appendices.

Effective Date: January 27, 2006.

71 Fed. Reg. 3,382 (Jan. 20, 2006) Notice of HUD's Fiscal Year 2006 - Notice of Funding Availability Policy Requirements and General Section to the SuperNOFA for HUD's Discretionary Programs

Summary: This notice provides prospective applicants for HUD competitive funding with the opportunity to become familiar with the General Section to HUD's FY 2006 SuperNOFA, in advance of publication of the FY 2006 SuperNOFA. Publication of HUD's annual SuperNOFA is targeted for publication in early 2006. This early publication of the General Section is one of several steps that HUD is taking to improve the funding process for its grantee community.

HUD PIH Notices

Notice PIH-2006-01 (HA) (Jan. 3, 2006) Reinstatement - Notice PIH 2005-2 Requirement for Designation of Public Housing Projects

Summary: This notice reinstates Notice PIH 2005-2 (HA), which expires January 31, 2006, for another year until January 31, 2007.

Expires: January 31, 2007.

Notice PIH 2006-03 (HA) (Jan. 11, 2006) Reduction of Annual Contributions Contract (ACC) Reserves, Rescission of Requirements Under form HUD-52681 for Most Housing Choice Voucher Program Units, and Sanctions for Failure to Submit Required Financial Reports Pursuant to 24 CFR 5.801

Summary: Through this notice, HUD is notifying Public Housing Agencies of the reduction and recapture of any remaining program reserve balances (ACC reserves) previously maintained pursuant to 24 CFR 982.154(b). PIH Notice 2005-01 established that the ACC reserve account would be reduced to an amount not to exceed one week of program reserves. This notice provides that any unused ACC reserves remaining after December 31, 2005, will be reduced to zero. Additionally, this notice provides that any budget authority provided to PHAs in calendar year 2005 that exceeds actual program expenses for the same period must be maintained in a PHA's undesignated fund balance account in accordance with Generally Accepted Accounting Principles.

Expires: January 31, 2007.

Notice PIH 2006-5 (HA) (Jan. 13, 2006) Implementation of the 2006 HUD Appropriations Act (Public Law 109-115) Funding Provisions for the Housing Choice Voucher Program

Summary: This notice implements the Housing Choice Voucher program funding provisions resulting from enactment of the Fiscal Year 2006 HUD Appropriations Act (Public Law 109-115) that was signed into law on November 30, 2005. In this law, Congress continues the 2005 allocation method for calculating and distributing housing assistance payments renewal funds, public housing agency administrative fees, and continues to prohibit the use of renewal funds for over-leasing.

Expires: January 31, 2007.

RHS Federal Register

71 Fed. Reg. (Jan. 27, 2006) Notice for Requests for Proposals for Guaranteed Loans Under the Section 538 Guaranteed Rural Rental Housing Program (GRRHP) for Fiscal Year 2006

Summary: This is a request for proposals for loan guarantees under the Section 538 Guaranteed Rural Rental Housing Program pursuant to 7 CFR 3565.4 for Fiscal Year (FY) 2006 subject to the availability of funding. FY 2006 funding for the Section 538 program is \$99 million.

Effective Date: January 27, 2006. ■

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