Housing Law Bulletin

Published by the National Housing Law Project
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 ISSN 0277 8491

EN BANC 9TH CIRCUIT RULES THAT "ONE-STRIKE" LAW DOES NOT PERMIT EVICTION OF "INNOCENT TENANTS"

On January 24, the 9th Circuit Court of Appeals, sitting *en banc*, upheld a federal district court's preliminary injunction preventing the Oakland (CA) Housing Authority (OHA) from terminating four separate tenancies under the Department of Housing and Urban Development's (HUD) "one-strike" policy, adopted pursuant to authority set out in 42 U.S.C.A. §1437d(l)(6).[1] *Rucker v. Davis,* 237 F.3d.1113, 2001 WL 55,724, (9th Cir. 2001). The court, in a seven-to-four decision that reviewed the law *de novo*, concluded that the "one-strike" statute cannot be interpreted to permit the eviction of "innocent tenants." It reverses an earlier-vacated, split-decision by a panel of the same court which had ruled in favor of the OHA.

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Facts and Procedural History

The case originated when OHA filed eviction actions in state court against four separate tenants under a lease provision, incorporated pursuant to 42 U.S.C.A. § 1437d(1)(6),[2] which requires public housing authorities (PHA's) to include the following in their leases:

> [A]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy. . . .[3]

[1]For background on the case see *Petition for Rehearing En Banc Granted in 9th Circuit Public Housing "One Strike" Case*, 30 HOUS. L. BULL. 118 (Aug. 2000); *Ninth Circuit Panel Upholds "One-Strike" Eviction,* 30 HOUS. L. BULL. 24 (Feb. 2000); and *Housing Authority Enjoined From Evicting Innocent Residents for Violation of "One-Strike" Lease Provisions by Household Members*, 28 119 (July 1998).

[2]Originally codified in 1988 as 42 U.S.C.A. § 1437d(l)(5), amended slightly since then, and redesignated as subsection (l)(6) in 1998 (West Supp. 2000).

[3]42 U.S.C.A. § 1437d(1)(6) (West Supp. 2000).

SECTION 8 HOMEOWNERSHIP PROGRAM TELECONFERENCES SET FOR MAY AND JUNE

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Three of the tenants presented very similar fact patterns. Ms. Rucker, a grandmother, was threatened with eviction because her daughter was found with cocaine three blocks from her public housing residence. Ms. Rucker asserted she regularly searched her daughter's room for evidence of drugs or alcohol and never found anything or witnessed other behavior that would indicate that her daughter was involved with drugs. OHA proceeded against two other tenants because their grandsons, who were members of their household, were caught smoking marijuana in the apartment complex's parking lot. These tenants contended that they had no prior knowledge of any drug involvement by their grandchildren.[4] The fourth tenant, Herman Walker, was an elderly man not capable of caring for himself. His in-home caregiver and two guests were found three times with cocaine in the unit. Mr. Walker fired the caregiver after being issued the eviction notice.[5]

All four tenants asserted that HUD's interpretation of the law was inconsistent with the statute and was therefore unlawful under the Administrative Procedures Act.

All four tenants sought an injunction in federal court to prevent their eviction and enjoining the enforcement of the HUD regulation and the OHA lease provision implementing the "one-strike" law. They asserted that HUD's interpretation of the law was inconsistent with the statute and was therefore unlawful under the Administrative Procedures Act (APA).[6] Alternatively, they asserted that if HUD's interpretation was correct, that the statute was unconstitutional. In addition, Mr. Walker contended that because he was disabled and unable to search his caregiver and guests, the Americans with Disabilities Act (ADA) required that OHA make a reasonable accommodation in his case, which OHA did not make.

After the preliminary injunction hearing, the district court, finding serious issues regarding possible APA and ADA violations, concluded that the tenants' loss of their homes outweighed the delay in eviction proceedings and granted the preliminary injunction for all four tenants. OHA appealed, and a split panel of the 9th Circuit reversed the district court. The tenants, supported by a number of other organizations filing *amicus curiae* briefs, requested an *en banc* review. The court granted the hearing and vacated the panel's decision.

The Decision of the Court

On appeal and rehearing, OHA and HUD argued that the district court based its decision on an erroneous interpretation of the law. They contended that the law and HUD's interpretation thereof as expressed by its regulations, authorizes evictions for any criminal activity that is a threat to health and safety or is drug-related by ". . .any member of the household, a guest, or another person under the tenant's control. . . ."[7] . Moreover they argued that HUD's interpretation of the statute should, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[8] be accorded deference.

Relying on *Chevron*, the court found that its first task was to determine whether Congress, in drafting the legislation, had spoken to the precise question at issue. If it had, then Congress' intent is the law and must be given effect regardless of the agency's interpretation.[9] Given that the question was one of law, it proceeded to review § 1437d(l)(6) *de novo*.[10]

The issue before the court was whether Congress intended for "innocent tenants, " as the majority referred to them— tenants who have not themselves been involved in criminal conduct-–to be evicted for the criminal actions of other household members when they had no knowledge of the actions and no control over those who committed them. The argument centered on the statutory phrase "under the tenant's control" and whether it modifies only "other person," as HUD contended, or the entire preceding phrase, including "other members of the tenant's household and guests," as the tenants contended.

Finding that the statutory text, "viewed in isolation," does not clearly resolve Congress' intent, the court moved to the next step in the statutory construction process. It considered § 1437d(l)(6)'s place in the overall statutory scheme and determined whether it could fit all parts into a harmonious whole.[11] Examining the framework of the public housing program, particularly Congress' effort to protect tenants from grave adversity if evicted through the enactment of provisions prohibiting leases with unreasonable terms and conditions and requiring good cause for eviction, the court concluded that the "one-strike" provisions of the law must be read consistently with those provisions and that "one-strike" evictions could only be pursued if the "one-strike" lease provisions were reasonable and there was good cause to evict.[12]

The court bolstered its view by looking at the policy considerations behind the "one-strike" provision— *i.e.*, to provide a safe and drug-free environment in public housing,

[4] *Rucker v. Davis*, 237 F.3d. 1113, 1117 (9th Cir. 2001).

[5] *Id.*

[6] 5 U.S.C.A. §§ 701-706 (West 1996).

[7] 24 C.F.R. § 966.4(f)(12)(i) (2000).

[8] 467 U.S. 837 (1984).

[9] *Rucker* at 1119.

[10] *Id.* at 1118.

[11] *Id.* at 1120.

[12] *Id.*

Save the Dates!

SECTION 8 HOMEOWNERSHIP TELECONFERENCES

The HUD Section 8 Homeownership Program is gaining popularity across the country as more and more Section 8 participants convert their tenant-based rental assistance to mortgage payment assistance in order to purchase their own homes. The new homeownership program offers a unique opportunity for low and very low-income families to participate in the American dream of homeownership at an affordable price.

In an effort to expand understanding of the Section 8 Homeownership Program and to ensure that viable and successful homeownership programs are adopted by local housing authorities across the country, the National Housing Law Project will conduct two one-and-one-half hour teleconferences about the program beginning in May and June of 2001.

The first teleconference is set for **Tuesday, May 1, 2001** and will provide an overview of the federal regulations and an explanation of how to put together a Section 8 homeownership program. The teleconference will also include a review of several programs across the country which have already been successfully implemented. The teleconference will be moderated by Lynn Martinez, NHLP's staff attorney responsible for administering our Section 8 Homeownership Initiative. Joining her will be the following panelists:

Jay Smith**, Community Builder, U.S. Dept. of Housing & Urban Development**
Mike Flo**, Executive Director, City of Benicia Housing Authority**
Deborah Collins**, Managing Attorney, Legal Services of Northern California**
Paul Dettman**, Executive Director, Burlington Housing Authority (invited but not confirmed).**

The second teleconference, set for **Tuesday, June 5, 2001**, will provide a detailed discussion of financing options and various types of community participation that can effectively promote homeownership opportunities among low-income families. Panelists for this teleconference will be announced at a later date.

Both teleconferences will begin at 10:00 a.m. Pacific Time (1:00 p.m. Eastern).

Who Should Participate?

Wide participation is encouraged. Housing attorneys, advocates, tenant leaders and organizers, housing sponsors, PHA staff, community lenders, first-time homeowner counseling agencies, community development organizations, government loan program staff, nonprofit developers, real estate professionals and others working in the field of housing and community development are invited to join in these unique teleconferences that will be moderated by NHLP.

Cost

There is a $30/telephone line charge for each teleconference. However, there are no limits as to the number of people that may listen in on the same line (you may use a speakerphone). In addition, participants will receive, or be able to download, materials for use during and after the teleconferences. **Persons signing up for both teleconferences at the same time may do so for a discounted total charge of $50.**

Registration

Persons interested in participating in these teleconferences must register with the National Housing Law Project by Monday, April 23, for the first teleconference and Tuesday, May 29, for the second teleconference. All persons who pre-register by these dates will received teleconference materials and dial-in instructions before the teleconference.

A registration form for the teleconferences is printed in the back of this issue of the Bulletin. The registration form is also available from NHLP's Web site nhlp.org. **Please mail the registration to NHLP together with your payment.**

and concluded that those considerations would be advanced only slightly, if at all, by accepting HUD's strict interpretation of the statute:

> Imposing the threat of eviction on an innocent tenant who has already taken all reasonable steps to prevent third-party drug activity could not have a deterrent effect because the tenant would have already done all that tenant could do to prevent the third-party drug activity. Likewise, evicting the innocent tenant will not significantly reduce drug-related criminal activity in public housing, since the tenant has not engaged in any such activity personally or knowingly allowed such activity to occur.[13]

The court was also convinced that HUD's interpretation of the statute would lead to "absurd" results, including the potential eviction of tenants based upon the drug-related activity of their child while that child was visiting relatives across the country or evictions of tenants whose family members or guest had been convicted of a crime years before. These "absurd" results further strengthened the court's resolve that Congress' intent in enacting the statute could not have been to permit the eviction of "innocent" tenants.[14]

The court found further support for its conclusion with respect to Congress' intent in enacting § 1437d(l)(6), in the statute's legislative history. The *Senate Report* accompanying a 1990 amendment to the section states that:

> The committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.[15]

While acknowledging that Congress intended to grant PHAs broad discretion in these eviction matters, the court did not accept HUD's argument that discretion could override the clearly established intent of Congress to not permit the eviction of innocent tenants.[16]

The court further supported its conclusion with respect to Congress' intent not to evict innocent tenants by reading the "one-strike" statute consistently with a civil forfeiture provision amendment enacted as part of the same legislative scheme as the "one-strike" legislation to combat drug abuse in public housing. Under that provision, Congress clarified that the federal government's preexisting authority to seize property included the seizure of public housing units from tenants who violate drug laws. Under the amended forfeiture law, the property interests of persons who had no knowledge of, or consented to, the violation could not be seized. The court concluded that it made no sense to protect innocent tenants from seizure by the federal government and not from eviction by a PHA when the result in both instances is the same.[17] In so doing, the court rejected the HUD argument that Congress' failure to insert a similar exception into the "one-strike" provision of the law evinces Congress' intent to differentiate between the two provisions.[18] The court was "unpersuaded by HUD's negative implication argument" noting that "to say Congress could have drafted the defense more explicitly in § 1437d(l)(6) is not to say it did not do so at all."[19]

The court did not accept HUD's argument that discretion could override the clearly established intent of Congress to not permit the eviction of innocent tenants.

The court also rejected another HUD argument that sought to bolster its interpretation of the "one-strike" law by pointing to a now repealed statutory provision that exempted innocent tenants from a provision that precluded tenants evicted for drug violations from receiving a statutory admissions preference for a three-year period. According to HUD, such an exemption was unnecessary if innocent tenants could not be evicted in the first place. While expressing a reluctance to harmonize a repealed provision of the law, the court found that the law was not inconsistent with the overall statutory scheme in effect at the time in that it provided a means by which innocent children of evicted households could return to public housing upon reaching adulthood.[20]

Finally, the court proffered that HUD's interpretation of the statute could create Due Process Clause problems: "we believe HUD's interpretation of § 1437d(l)(6), which would permit the deprivation of a tenant's property interest when the property was not used in the commission of a crime and when the tenant did not know of the illegal activity, would raise serious due process concerns."[21]

[13] *Id* at 1121.

[14] *Id*., at 1125.

[15] *Id*. (quoting S. Rep. No. 101-316, at 179 (1990) *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941.)

[16] *Rucker* at 1121.

[17] *Id*. at 1122.

[18] *Id*.

[19] *Id*.

[20] *Id*. at 1122-3.

[21] *Id*. at 1125.

The court, however, concluded that, under the doctrine of constitutional avoidance, which suggests that a court should not unnecessarily address constitutional issues, it need not address the potential Due Process claims. Since the majority concluded that its interpretation of §1437d(l))6) is not "plainly contrary to the intent of Congress"[22] and the interpretation obviates the Constitution problem, the court made no ruling on the Due Process claims.

Having concluded that HUD's regulations were invalid because they were inconsistent with the statute, the court also found the OHA lease provision to be unreasonable, as it represented the embodiment of an erroneous, broad interpretation of the statute. Accordingly, it upheld the district court's issuance of a preliminary injunction against eviction of innocent tenants and remanded the case to the district court.

It is important to note that the majority opinion expressly permits OHA to proceed with evictions of tenants who themselves have committed an offense or knew or should have known of the offense.[23] And it reenforces OHA's ability to pursue evictions in cases where the drug-related activity occurs within the apartment, stating that a "rebuttable presumption" arises that a tenant controls what occurs in his or her apartment.[24]

The ADA Claim

With respect to Mr. Walker's ADA claim, the court concluded that his case was replete with unresolved factual determinations with respect to his ability to search his caregiver, whether the guests found in the apartment were his or that of his caregiver, and whether there was a reasonable accommodation that the OHA could grant him. The district court having found that Mr. Walker raised substantial issues under the ADA, the court of appeals was satisfied that the district court had not abused its discretion in issuing the preliminary injunction and declined to reverse the decision.[25]

Dissent

There was a strong dissent in the case, the vigor of which is indicated in part by the dissent's re-designation of the tenants in question as "ignorant," rather than "innocent."[26] The dissent first asserted that the plain language of the statute is clear and that it permits the eviction of innocent tenants, notwithstanding the majority's contention that such an interpretation would lead to "absurd results." The dissent contended that the statute "per se" placed tenants, household members and guest under the tenants' control and therefore authorized evictions for acts of anyone within those categories. Only with respect to other persons is the "under control" modifier significant and necessary to establish vicarious liability. Thus, it concluded that HUD's regulations are consistent with the statute and should be accorded appropriate deference. The dissent also rejected the majority's "absurd results" argument because the individual plaintiffs did not present facts to support such results and courts should not rely on hypothetical situations to invalidate a statute.[27]

The dissent found support for its position in the two statutory provisions that the majority also relied on to support its position. Contrary to the majority, it claimed that the exception allowing innocent tenants to be admitted to public housing before the expiration of the three-year exclusionary period supported the conclusion that Congress intended to allow for the eviction of ignorant tenants. It contended that the exception was unnecessary if Congress did not intend innocent tenants to be evicted in the first place. With respect to the second statutory provision, it argued that canons of statutory construction dictate that the inclusion of specific exclusionary language in the forfeiture statute and not in the eviction statute mandates a finding that Congress intended to treat innocent persons differently under the two provisions.[28]

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As to the legislative history, the dissent found the one quote from the *1990 Senate Report* relied on by the majority to be inconclusive. Focusing on the discretion granted to the PHAs by the quote's "humane judgment" language, the dissent argued that this language was consistent with an overall statutory scheme to give PHAs great discretion in exercising judgment regarding evictions, which included the ability to evict innocent tenants.[29] The dissent further countered the "absurd results" argument by suggesting that Congress could well have intended for HUD to have the ability to evict anyone who was associated with drug activity in any way in order to overcome the prevalence of drugs in public housing units.

[22]*Id*. at 1125-6 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994)).

[23]*Id.* at 1126-7.

[24]*Id.* at 1127.

[25]*Id.* at 1127-8.

[26]*Id.* at 1128. The dissent's characterization notwithstanding, this article will continue to refer to the residents as innocent tenants.

[27]*Id.* at 1130-1.

[28]*Id.* at 1131-3.

[29]*Id.* at 1133.

Finally, the dissent found no constitutional problem with the eviction of innocent tenants, and insinuated that the majority believed the statute to be unconstitutional, but avoided stating their belief through their ruling. Because public housing is a special benefit granted by the government, the dissent contended that the government could place very strict limits and conditions on the recipients of the benefit, "so long as this condition is relevant to the government's underlying interest as a landlord."[31]

In sum, the dissent acknowledged that some unfairness might result from the "one-strike" policy, but believed that Congress gave the PHAs the discretion to deal appropriately with these situations. Finding the statute to be clear on its face, its legislative history to be inconclusive, and its constitutionality not a barrier, the dissent would have lifted the injunction.[32]

The Rucker *decision is the first appellate decision to carefully review and analyze HUD's "one-strike" policy and hold it inconsistent with the authorizing statute.*

Conclusion

The *Rucker* decision is the first appellate decision to carefully review and analyze HUD's "one-strike" policy and hold it inconsistent with the authorizing statute. It asserts that it has invalidated the HUD regulations, albeit not in a very clear manner.[33] Moreover, it is not clear whether HUD will acquiesce in the court's decision beyond the 9th Circuit Court's jurisdiction. It is possible, indeed likely, that HUD will seek Supreme Court review of the decision. In the meantime, it should encourage more courts to reject HUD's policy of promoting evictions of entire households when a single member of a household has engaged in criminal or drug-related activity without the knowledge and outside the control of other household members and without regard to how remote in time or distance. ■

[30] *Id.* at 1139-40.

[31] *Id.* at 1141.

[32] *Id* at 1142. Regarding Mr. Walker, the dissent contended that the OHA had accommodated him, implied that he was perhaps less of a victim than the majority recitation of the facts portrayed him, and suggested that his ADA claim should be rejected.

[33] *Id.* at 1126.

HUD ISSUES ADDITIONAL GUIDANCE FOR SECOND YEAR PHA PLANS

The Department of Housing and Urban Development (HUD) issued a notice entitled *Instructions for Submitting Second Public Housing Agency (PHA) Plans for PHAs with Fiscal Years beginning on July 1, 2001 and Capital Performance and Evaluation Reporting Requirements for January and April 2001 PHAs* on January 19, 2001.[1] HUD also extended the time for PHA compliance with the deconcentration regulations.[2]

The HUD notice covers instructions for a variety of topics relating to the PHA Plan including, but not limited to:

- the deconcentration of poverty and income-mixing in public housing;
- Section 8 project-based vouchers;
- Resident Advisory Boards (RABs);
- the consequences of the failure of Section 8-only agencies to submit an approvable PHA Plan.

Deconcentration of Poverty and Income-Mixing in Public Housing

HUD amended the deconcentration regulations that were previously published in final form on December 22, 2000 to make the regulation applicable to PHAs with fiscal years beginning October 1, 2001 and thereafter.[3] The rule previously was applicable to PHAs with fiscal years beginning July 1, 2001. The deconcentration rule makes it clear that a PHA subject to the deconcentration regulations must amend both its Five Year Plan and Annual Plan.[4]

The notice contains a revision of the PHA Annual Plan Template[5] questions for the implementation of policies

[1] HUD Notice PIH 2001-4 (HA) (Jan. 19, 2001) hereinafter HUD Notice 2001-4. See *Resident Advisory Board and Public Participation in the PHA Plan Adoption Process* 30 HOUS. L. BULL. 173 (Nov/Dec 2000) for a discussion of other HUD notices affecting the second year of the PHA Plan process.

[2] 66 Fed. Reg. 8,897 (Feb. 5, 2001) (*Rule To Deconcentrate Poverty and Promote Integration in Public Housing; Change in Applicability Date of Deconcentration Component of PHA Plan).*

[3] *Id.* at § 903.5.

[4] HUD provides no additional guidance on what changes it anticipates a PHA will make to the Five-Year Plan. The Template for the Five-Year Plan currently provides two objectives under the caption of "Improving community quality of life and economic vitality." The first objectives states that the PHA will implement measures to deconcentrate poverty by bringing higher-income families into lower-income developments and the second objective states that the PHA will promote income-mixing by assuring access for lower-income families into higher-income developments. PHAs with developments subject to the deconcentration regulations will have to check the appropriate box and address this issue in the public hearings and with the RAB. *See* PHA Plans Template, (HUD 50075) (expires 03/31/2002) (hereinafter "Template")

[5] *Id.* The questions on deconcentration that are now in the Template will be replaced by the new questions.

relating to deconcentration of poverty and income-mixing in public housing. PHAs with a fiscal year of October 1, 2001 and beyond must comply with the new deconcentration regulations[6] and answer the new questions. The questions are consistent with many others in the PHA Plan Template in that they most likely will be meaningless or confusing to someone who is not familiar with the program or who does not have a full understanding of the regulations and statute. RAB members, tenants and other program participants will need training, advice or a thorough background in their knowledge of HUD rules to understand a PHA's response to the questions and the importance of the answers.

The following attempts to place each question and response in the context of the new regulation. The first question is:

Does the PHA have any general occupancy (family) public housing developments covered by the deconcentration rule? If no, this section is complete. If yes, continue to the next question.[7]

To answer this question, a PHA must review the deconcentration regulation and determine if it is exempt from the regulation or whether development(s)[8] that it manages are exempt. Approximately half of the PHAs nationwide have no general occupancy (family) public housing developments that are covered by the deconcentration rule. The exempt developments include:

- developments operated by a PHA with fewer than 100 public housing units overall;
- developments which house only elderly persons or persons with disabilities or both;
- developments operated by a PHA that operates only one general occupancy family public housing development;
- developments approved for demolition or for conversion to tenant-based assistance; and
- certain developments operated in accordance with a HUD-approved, mixed-finance plan using public housing funds (including HOPE VI) which were awarded before January 22, 2001.[9]

All general occupancy family developments that do not fit into one of the above categories are considered a "covered development."[10] If all of the PHA's general occupancy (family) public housing developments are exempt, then the PHA will check the *no* box; otherwise it must check *yes* and continue with the next question, which reads as follows:

Do any of these covered developments have average incomes above or below 85 percent to115 percent of the average incomes of all such developments? If no, this section is complete.[11]

To answer this question, a PHA must determine the average income of the families residing in all "covered developments" and the average income of each covered development.[12] The PHA must then determine whether each covered development falls within the "Established Income Range" (EIR) which is 85 to 115 percent of the PHA–wide average income.[13] If the development falls within the EIR, the PHA may answer the question in the negative and is also not required to take any additional action to promote deconcentration of income.[14] If the development is a mixed-finance development, the PHA includes in the calculations the incomes of only the public housing residents.[15]

If the PHA answers the above question with a *yes*, the following section of the Template is very important with respect to the implementation of deconcentration policies and should be carefully reviewed by advocates. This section deals with those developments that fall outside the EIR, either above or below. Each of those developments must be listed and an explanation must be provided as to why the development is not subject to the PHA's deconcentration policy. Alternatively, the PHA must list the deconcentration policy adopted by the PHA that applies to the particular development. Unfortunately for those developments for which the PHA provides an explanation, there does not appear to be much room on the Template to encourage the PHA to provide an intelligible response. As noted in a prior *Bulletin* article, the explanation may include the fact that deconcentration is achieved at the development because of its geographic location or that the PHA is taking steps to achieve deconcentration, such as seeking to increase the income of current residents.[16]

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[6]65 Fed. Reg. 81,213 (Dec. 2000) amended 66 Fed. Reg. 8,897 (Feb. 5, 2001). HUD issued Notice 2001-4 before the February 5, 2001 amendment so the notice makes an erroneous reference to the fact that the deconcentration regulations are applicable to PHAs with fiscal years July 1, 2001 and beyond. For a discussion of the deconcentration regulations *see Deconcentration Final Regulations Are Published*, 31 HOUS. L. BULL. 10 (Jan. 2001).

[7]HUD Notice 2001-4 at pg. 2.

[8]A public housing development includes units or buildings with the same project number or units or buildings that are on contiguous sites. *Id* at pg. 4.

[9]"HUD . . . is not granting a blanket exemption for all mixed finance or HOPE VI developments." 65 Fed. Reg. 81,214, 81,220 (Dec. 22, 2000) (right column). A PHA must submit a certification as part of the PHA Plan that an exemption is necessary to honor an existing contract or to be consistent with a mixed-finance plan. The mixed-finance plan must include provisions regarding the incomes of the public housing residents to be admitted and must have been developed in consultation with the tenants and other interested persons. *Id*. at 81,223, § 903.2(b)(2)(v). Local advocacy will be important to ensure that this provision is used to exempt only selected mixed-finance developments funded prior to January 22, 2001.

[10]65 Fed. Reg. 81,213, 81,222 (Dec. 22, 2000) (§ 903.2(b)(1)).

[11]HUD Notice PIH 2001-4 (HA) at pg. 2.

[12]65 Fed. Reg. 81,213, 81,222 (Dec. 22, 2000) (§ 903.2(c)).

[13]*Id*. at § 903.2(c)(1)(iii).

[14]*Id*. at § 903.2(c)(2)(i).

[15]HUD Notice 2001-4 at pg. 4.

[16]*Deconcentration Final Regulations Are Published*, 31 HOUS. L. BULL. 10 (Jan. 2001)

The important thing for advocates to remember in reviewing any explanation or justification for a development outside the EIR is that it must be consistent with the goals of deconcentration and income-mixing, local goals and the strategies contained in the PHA Annual Plan. Thus, the explanation must show that the development is bringing higher-income families into lower-income developments or vice versa. In addition, the plan for the development must be consistent with the goals and strategies of the PHA which include promoting self-sufficiency and equal opportunity and affirmatively furthering fair housing.[17] The explanation should also be consistent with the PHA's strategies with respect to its obligation to target available assistance to families at or below 30 percent of Area Media Income (AMI).[18]

PHAs with developments outside EIR and for which the PHA has provided no acceptable explanation or justification are required to adopt a deconcentration policy.

Advocates should pay special attention to mixed-finance developments if they are outside the range. If the income of the families in the public housing units of the mixed-finance development is above the EIR, the PHA should take steps to attract the lowest-income families by preferring such families and by skipping over higher-income families to admit them. Any justification or explanation that would allow the PHA to ignore such practices should be closely reviewed and possibly challenged because not only are the public housing units above the EIR but also non-public housing units in the development are providing an even greater income mix. Moreover, most mixed-finance developments are HOPE VI developments, and thus have a community and supportive services component including:

- adult education;
- job readiness;
- employment training;
- life skills training;
- substance abuse treatment and counseling;
- domestic violence prevention;
- child care services; and
- transportation for job related purposes.[19]

These services must primarily benefit former residents of the HOPE VI site, but may also assist new admittees.

If the income of the public housing residents in a mixed-finance development is below the EIR, PHAs should be urged to justify or explain that the development should not be subject to the PHA's standard deconcentration policy. The PHA should prefer the lowest-income families for public housing units at a mixed finance development. The PHA's explanation would be for reasons similar to those made above. It could explain that the non-public housing units in the mixed-finance development provide the decon-centration.[20] Second, the lowest-income families will benefit most from the community and supportive services component of a HOPE VI development and hence should be preferred.

PHAs with developments outside EIR and for which the PHA has provided no acceptable explanation or justification are required to adopt a deconcentration policy. If the PHA has a deconcentration policy that policy must be a part of its admission policy. The admission policy should be contained in the PHAs Admission and Continued Occupancy Plan (ACOP) which is a supporting document to the PHA Plan and must be made available to the public and the RAB for review and comment.[21] The HUD notice explains how PHAs calculate average family income and account for various unit sizes.[22]

Section 8 Project-Based Vouchers

In the fall of 2000, Congress amended the existing law to make it easier for PHAs to "project-base" up to 20 percent of their vouchers.[23] PHAs that intend to use the project-based voucher program must include in their Annual Plan certain information. The PHA must attach to the Template a statement indicating the projected number of units, the proposed general location of such units and a statement of how such action is consistent with their plan. HUD suggests that a reason that a PHA may decide to "project-base" vouchers is because "the supply of units for tenant-based assistance is very limited and project-basing in certain strategic locations is needed to assure the availability of units for a period of

[17]The PHAs goals are found in the Template in the Five-Year Plan and the PHAs strategies are found in the Template for both the Five-Year and Annual Plan. *See* Template, pgs. 1-3 and 7-9.

[18]The PHA may have determined to exceed the federal targeting for families at or below 30 percent of AMI or employ admission preferences aimed at families with economic hardships.

[19]65 Fed. Reg. 9,599, 9,605-6 (Feb. 24, 2000) (Funding Availability for the HOPE VI Program, ¶ IVC(2)(d)(CSS Programs and Activities)).

[20]This justification is similar to a justification based upon the "developments' size, location, and/or configuration [that] promote deconcentration, such as scattered site or small developments." 65 Fed. Reg. 81,213, 81,233 (Dec. 22, 2000) (§ 903.2(c)(1)(iv)(C)).

[21]Template List of Supporting Documents Available for Review, Template at pg. 3; *see also* 24 C.F.R. §§ 903.17(b)(1) and 903.23(d) (2000).

[22]For example a two-bedroom unit is weighted 1.0 and any smaller unit is less, down to a .70 for a zero-bedroom unit and up to 1.82 for a six-or-more bedroom unit. *See also* 65 Fed. Reg. 81,213, 81,223 (Dec. 22, 2000) (§ 903.2(c)(1)(ii)).

[23]Pub. L. 106-377 (Oct. 27, 2000) *Fiscal Year 2001 VA-HUD Appropriations Act*, Section 232 amending 42 U.S.C. § 1437f(o)(13). For a discussion of the statue *see Congress Passes Major Revisions to the Project-Based Voucher Statute* 30 HOUS L. BULL 186 (Nov/Dec. 2000) revised and updated Sard, Barbara, *Revisions of the Project-Based Voucher Statute* available *at* cbpp.org.

years."[24] There may be other reasons beyond the one suggested by HUD. For example, project basing may be necessary in an area near employment to assist with tenant self-sufficiency. It may also serve as a means to locate affordable housing in gentrifying neighborhoods that may not be as accepting of such housing in the future.

A PHA must now include as part of the Annual Plan a list of the members of the RAB. PHAs are urged to provide an early announcement of the RAB members so as to ensure full participation in the plan process.

The HUD notice explains that the general locations that must be specified in the plan refer "to eligible census tracts or smaller areas within eligible census tracts that will still result in a reasonable choice of buildings or projects to be provided project-based assistance when the PHA solicits applications."[25] Any plan to "project-base" vouchers must also be consistent with the PHA's obligations of nondiscrimination, to affirmatively further fair housing, the goal of deconcentration and expanding housing and economic opportunities.[26] Until final regulations are published for the project-based vouchers, HUD will "require[] that all new project-based assistance agreements or HAP contracts be for units in census tracts with poverty rates of less than 20 percent." [27] The poverty rate in a particular census tract can be obtained from HUD's "Picture of Subsidized Households 1998" *at* huduser.org/datasets/assthsg/statedata98. The rate is set out under the column titled "PV". You can find the census tract for any known address *at* census.gov/main/www/access.html. Click on "Censtats", and then on "Census Tract Street Locator." However, the notice specifically provides that HUD may approve an exception to the 20 percent rule.[28]

For PHAs with fiscal years beginning July 1, 2001 and thereafter, a statement may be included regarding "project-basing" vouchers in their ordinary plan process. For PHAs with January or April fiscal years, they must modify or amend their plans. In this latter situation, notice and comment for the RAB and public may be necessary depending upon how the PHA has defined a significant amendment or change to the plan.[29]

Resident Advisory Board (RAB)

A PHA must now include as part of the Annual Plan a list of the members of the RAB. PHAs are urged to provide an early announcement of the RAB members so as to ensure full participation in the plan process. At a minimum, the list of RAB members must be made available to the public and to PHA program participants at the time of the announcement of the public hearing.[30] The announcement of the public hearing must be made 45 days prior to the hearing.

The notice again encourages PHAs to meet with RABs during the process of PHA Plan development and where substantial issues have been raised at the public hearing.[31] The purpose of the meetings is "to ensure that careful consideration is given to recommendations from the RAB."[32] In a well planned situation, the public hearings should not be scheduled immediately before the PHA Plan is due to be submitted to HUD. HUD anticipates that the public hearings will be set sufficiently in advance of the date that the PHA Plan is due at HUD so as to allow the PHA to incorporate RAB comments and public comments and the RABs comments on the public comments.[33]

In what appears to be a change from prior policy, if a RAB submits written comments the PHA "is required to include copies of the recommendations" as an attachment to the plan.[34]

Consequences of an Agency's Failure to Submit an Approvable PHA Plan

HUD previously stated that it will impose sanctions on PHAs that fail to submit approvable plans. The listed sanctions included the loss of Capital Funds and Public Housing Drug Elimination Program (PHDEP) grants.[35] The new notice now also states that for Section 8- only PHAs, HUD may reduce the administrative fee for the PHA or exclude the PHA from applying for incremental vouchers. ■

[24]66 Fed. Reg. 3,605, 3,608 (Jan. 16, 2001).

[25]HUD Notice 2001-4 at pg. 5.

[26]66 Fed. Reg. 3,608 (Jan.16, 2001).

[27]*Id*. HUD nationwide data shows that currently the neighborhood poverty rate for census tracts in which Section 8 vouchers and certificates are used is 20 percent. *See* huduser.org/datasets/assthsg/picqwik.html. If this figure represents the "average" poverty rate for communities where vouchers are used, then it appears that one-half of the jurisdictions in which vouchers are currently used will be ineligible for project-based vouchers.

[28]66 Fed. Reg. 3,608 (Jan.16, 2001).

[29]24 C.F.R. § 903.21 (2000)

[30]HUD Notice 2001-4 at pg. 8.

[31]*See also* HUD Notice PIH 2000-36 (HA) (*Transmittal of Guidance on the Requirement for Appointment and Role of Resident Advisory Boards in the Development of Public Housing Agency Plans*) (Aug. 21, 2000).

[32]HUD Notice 2001-4 at pg. 9.

[33]See *Public and Assisted Housing Reforms for the 21st Century Chapter IV*, Section A at pgs. 15 and 21.

[34]Compare HUD Notice 2001-4 with Template at pg. 38 which provides a PHA with the *option* to attach the RAB comment or summarize them. Because the Template has not been changed to conform with the Notice, PHAs may not be aware of the new requirement.

[35]HUD Notice PIH 2000-43 (Sept. 18, 2000), *PHA Plan Guidance; Streamlining of Small PHA Plans*; etc. at pgs. 14-15.

PHAS CHALLENGED BY IMPLEMENTATION OF SECTION 8 WELFARE-TO-WORK VOUCHERS

The Clinton Administration's mission of redefining the existing welfare assistance program and promoting working families resulted in substantial changes to both federal welfare and housing laws. Leading the campaign was the conversion, in 1996, of the seven-decade-old welfare system known as Aid to Families with Dependent Children (AFDC), to the new Temporary Assistance for Needy Families (TANF) program.[1] Under TANF, most families receiving welfare assistance are now required to make a transition to employment within a certain period of time.[2] In addition, a family may only receive welfare benefits for a maximum of five years (or less if a state decides to adopt shorter time limits) throughout the lifetime of any adult living within the family unit.[3] As a result, many parents receiving welfare are currently searching for meaningful employment options which will provide a high enough wage to provide for necessities (including housing and food) for their families.[4]

To facilitate the previous administration's move toward ending welfare assistance and promoting work, existing federal housing law was also amended to expand opportunities for families who were moving toward, or engaging in, employment. These amendments were designed to create a variety of incentives promoting work among tenants receiving federal rent assistance, including, among other things, the ability to utilize an earned-income disregard to maintain lower rents for a period of time after beginning employment.[5] Other opportunities include increased family self-sufficiency programs for public housing and Section 8 voucher tenants and the allowance of discretionary admission preferences for working families in several federally-subsidized housing programs.[6]

In addition, the Department of Housing and Urban Development (HUD) implemented the statutory merger of the Section 8 tenant-based voucher and certificate programs into one universal program called the *Section 8 Housing Choice Voucher* program in 1998.[7] The consolidation of the tenant-based assistance programs sought to provide more options to the Section 8 tenant, including the tenant's choice to pay a higher percentage of their income toward housing and to freely move to other communities. To promote the continuing welfare reform efforts, a new form of housing assistance under the *Section 8 Housing Choice Voucher* program was also created, designed to be used solely by families engaged in welfare-to-work programs. Known as the *Section 8 Welfare-to-Work Rental Voucher*, the new vouchers were to be provided to approximately 50,000 families nationwide who are receiving (or recently received) assistance and services funded under the TANF program.

This article focuses on the welfare-to-work voucher and whether it is instrumental in promoting movement among welfare families into the workforce. It examines whether these vouchers provide meaningful opportunities for families on welfare to obtain decent and affordable housing or whether families using welfare-to-work vouchers encounter additional obstacles and barriers—beyond those encountered by families utilizing the general Housing Choice voucher—in finding landlords who are willing to rent to Section 8 participants. It also discusses how effective the welfare-to-work vouchers are in assisting families with their employment efforts, addressing whether the vouchers are instrumental in helping TANF-assisted families move to employment-rich areas or whether the vouchers actually limit choice in housing and exclude certain families who are otherwise eligible under the program.

Legislative Background

In Fiscal Year (FY) 1999, Congress appropriated $283 million to fund the *Section 8 Welfare-to-Work Rental Voucher* program, designed to provide tenant-based rental assistance to help eligible families make the transition from welfare to work.[8] Of the $283 million appropriated, at least $32 million was required to be set aside and provided, upon submission of specific applications, to preselected public housing

[1]Congress replaced AFDC with TANF in the *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Pub. L. No. 104-93, 110 Stat. 2105 (Aug. 26, 1996), which amended the *Social Security Act*. 42 U.S.C.A. §601 *et seq*. (West 1994 and 2000 Supp.)

[2]42 U.S.C.A. §§602(a)(1)(A)(ii), 607(e) (2000).

[3]*Id.* §608(a)(7).

[4]For a detailed discussion of the recent changes created by TANF and what can be done by housing providers to assist in the movement toward employment, *see* D. Bryson, *Welfare and Housing: How Can the Housing Assistance Programs Help Welfare Recipients?* (National Housing Law Project, 2000).

[5]For discussion regarding the "earned income disregard" for public housing tenants, see *Final Admission and Occupancy Regulations Issued*, 30 HOUS. L. BULL. 38 (Mar./Apr. 2000). For disregards in other HUD housing programs, including the Section 8 Housing Choice Voucher Program, *see* 66 Fed. Reg. 6,218 (Jan. 19, 2001) (*Final Rule Determining Adjusted Income in HUD Programs Serving Persons with Disabilities; Requiring Mandatory Deductions for Certain Expenses; and Disallowance of Earned Income*).

[6]*See* 42 U.S.C.A. §1437u (West 1994 and 2000 Supp.); 24 C.F.R. Part 984 (2000) (*Family Self-Sufficiency Program*); *Id.* §960.206(b)(2) (*"Working Preferences" in conventional public housing program*); *Id*. at §982.207(b)(2) (*"Working Preferences" in Section 8 Housing Choice Voucher program*); *Id.* at §5.655(c)(2)(i) (*"Working Preferences" in multi-family project-based subsidized housing*). *See also* S. Lynn Martinez and Barbara Sard, *Federal Housing Programs and Working Families*, 34 CLEARINGHOUSE REVIEW 597 (Jan./Feb. 2001).

[7]64 Fed. Reg. 56,894 (Oct. 21, 1999), as amended by 64 Fed. Reg. 59,620 (Nov. 3, 1999) and corrected by 65 Fed. Reg. 16,819 (Mar. 30, 2000.)

[8]*FY 1999 Appropriations Bill* (H.R. 4194), Pub. Law 105-276, 112 Stat. 2461 (Oct. 21, 1998) (*The Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999*).

authorities (PHAs) to use for self-sufficiency and welfare-to-work initiatives in those communities.[9] In addition, Congress permitted HUD to use $2.83 million of the welfare-to-work appropriation "to conduct a detailed evaluation of the effect of providing Section 8 Welfare-to-Work Rental Voucher assistance."[10]

The remaining $248.2 million was made available by HUD to other PHAs, Indian tribes and tribally designated housing entities (TDHEs)[11] through a national competitive funding process. To receive the tenant-based assistance, a PHA was required to assess the conditions in the local community and demonstrate in its application to HUD that welfare-to-work rental assistance was critical for families receiving welfare to successfully obtain or retain employment. In addition, PHAs applying for the funds were required to coordinate their activities with other local welfare-to-work initiatives. This included, but was not limited to, the development of a welfare-to-work housing program in consultation with local, tribal or state TANF agencies, or other entities administering welfare-to-work programs.[12]

In July 1999, HUD publically announced the recipients of the welfare-to-work voucher assistance funds.[13] HUD awarded a total of 50,000 vouchers to 133 local PHAs and tribal entities in 35 states, including several groups of neighboring PHAs which partnered together to file one joint application. Over one-half of the awards—25,637 vouchers—were allocated to seven states: California, Washington, Georgia, New York, Maryland, Massachusetts and New Jersey.[14]

General Program Requirements

Funds received for Welfare-to-Work vouchers (hereinafter *WtW* vouchers) may only be used by PHAs for voucher housing assistance to families and for administration of the *WtW* voucher program. Even though PHAs receive no additional funding in connection with the *WtW* vouchers, they must coordinate the *WtW* tenant-based assistance with other welfare reform and welfare-to-work initiatives. The PHAs must ensure that the rental assistance will be coordinated with all entities administering the local TANF and welfare-to-work programs in the PHA's jurisdiction.[15] The proposed coordination plans must have been set out in the PHAs initial application for *WtW* funding, together with certifications of coordination from the local TANF agencies.

Funds received for Welfare-to-Work vouchers may only be used by PHAs for voucher housing assistance to families and for administration of the Welfare-to-Work voucher program.

The Notice of Funding Availability (NOFA) sets forth the eligibility requirements for families receiving *WtW* vouchers. First, the family cannot already be receiving any type of Section 8 tenant-based assistance. Second, the family must be on the PHA's Section 8 waiting list and determined to be TANF-eligible at the time it is initially selected by the PHA to participate in the *WtW* voucher program. If a closed Section 8 waiting list does not generate enough TANF-eligible families to receive *WtW* vouchers, the PHA must reopen and admit new families to its waiting list to determine whether any new applicant families are eligible for the program.

As defined by the legislation, TANF-eligible families include families that are eligible to receive or are currently receiving assistance and services funded under the TANF program.[16] It also includes families who received TANF assistance and services at some time within the preceding two years of receiving a *WtW* voucher. Finally, the PHA must determine that in order to successfully obtain or retain employment, it is essential for the family to receive *WtW* tenant-based assistance.

With the exception (upon HUD waiver) of mandatory income-targeting requirements, the *WtW* voucher program must be administered in compliance with the general HUD Section 8 Housing Choice Voucher regulations and requirements and in accordance with the local policies set forth in the PHA's Administration Plan.[17]

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[9] *Id.*, *see also* 64 Fed. Reg. 4,496 (Jan. 28, 1999) (*Notice of Funding Availability for the Welfare-to-Work Section 8 Tenant-Based Assistance Program for Fiscal Year 1999*). The designated "set-aside sites" were San Bernardino County, CA; Cleveland, OH; Kansas City, MO; Charlotte, NC; Miami/Dade County, FL; Prince Georges County, MD; New York City, NY; and Anchorage, AK.

[10] 64 Fed. Reg. at 4,496-97 (Jan.28, 1999).

[11] Hereinafter collectively referred to as "PHAs."

[12] Hereinafter referred to generally as "TANF Agencies."

[13] 65 Fed. Reg. 46,724 (July 31, 2000).

[14] Nineteen PHAs throughout California received an aggregate total of 8,950 vouchers, the highest award in any state. PHAs in the state of Washington received 4,165 vouchers; Georgia received 3,150; New York received 2,547 vouchers; and PHAs in Maryland, Massachusetts and New Jersey received 2,319, 2,300 and 2,206 vouchers respectively. For a breakdown of the allocations per state, *see* hud.gov/pressrel/w2wfss/menu.html. *See also Announcement of Funding Awards for the Welfare-to-Work Section 8 Tenant-Based Assistance Program for Fiscal Year 1999*, 65 Fed. Reg. 46,724 (July 31, 2000).

[15] 64 Fed. Reg. at 4,498 (Jan. 28, 1999).

[16] *FY 1999 Appropriations Bill* (H.R. 4194), Pub. Law 105-276, 112 Stat. at 2470 (Oct. 21, 1998) *(The Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999*).

[17] 64 Fed. Reg. at 4,497 (Jan. 28, 1999). The PHA may seek a waiver from HUD requesting approval to disregard the PHA's income-targeting requirement for extremely low-income families in the admission of *WtW* families. 24 C.F.R. §982.201(b)(2)(iii)(2000). Regulations governing the Section 8 tenant-based assistance for the Housing Choice Voucher are set forth at 24 C.F.R. Part 982. For information regarding the PHA administration and the adoption of the PHA Administrative Plan, see 24 C.F.R. §§982.51 *et seq*.

Disbursement of the Section 8 WtW Vouchers

Despite its intent to create meaningful opportunities for families engaged in TANF activities, the overall success of the *WtW* voucher program during the past year was mixed. First, despite the award announcements in mid-1999, the funding disbursements were delayed for several months. Most of the Annual Contributions Contracts (ACCs) between HUD and the PHAs participating in the *WtW* voucher program were not signed until December 1999 or January 2000.[18] By that time, nearly a year had passed since the publication of the FY 1999 *WtW* NOFA and nearly as much time had passed since the development of the coordination efforts with local TANF agencies.

After execution of the ACCs, recipient PHAs were given 12 months to identify eligible families for the program, issue a *WtW* voucher to each family and complete the required leasing documentation to enable the family to move into the unit.[19] This process is commonly referred to as "leasing-up." By August 2000, however, nearly one-third of the PHAs (42 of the 133 PHAs receiving *WtW* vouchers) were identified by Quadel Consulting Corporation (an organization that contracted with HUD to conduct data collection and review of the *WtW* program) as being unable to achieve 100 percent "lease-up" of the vouchers by the end of the year.[20] Although the remaining 91 PHAs were reportedly "on track" for full "lease-up," Quadel Consulting also reported delays incurred by these PHAs with both the initial issuance and "lease-up" of the *WtW* vouchers. Quadel cited a number of impediments causing the delays including the lack of PHA capacity, delays in program implementation and frustration caused by tight housing markets.[21]

Concerned about the mixed progress in the issuance and leasing rates of the *WtW* vouchers, HUD issued a six-month extension for all *WtW* voucher program ACCs in November 2000.[22] It also urged the PHAs to use the increased fair market rents (FMRs) mitigation measures during the six-month extension to improve leasing rates and ensure program success.[23] Under the extension, each PHA must now have all of its *WtW* vouchers leased by June 30, 2001.

Coordination of Local Welfare Reform Efforts

According to the Quadel Consulting Corporation, a small number of delays in implementation were reportedly caused by poor coordination between the PHA and the local TANF agency. Since PHAs applying for the funds were required to coordinate the *WtW* programs with other local welfare-to-work initiatives, including the development of a program in consultation with local or state TANF agencies, prior to submitting their applications to HUD, coordination between the agencies should have already been established and ready to implement upon receipt of the voucher allocations. However, in at least 20 cases, such coordination was either not established or broke down prior to the leasing of the *WtW* vouchers.

For example, the Miami-Dade Housing Authority (MDHA) in Florida confronted coordination difficulties when the local TANF agency was absorbed by the Private Industry Council and underwent massive restructuring.[24] The Los Angeles City Housing Authority (LACHA) also was behind target for full "lease-up" by the end of 2000, reportedly as a result of a lack of PHA capacity and poor coordination with the TANF agency.[25] The failure to implement, in a timely fashion, a Memorandum of Understanding (MOU) between the LACHA and the local TANF agency caused a substantial delay in the PHA's progress in getting the *WtW* vouchers issued to families.[26] To accelerate issuance of the *WtW* vouchers, LACHA now receives approximately $2500 per family from the local TANF agency to help pay for moving expenses, security deposits and housing search assistance for *WtW* families.[27] By December 2000, LACHA had issued all of its *WtW* vouchers but still had only "leased-up" 21 percent of the issued vouchers.[28]

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[18]Telephone conversation with HUD public housing staff, San Francisco regional office (Oct. 4, 2000). The Annual Contributions Contract is a written contract between HUD and a PHA wherein HUD agrees to make payments to the PHA for a specified period of time for housing assistance voucher payments and for the PHA administrative fee. 24 C.F.R. § 982.151 (2000).

[19]Generally, once the family finds an apartment or house to rent with its Section 8 voucher, the PHA must enter into a Housing Assistance Payment (HAP) contract with the owner of the unit, guaranteeing payment of the HUD subsidy to the private landlord. The family and the landlord also enter into an additional lease contract, defining the terms of the family's tenancy. *See* 24 C.F.R. §§982.451 (housing assistance payment contract between HUD and owner) and 982.308 (lease and tenancy between owner and tenant).

[20]Quadel Consulting Corporation, *Welfare-to-Work Leasing Progress Report: PHA Leasing Status - Part Two (Individual Agency Status and Leasing Delays), August 2000* (Nov. 8, 2000).

[21]*Id*.

[22]Correspondence from Harold Lucas, Assistant Secretary for Public and Indian Housing, HUD, to PHA Executive Directors re: *WtW* Voucher Program Extension (Nov. 3, 2000) (on file at NHLP).

[23]In October 2000, HUD implemented its new policy permitting PHAs in certain areas to increase the FMRs to the 50th percentile rent and allowing other PHAs to obtain, upon demonstration to HUD, approval to use 50th percentile FMRs or exception payment standard amounts above 120 percent to achieve higher "lease-up" rates. 65 Fed. Reg. 58,870 (Oct. 2, 2000). *See also* Notice PIH 2000-1 (Jan. 3, 2001) (*Guidance for Implementation of the October 2, 2000 Interim Rule).*

[24]Quadel Consulting Corporation, *Welfare-to-Work Monthly Narrative Report* at 18 (Nov. 13, 2000).

[25]Quadel Consulting Corporation, *Welfare-to-Work Leasing Progress Report: PHA Leasing Status - Part Two (Individual Agency Status and Leasing Delays), August 2000* (Nov. 8, 2000).

[26]Quadel Consulting Corporation, *Welfare-to-Work Monthly Narrative Report* at 5 (Sept. 11, 2000).

[27]Quadel Consulting Corporation, *Welfare-to-Work Monthly Narrative Report* at 4 (Nov. 13, 2000).

[28]Quadel Consulting Corporation, *Welfare-to-Work Leasing Report: All PHAs Reporting to Date for the Month of December 2000* at 1.

Implementing the WtW Program

Significantly, many of the PHAs awarded *WtW* vouchers described the initial delays in the program implementation as barriers toward the goal of 100 percent "lease-up" by the end of December, 2000. For example, the MDHA reported in September 2000 that it had issued 68 percent of its 581 *WtW* vouchers.[29] Despite its promising issuance rate, less than 1 percent of the issued vouchers were under a leasing contract. MDHA reported that a key barrier to its low "lease-up" rate was a lack of outreach and marketing strategy to landlords to persuade them to participate in the Section 8 voucher program. In addition, there was no system in place to help voucher participants search for a Section 8-eligible unit.

These problems were compounded by MDHA's difficulties in achieving the implementation steps of the *WtW* voucher program. The relocation advisor proposed in its HUD *WtW* voucher application had not yet been hired, causing continuous leasing delays.[30] Although more vouchers (88 percent) had been issued by December 2000, only 48 percent of those vouchers had been "leased-up" by eligible families.[31]

Finding Enough Units in Tight Housing Markets

The majority of PHAs faced the same difficulties in leasing *WtW* vouchers that they encounter in the general Section 8 voucher program. Obstacles caused by tight housing markets, including low vacancy rates, voucher saturation in the community or the Section 8 payment standard falling well below the actual market rent of units, was an issue for PHAs in 131 instances.[32] While PHAs are finding creative ways to increase private landlord participation with limited funds, it is clear that HUD must also undertake efforts to promote the Section 8 voucher program and remain consistent with its current focus of providing more vouchers to achieve affordability in housing.

In an effort to overcome these obstacles, PHAs across the country are starting to create a variety of incentive programs for private landlords to participate in the Section 8 rental assistance program, including both the Housing Choice Voucher and the *WtW* Voucher programs. In Alameda, California, the Alameda Housing Authority (AHA) issued all its 100 vouchers by October 2000.[33] However, due to an extremely tight rental market and escalating rents in the San Francisco Bay Area, its "lease-up" rate remained at 11 percent through December, 2000. Thus, in an effort to increase the lease rate of its vouchers, AHA raised its payment standard to 110 percent of the FMRs to be more competitive with the private rental market. In addition, AHA advertises in local newspapers to promote the Section 8 program and targets real estate agents for early identification of potential rental vacancies. Finally, to reward private landlords for participating in the Section 8 program, the AHA also gives each owner or landlord a $50 gift certificate for each new Section 8 lease and Housing Assistance Payment Contract (HAP) executed by the owner or landlord.[34]

While PHAs are finding creative ways to increase private landlord participation with limited funds, it is clear that HUD must also undertake efforts to promote the Section 8 voucher program and remain consistent with its current focus of providing more vouchers to achieve affordability in housing.

Similarly, by November 30, 2000, the Seattle, Washington Housing Authority (SHA) had issued more than one-half of its 700 vouchers but had only "leased-up" 172 of those vouchers. When SHA couldn't find enough subsidized units to support the number of *WtW* vouchers to be issued, it initiated a campaign called *Home for the Holidays* to recruit new landlords for the *WtW* program. Under this initiative, the PHA gives new Section 8 landlords one-half month's rent as a "signing bonus" for each unit rented to a family with a *WtW* voucher.[35] It also provides a $100 finder's fee for referrals that result in new landlords participating in the Section 8 program. By December 2000, the number of families with *WtW* vouchers that had leased a unit had increased to 320.[36]

A negative image of the Section 8 program among landlords in eastern Massachusetts motivated the Massachusetts

[29]Quadel Consulting Corporation, *Welfare-to-Work Monthly Narrative Report* at 15 (Sept. 11, 2000).

[30]*Id.*

[31]Quadel Consulting Corporation, *Welfare-to-Work Leasing Report: All PHAs Reporting to Date for the Month of December 2000* at 1. According to the HUD Web site, MDHA had still not reached 100 percent "lease-up." *See Welfare to Work: Monthly Lease-Up Reports at* hud.gov/pih/programs/ph/wtw (last updated Feb. 13, 2001).

[32]Quadel Consulting Corporation, *Welfare-to-Work Leasing Progress Report: PHA Leasing Status - Part Two (Individual Agency Status and Leasing Delays), August 2000* (Nov. 8, 2000).

[33]Quadel Consulting Corporation, *Welfare-to-Work Monthly Narrative Report* at 3 (Nov. 13, 2000).

[34]Quadel Consulting Corporation, *Welfare-to-Work Leasing Report: All PHAs Reporting to Date for the Month of December 2000* at 1; Quadel Consulting Corporation, *Welfare-to-Work Monthly Narrative Report* at 4 (Dec. 18, 2000). Currently, a PHA may establish a payment standard amount at any level between 90 percent and 110 percent of the HUD published FMR for each unit size. *See generally* 24 C.F.R. §§982.503 *et seq* (2000).

[35]Quadel Consulting Corporation, *Welfare-to-Work Monthly Narrative Report* at 4 (Dec. 18, 2000); Seattle Daily Journal of Commerce, *City Needs Section 8 Housing*, (Dec. 20, 2000) .

[36]Quadel Consulting Corporation, *Welfare-to-Work Leasing Report: All PHAs Reporting to Date for the Month of December 2000* at 1.

Department of Housing & Community Development (MDHCD) to launch an owner incentive program to encourage "lease-up" of its 2000 *WtW* vouchers. Under the incentive program, MDHCD uses its own funds to distribute between $50 and $500 to increase landlord participation in the program. According to MDHCD, these efforts have generated new interest among the region's owners and enabled it to "lease-up" 40 percent of its *WtW* vouchers by the end of last year.[37] Other PHAs across the country are implementing similar landlord incentive programs to increase owner participation in the Section 8 programs.[38]

HUD must begin to promote the Section 8 programs to private landlords on a national level with an aggressive marketing strategy similar to that which HUD has undertaken to advance its homeownership programs.

The barriers described by these PHAs clearly demonstrate the need for an allocation of additional funds from HUD to allow PHAs to focus on marketing and outreach. In addition, HUD must begin to promote the Section 8 tenant-based programs to private landlords on a national level with an aggressive marketing strategy similar to that which HUD has undertaken to advance its homeownership programs. The recent allocation of 50,000 new vouchers to assist families on welfare to move toward employment is commendable. However, it is evident that without enough available housing units and without the participation of the private landlord market, the much-needed housing assistance is worthless and many of the *WtW* vouchers will not be leased by the HUD-extended deadline of June 30, 2001.

Utilizing the WtW Voucher

The *WtW* voucher program is a promising method of providing immediate housing assistance to families engaged in TANF and welfare-to-work activities. Eligible families may jump to the top of the Section 8 voucher waiting list to immediately receive a *WtW* housing voucher. However, families who opt to take a *WtW* voucher instead of waiting for a general Section 8 voucher, may also be faced with burdensome obligations if they wish to remain in the program. In addition to competing with other Section 8 families in voucher-saturated or high-cost rental markets, families with *WtW* vouchers may experience reduced choices about where they can live if they decide to seek housing outside of the originating PHA jurisdiction.

Family Obligations and Eligibility

After receiving a *WtW* voucher, families must comply with any local obligations imposed on families receiving TANF, in addition to the general family obligations set forth under HUD regulations and in the PHA Administrative Plan.[39] Local welfare-to-work requirements may include employment, educational or job training participation and may impose time limits for receiving assistance. Families must be fully briefed on the specifics of any additional welfare-to-work obligations and advised that the failure to meet such obligations may result in the denial of admission into the Section 8 *WtW* program or termination of *WtW* voucher assistance.[40]

For instance, the Atlanta Housing Authority (GA) created a family obligations contract that requires applicants to either find employment or maintain current employment to participate in the program. If a *WtW* voucher-holder loses her job, she must find new employment or enter a job training program within a specified time period or risk losing her voucher.[41] Conversely, in Vallejo, California (which had a "lease-up" rate of only 21 percent by December 2000), *WtW* voucher participants must work; they are not given the option of complying with job training or educational welfare-to-work requirements.[42]

Some PHAs impose additional family obligations under the *WtW* program that may compel families to decline the *WtW* assistance and wait for a regular Section 8 voucher with less demanding obligations. In Michigan, only 38 percent of the 250 *WtW* vouchers received by the Ann Arbor Housing Commission were leased as of December 31, 2000.[43] One of the factors responsible for the slow leasing rates is a "reluctance on the part of eligible families to sign the contract of participation" used by the Ann Arbor Housing Commission.[44] Under that contract, which the Housing Commission modeled after its Family Self-Sufficiency (FSS)

[37]Quadel Consulting Corporation, *Welfare-to-Work Monthly Narrative Report* at 26 (Dec. 18, 2000); Quadel Consulting Corporation, *Welfare-to-Work Leasing Report: All PHAs Reporting to Date for the Month of December 2000* at 1.

[38]In New Jersey, the Perth Amboy Housing Authority uses state TANF funds to pay move-in costs, utilities, and security deposits for *WtW* families. Because Perth Amboy has a tight rental market, the Housing Authority pays the security deposit to the landlord immediately after the unit passes inspection by the Housing Authority to hold the unit for the family. This practice helps simplify the process and keeps landlords in the program. The Housing Authority also immediately processes the housing assistance payment to the landlord in pro-rated amounts as soon as the HAP contract is signed. Quadel Consulting Corporation, *Welfare-to-Work Monthly Narrative Report* at 41 (Dec. 18, 2000).

[39]*See* 24 C.F.R. §982.551 *et seq* (2000).

[40]*Id.* §§982.301(a)(5) and (b)(14).

[41]Quadel Consulting Corporation, *Welfare-to-Work Monthly Narrative Report* at 19 (Dec. 18, 2000).

[42]*Housing Authority of the City of Vallejo/County of Solano Administrative Plan for the Section 8 Housing Choice Voucher Program,* Chpt. 23 at pg. 4; Quadel Consulting Corporation, *Welfare-to-Work Leasing Report: All PHAs Reporting to Date for the Month of December 2000* at 1.

[43]Quadel Consulting Corporation, *Welfare-to-Work Leasing Report: All PHAs Reporting to Date for the Month of December 2000* at 1.

[44]Quadel Consulting Corporation, *Welfare-to-Work Monthly Narrative Report* at 28-29 (Nov. 13, 2000).

Program, single adult households must work 25 hours per week and two-adult households must work a combined 40 hours per week. However, under the Ann Arbor participation contract, work requirements may be offset by enrolling in a training or work program. Unlike the general Section 8 voucher program, however, families unable to achieve and maintain these work requirements will be denied admission into the *WtW* program or, if already receiving a *WtW* voucher, will face termination of the voucher assistance.

In addition, stringent work requirements may cause PHAs to deny welfare-to-work vouchers to families who are otherwise statutorily eligible for the program. For example, since a family's ability to obtain and retain employment is crucial to the continued receipt of the *WtW* voucher in Ann Arbor, the Housing Commission strictly screens "potentially eligible" TANF families to determine if they are "incapable of working."[45] If so determined, the family will be automatically denied assistance in the *WtW* program. However, even if a family is deemed to be capable of meeting the work requirements, some eligible families, as noted above, decline to participate in the *WtW* program because they are apprehensive about the obligations set forth by the PHA.

The administrative policies of PHAs' with *WtW* vouchers must be carefully reviewed by housing advocates to determine whether the *WtW* obligations imposed by the PHA extend beyond those imposed by the local welfare agency. These obligations may include:

- stringent work requirements;
- mandatory job referral;
- program participation compliance; or
- special qualifications of new family members.[46]

Conflicts may arise for families who are eligible for the welfare-to-work program under HUD guidelines (because they are eligible to receive or are currently receiving TANF) but are forced to comply with differing employment or training requirements imposed by the local TANF welfare-to-work programs. If a PHA employs an actual work requirement without considering job training, educational programs, community service or other supplementary work-related activities permitted by TANF and other welfare-to-work programs, it is undermining the intent of the *WtW* voucher program to assist eligible TANF families to move toward successfully obtaining and retaining meaningful employment.

Fair Housing Implications

Local PHAs are mandated by HUD to administer the *WtW* program in compliance with federal, state and local fair housing and civil rights laws.[47] Accordingly, disabled heads of household receiving TANF benefits should, in appropriate circumstances, be provided reasonable accommodations to participate in the *WtW* program. Despite its mandate to comply with fair housing, however, HUD has taken a contrary position. Pursuant to the "guidance" published on the HUD Web site, PHAs are instructed to discriminate against disabled family members in the administration of the *WtW* program. According to HUD, if no adult family member is able to work, the family cannot qualify for a *WtW* voucher because the vouchers may only be used by families in need of "housing assistance in order to obtain or retain *employment*."[48] Thus, HUD rationalizes that a disabled, single parent head-of-household who is unable to work cannot qualify for a *WtW* voucher—even if that family is eligible to receive, or is currently receiving, TANF assistance.[49] However, since the federal *Fair Housing Act* prohibits discrimination on the basis of, among other things, disability and familial status, administration of the *WtW* program without provision for reasonable accommodations for disabled families receiving TANF may violate applicable fair housing laws. HUD should advise PHAs accordingly.

Other program policies may also violate fair housing protections. Under TANF or other welfare-to-work policies, women may be exempted from work requirements during pregnancy and for a period of time after giving birth to a child. Rather than being terminated from the *WtW* program, the local PHA should provide an exemption from its *WtW* work requirements consistent with those provided by the local TANF agency.[50] Similarly, family composition limitations, such as those discussed in footnote 46 above, may violate the rights of protected classes based on familial and marital status as well as raise constitutional due process and equal protection claims.

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[45] *Id.* The fair housing implications of not providing exceptions for disabled families in the *WtW* program are discussed below.

[46] For example, in addition to requiring that wages must be part of the family's income, the Vallejo, California Housing Authority prohibits the addition of any adult "to the initial family composition unless [that adult adds] income to the assisted families (sic) total tenant payment." *Housing Authority of the City of Vallejo/County of Solano Administrative Plan for the Section 8 Housing Choice Voucher Program*, Chpt. 23 at pg. 4.

[47] 24 C.F.R §§5.105(a) and 982.53 (2000).

[48] *See* HUD, *Welfare to Work Vouchers: FAQs (Frequently Asked Questions) for Family Eligibility and Selection at* hud.gov/pih/programs/ph/wtw (last updated May 30, 2000)(emphasis added).

[49] HUD does encourage the PHA, however, to review and modify the criteria used by the PHA to select among the pool of eligible families—"*as long as the changes support the objectives of the program and are reflected in the PHA's administrative plan,* PHAs may implement these changes without seeking HUD approval." *Id.*(emphasis in original).

[50] In its *Frequently Asked Questions*, HUD proposes that a *WtW* voucher family's assistance should not be terminated if the head of a single parent household becomes disabled. Rather, HUD suggests that the PHA switch the family to a regular housing choice voucher as soon as possible. *Id.* However, there is no provision for the continuation of assistance in any other similar circumstance which may arise. For example, if a two-parent family originally qualified for the *WtW* voucher because one parent was disabled and one parent was working, and the second parent becomes disabled, HUD suggests that the family should be terminated from the *WtW* program and not switched to a regular housing choice voucher.

Some states and local governments have also enacted "source of income" anti-discrimination laws making it unlawful to consider income sources in the rental of housing. These anti-discrimination laws may dictate how the PHA structures its *WtW* program and other work-related incentives, including working preferences.[51] For example, as discussed below, a prohibition against allowing families to move to other jurisdictions because they receive a *WtW* voucher based on the receipt of TANF funds, may be discriminatory because of the source of the family's income. Likewise, allowing only families who have earned income from employment to participate in the *WtW* program (instead of permitting families who are participating in all TANF-approved job training or educational programs) may also violate state and local anti-discrimination laws based on source of income.

Portability Problems

PHAs are also administering different programmatic policies with regard to allowing families with *WtW* vouchers to move to other communities. Policies prohibiting a *WtW* family from moving to another PHA jurisdiction denies the family an equal opportunity to locate additional housing units and frustrates the purpose of the *WtW* voucher program to provide housing assistance to enable families to obtain and retain employment. Since *WtW* vouchers must remain available for eligible families meeting the *WtW* voucher requirements, a receiving PHA that does not have an allocation of *WtW* vouchers often has difficulties absorbing a *WtW* voucher into its program.[52] The failure to allow families to move to other jurisdictions, however, is inconsistent with the general requirements governing the Section 8 voucher program.

Under the general portability regulations, a family with a Section 8 voucher has the right to use its voucher assistance to lease a unit outside the jurisdiction of the originating PHA; including anywhere within the United States in a jurisdiction with a PHA operating a Section 8 tenant-based program.[53] The receiving PHA must accept the family by issuing the family a voucher and deciding whether it will bill the initial PHA for the portable family's assistance or simply absorb the family into its own program.[54] The initial PHA or the receiving PHA may decide to deny or terminate assistance to the family for a violation of family obligations, including the alleged "willful and persistent failure" of a *WtW* family to comply with its obligations under the *WtW* voucher program.[55]

Several PHAs have used the portability process successfully to increase the leasing rates of their *WtW* vouchers. The Housing Authority of Kansas City, Missouri, recently entered into a cooperative agreement with several PHAs in neighboring jurisdictions to provide *WtW* voucher participants the opportunity to move to suburban areas.[56] In Culver City, California, the local PHA allows limited portability within the city of Los Angeles with an agreement to bill the receiving PHA for the *WtW* voucher-holders who do "port-out." This arrangement has helped ameliorate the inability of *WtW* families to lease units caused by the "very tight rental market" in the Culver City area.[57] Similarly, the Tampa City Housing Authority (FL) has expanded its jurisdiction into the surrounding county to broaden the area from which *WtW* voucher-holders can select units.[58]

Under the general portability regulations, a family with a Section 8 voucher has the right to use its voucher assistance to lease a unit outside the jurisdiction of the originating PHA.

Other PHAs, such as the Perth Amboy Housing Authority in New Jersey, are experiencing problems with families "porting" to other jurisdictions that do not administer a *WtW* program. According to the report issued by Quadel Consulting Corporation in December 2000, the Perth Amboy Housing Authority is encouraged to "develop a memorandum of agreement with the local housing authorities for *WtW* families porting-out in the first year, for the tracking and monitoring of services."[59] Similarly, the Cherokee Nation Housing Authority in Oklahoma is providing housing assistance in an area with a depressed economy and a lack of local employment opportunities which necessitate long commutes by employer-provided busses into Arkansas. To remedy this problem, the housing authority is negotiating cooperative agreements with nearby tribes to provide welfare-to-work subsidies and services to members of the neighboring tribes.[60] By developing cooperative agreements with other PHAs, initial PHAs can ensure additional leasing opportunities and continued compliance with the *WtW* family obligations when the family elects to move to a community that does not have an allotment of *WtW* vouchers.

Finally, some PHAs, such as the Vallejo Housing Authority (CA), prohibit "porting" for the first year of *WtW* assistance, and thereafter, permit it only in limited circum-

[51] *See* fn. 6 *supra.*

[52] 64 Fed. Reg. at 4,497 (Jan. 28, 1999).

[53] 24 C.F.R. §982.353(b) (2000).

[54] *Id.* §982.355.

[55] *Id.* §§982.355(c)(9) and 982.553(c)(x).

[56] Quadel Consulting Corporation, *Welfare-to-Work Monthly Narrative Report* at 35-37 (Dec. 18, 2000).

[57] *Id.* at 7.

[58] *Id.* at 17.

[59] *Id.* at 41.

[60] *Id.* at 50-52.

stances related to work opportunities.[61] However, such policies violate general Section 8 program requirements which must be complied with in administering the *WtW* vouchers.[62] Moreover, as described above, a blanket prohibition against "porting-out" of the jurisdiction at any time during the receipt of assistance not only violates the program requirements but also frustrates the primary purpose of the *WtW* voucher program of assisting families in obtaining and maintaining employment.

If administered creatively and in compliance with the law, the Section 8 welfare-to-work voucher will encourage families to move into meaningful employment and self-sufficiency.

If not "leased-up," the Section 8 *WtW* vouchers are subject to recapture by HUD later this year. PHA policies prohibiting families from moving, or only allowing a move under limited circumstances, impede the nationwide effort to "lease-up" the *WtW* vouchers before the vouchers are forfeited. Since PHAs are provided funds for the administration of the *WtW* vouchers, PHAs should be fully encouraged to develop agreements with other PHAs to enable families complying with *WtW* requirements to move in search of better housing and employment.

Conclusion

Undeniably, any increase in housing assistance, including an increased allotment of Section 8 vouchers, is a move in the right direction to providing more housing opportunities for lower-income families. However, simply augmenting the number of renters with Section 8 vouchers in any given community will not adequately address the need for more housing for lower-income families. An increased demand in the private rental market by Section 8 voucher- holders will remain unmet unless new methods are employed to increase the number of units available to utilize voucher assistance. Such strategies include the provision of incentives to expand participation in the program by private landlords and increased support, both locally and nationally, for the development of new affordable housing.

If administered creatively and in compliance with the law, the Section 8 welfare-to-work voucher will encourage welfare-to-work families to move into meaningful employment and self-sufficiency. By providing access to decent and affordable housing and the ability to move to job-rich locations, families receiving TANF have additional support to meet the required work and training requirements necessary to move off welfare successfully within the specified time limits. However, without coordinated services between the PHA and TANF agencies, differing work obligations actually encourage failure of, and add increased pressure on, welfare-to-work families. Moreover, unreasonable sanctions and punitive measures serve only to intimidate (and possibly discriminate against) the very families that the *WtW* voucher program was intended to support. ■

[61] *See* fn. 6 *supra.*

[62] The San Francisco HUD office recently advised a local PHA that a prohibition against allowing families from "porting-out" of the initial PHA jurisdiction during the first year of the Section 8 contract (unless the family did not already have legal residence in the PHA jurisdiction) is impermissible and in violation of applicable HUD regulations. Letter from Joyce L. Lee, Director, Office of Public Housing, California State Office, to Marin Housing Authority (Apr. 15, 1999) (on file at NHLP).

SURVEY OF THE PROPORTION OF FAMILY PUBLIC HOUSING RENTAL UNITS INCLUDED IN HOPE VI REVITALIZATION SITES: FY 1998, 1999, 2000 AWARDS

The National Housing Law Project has prepared a survey of HOPE VI revitalization project descriptions released by the Department of Housing and Urban Development (HUD) and the Housing Research Foundation for the three most recent grant cycles: Fiscal Years (FY) 1998, 1999, and 2000. The purpose of this survey was to develop a picture of the composition of revitalized public housing sites by unit type; with particular regard to the proportion of family public housing rental units included in these sites. Based on reports that NHLP has received in recent years, we are concerned by the extent to which very-low and extremely low-income families are being excluded from the opportunities revitalized HOPE VI sites provide due to the small proportion of units on these sites that are affordable to families at these income levels.

The HOPE VI Program

Launched in 1992, the HOPE VI Program is a HUD grant initiative intended to address the nation's "severely distressed" public housing. Permanent statutory authorization for the program was established by the *Quality Housing and Work Responsibility Act of 1998* (QHWRA).[1] No regulations specific to the HOPE VI program exist, but HUD's annual HOPE VI notices of funding availability[2] provide details

[1] Pub. L. No. 105-276, Title V, Subtitle B, Part 3, 112 Stat. 2461, 2569 (1998).

[2] In 1999 and 2000, HOPE VI notices of funding availability (NOFAs) were published in the Federal Register along with NOFAs for many other HUD programs in "SuperNOFAs."

about the implementation of the program, at least during the application phase of each grant cycle.[3] In the past two years, HUD has made two kinds of funding available to public housing authorities (PHAs): HOPE VI demolition funding and HOPE VI revitalization funding.[4]

Overall Features of the Composition of the HOPE VI Revitalization Sites Surveyed: The Bias Towards Eliminating Family Public Housing Rental Units Even Where Post-Revitalization Site Density Increases

During the FY 1998, 1999, and 2000 grant cycles, HUD made a total of 61 HOPE revitalization awards to 50 PHAs across the country. Of the 61 projects, NHLP was unable to obtain sufficiently detailed site composition data for seven awards.[5] Three awards[6] involve a very high level of scattered-site development, making it difficult or impossible to identify a principal revitalization site whose composition could be determined.

Among the remaining 51 awards, NHLP examined the planned unit composition of the revitalization sites. With one exception,[7] every site involved a mix of unit types. For the purposes of this survey, three broad categories of unit types were used: family public housing rental units, other rental

[3]*See* 65 Fed. Reg. 9,320, 9,597 (Feb. 24, 2000) (*FY 2000 HUD SuperNOFA*); 64 Fed. Reg. 9617, 9725 (Feb. 26, 1999) (*FY 1999 HUD SuperNOFA*); 63 Fed. Reg. 15,489 (Mar. 31, 1998) (*FY 1998 HOPE VI Revitalization NOFA*).

[4]Earlier in the program's history, funding was provided for planning activities. In 1998, special funding was authorized for activities related to elderly developments.

[5]Fairview Homes in Charlotte; Rogers Garden Park and Rogers Addition in Bradenton, Florida; Washington Park and Lake Ridge in Lakeland, Florida; Westwood Gardens in Oakland, California; Frederick Douglass and Stanton Dwellings in Washington, D.C.; Hurt Village in Memphis; and Easter Hill in Richmond, California.

[6]New Brunswick Homes in New Brunswick; Shore Park and Shore Terrace in Atlantic City; and Newport Neighborhood in Newport, Kentucky.

[7]Prospect Plaza in New York, New York.

TABLE I: SUMMARY*

**Each value calculated independently.*

	MEAN VALUE	MEDIAN VALUE
Grant Amount	$26,060,644.65	$27,291,017.00
On-Site Family Public Housing Rental Units, Pre-Revitalization	559.5 units	400.5 units
On-Site Family Public Housing Rental Units, Post-Revitalization	219.1 units (46.4%)	189.5 units (44.9%)
Other On-Site Rental Units, Post-Revitalization	158.6 units (25.4%)	64.0 units (24.7%)
On-Site Homeownership Units, Post-Revitalization	147.9 units (27.2%)	100.0 units (21.5%)
Total On-Site Units, All Types, Post-Revitalization	525.6 units	385.5 units

Reductions in the Total Number of Units on Revitalized Sites Versus Reductions in the Number of Family Public Housing Rental Units on These Sites (Expressed as Percentages)

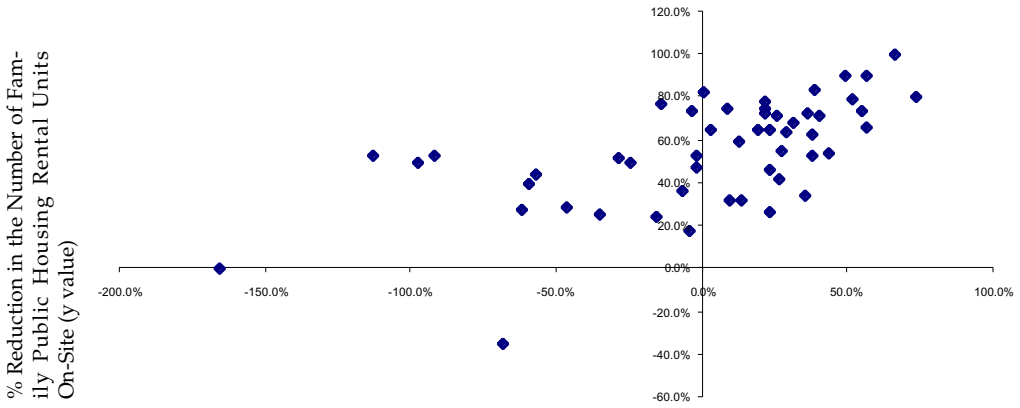

TABLE II: SELECTED FY 1998, 1999, 2000 HOPE VI REVITALIZATION SITES

CITY	DEVELOPMENT NAME	# ON-SITE FAMILY PH RENTALS, (PRE-REVIT.)	GRANT AMOUNT[1]	YEAR	# ON-SITE FAMILY PH RENTAL	% ON-SITE FAMILY PH RENTAL	# OTHER ON-SITE RENTAL	% OTHER ON-SITE RENTAL	# ON-SITE H/O	% ON-SITE H/O	TOTAL # ON-SITE UNITS, ALL TYPES	% RED. IN # OF UNITS ON-SITE, ALL TYPES	% RED. IN # OF ON-SITE FAMILY PH RENTAL
Danville, VA	Liberty View	250	$20,600,000	2000	0	0.0%	50	58.8%	35	41.2%	85	66.0%	100.0%
Seattle, WA	Roxbury House and Village[2]	60	$17,020,880	1998	15	9.0%	151	91.0%	0	0.0%	166	21.3%	75.0%
High Point, NC	Springfield Townhomes	198	$20,180,647	1999	35	17.7%	38	19.2%	125	63.1%	198	0.0%	82.3%
Greenville, SC	Woodland/Pearce Homes	348	$21,075,322	1999	34	19.0%	0	0.0%	145	81.0%	179	48.6%	90.2%
Columbia, SC	Saxon Homes	400	$25,843,793	1999	93	20.4%	138	30.3%	225	49.3%	456	-14.0%	76.8%
Miami-Dade, FL	Scott Homes/Carver Homes	850	$35,000,000	1999	80	21.6%	0	0.0%	291	78.4%	371	56.4%	90.6%
Seattle, WA	High Point Garden	750	$35,000,000	2000	350	21.9%	515	32.2%	735	45.9%	1600	-113.3%	53.3%
Denver, CO	Curtis Park Homes and Arapahoe Courts	286	$25,753,220	1998	135	24.5%	210	38.2%	205	37.3%	550	-92.3%	52.8%
Chicago, IL	Madden/Wells/Darrow Homes[3]	2891	$35,000,000	2000	750	25.0%	1450	48.3%	800	26.7%	3000	-3.8%	74.1%
Seattle, WA	Rainier Vista Garden	496	$35,000,000	1999	250	25.5%	231	23.5%	500	51.0%	981	-97.8%	49.6%
Philadelphia, PA	Martin Luther King Plaza	537	$25,229,950	1998	85	25.8%	93	28.2%	152	46.1%	330	38.5%	84.2%
Chicago, IL	ABLA Homes[4]	2635	$35,000,000	1998	656	27.1%	795	32.9%	966	40.0%	2417	8.3%	75.1%
Washington, DC	East Capitol Dwellings/Capitol View Plaza	897	$30,800,000	2000	196	27.8%	364	51.6%	145	20.6%	705	21.4%	78.1%
Dallas, TX	Roseland Homes	611	$34,907,186	1998	310	32.1%	449	46.5%	206	21.3%	965	-24.9%	49.3%
Oakland, CA	Coliseum Gardens	202	$34,400,000	2000	54	34.0%	20	12.6%	85	53.5%	159	21.3%	73.3%
Gary, IN	Duneland Village	163	$19,847,454	1999	91	35.5%	152	59.4%	13	5.1%	256	-57.1%	44.2%
Tucson, AZ	Robert F. Kennedy Homes	80	$12,700,000	2000	28	35.9%	30	38.5%	20	25.6%	78	2.5%	65.0%
Chattanooga, TN	McCallie Homes	416	$35,000,000	2000	200	37.4%	260	48.6%	75	14.0%	535	-28.6%	51.9%
Alexandria, VA	Samuel Madden Homes	100	$6,716,250	1998	100	37.6%	14	5.3%	152	57.1%	266	-166.0%	0.0%
Greensboro, NC	Morningside Homes	380	$22,987,722	1998	230	37.8%	190	31.3%	188	30.9%	608	-60.0%	39.5%
Baltimore, MD	Flag House Courts	487	$21,500,000	1998	140	38.4%	57	15.6%	168	46.0%	365	25.1%	71.3%
Birmingham, AL	Metropolitan Gardens	910	$34,957,850	1999	183	41.0%	263	59.0%	0	0.0%	446	51.0%	79.9%
Lexington, KY	Charlotte Court	356	$19,331,116	1998	123	42.4%	0	0.0%	167	57.6%	290	18.5%	65.4%
Newark, NJ	Stella Wright Homes	1206	$35,000,000	1999	331	42.8%	158	20.4%	284	36.7%	773	35.9%	72.6%
Atlanta, GA	Joel Chandler Harris Homes	510	$35,000,000	1999	240	42.9%	260	46.4%	60	10.7%	560	-9.8%	52.9%
Tacoma, WA	Salishan	835	$35,000,000	2000	600	44.3%	525	38.8%	228	16.9%	1353	-62.0%	28.1%
Durham, NC	Few Gardens	240	$35,000,000	2000	75	45.5%	55	33.3%	35	21.2%	165	31.3%	68.8%
Savannah, GA	Garden Homes	315	$16,000,000	2000	111	45.7%	132	54.3%	0	0.0%	243	22.9%	64.8%
Atlanta, GA	Carver Homes	990	$34,669,400	1998	399	46.1%	359	41.5%	107	12.4%	865	12.6%	59.7%
Cincinnati, OH	Lincoln Court	886	$31,093,590	1998	250	47.0%	182	34.2%	100	18.8%	532	40.0%	71.8%
Oakland, CA	Chestnut Court and 1114 14th St.	83	$12,705,010	1998	59	48.4%	35	28.7%	28	23.0%	122	-47.0%	28.9%
Cincinnati, OH	Laurel Homes	1188	$35,000,000	1999	421	49.9%	272	32.3%	150	17.8%	843	29.0%	64.6%
Camden, NJ	Westfield Acres	511	$35,000,000	2000	270	51.6%	30	5.7%	223	42.6%	523	-2.3%	47.2%
Mercer County, PA	Steel City Terrace Extension	100	$9,000,000	2000	74	54.8%	35	25.9%	26	19.3%	135	-35.0%	26.0%
Wheeling, WV	Grandview Manor/Lincoln Homes	328	$17,124,895	1999	85	56.7%	0	0.0%	65	43.3%	150	54.3%	74.1%
Raleigh, NC	Halifax Court	318	$25,942,034	1999	200	58.8%	140	41.2%	0	0.0%	340	-6.9%	37.1%
Norfolk, VA	Roberts Village/Bowling Green	767	$35,000,000	2000	288	60.3%	90	18.8%	100	20.9%	478	37.7%	62.5%
Los Angeles, CA	Aliso Village	802	$23,045,297	1998	359	61.3%	134	22.9%	93	15.9%	586	26.9%	55.2%
Decatur, IL	Longview Place	386	$34,863,615	1999	292	65.0%	0	0.0%	157	35.0%	449	-16.3%	24.4%
Wilmington, DE	Eastlake	401	$16,820,350	1998	214	69.3%	0	0.0%	95	30.7%	309	22.9%	46.6%
Baltimore, MD	Broadway Homes	429	$21,362,223	1999	84	72.4%	12	10.3%	20	17.2%	116	73.0%	80.4%
Nashville, TN	Preston Taylor Homes	550	$35,000,000	1999	370	74.0%	30	6.0%	100	20.0%	500	9.1%	32.7%
Biloxi, MS	Bayou Auguste/Bayview Apartments	322	$35,000,000	2000	150	75.0%	25	12.5%	25	12.5%	200	37.9%	53.4%
Chester, PA	McCaffery Village	350	$9,751,178	1998	118	76.6%	0	0.0%	36	23.4%	154	56.0%	66.3%
Milwaukee, WI	Lapham Park	370	$11,300,000	2000	251	78.0%	71	22.0%	0	0.0%	322	13.0%	32.2%
Roanoke, VA	Lincoln Terrace	300	$15,124,712	1998	174	78.4%	0	0.0%	48	21.6%	222	26.0%	42.0%
Dayton, OH	Edgewood Ct./Metro Gardens/Metro Annex	581	$18,311,270	1999	478	78.6%	0	0.0%	130	21.4%	608	-4.6%	17.7%
Tulsa, OK	Osage Hills	287	$28,640,000	1998	388	80.0%	47	9.7%	50	10.3%	485	-69.0%	-35.2%
Albany, NY	Edwin Corning Homes	292	$28,852,200	1998	134	80.7%	26	15.7%	6	3.6%	166	43.2%	54.1%
Milwaukee, WI	Parklawn	518	$34,230,500	1998	380	95.0%	0	0.0%	20	5.0%	400	22.8%	26.6%
New York, NY	Prospect Plaza	368	$21,405,213	1998	240	100.0%	0	0.0%	0	0.0%	240	34.8%	34.8%

[1]Some developments have been subject to non-revitalization HOPE VI awards and/or awards made prior to 1998—e.g., ABLA Homes, which was subject to a 1996 award for $24,483,250. Unless otherwise noted, only figures for FY 1998, 1999, and 2000 revitalization awards are given below.
[2]At the time its application was submitted, this development also contained 151 public housing units designated for occupancy by elderly and disabled residents.
[3]This award is part of a multi-phase redevelopment plan. Figures given here include the unit mix projected after final completion of the plan.
[4]The unit figures given here do not include the Brooks and Loomis developments which are not being redeveloped with HOPE VI funds.

TABLE II-A: OMITTED DEVELOPMENTS

CITY	DEVELOPMENT NAME	#ON-SITE RENTAL PH, PRE-REVIT	GRANT AMOUNT	YEAR
Atlantic City, NJ	Shore Park/Shore Terrace	214	$35,000,000	1999
Bradenton, FL	Rogers Garden Park/Rogers Addn.	180	$21,483,332	1999
Charlotte, NC	Fairview Homes	410	$34,724,570	1998
Lakeland, FL	Washington Park/Lake Ridge	380	$21,842,801	1999
Memphis, TN	Hurt Village	450	$35,000,000	2000
New Brunswick, NJ	New Brunswick Homes	246	$7,491,656	1998
Newport, KY	Newport Neighborhood	377	$28,400,000	2000
Oakland, CA	Westwood Gardens	46	$10,053,254	1999
Richmond, CA	Easter Hill	300	$35,000,000	2000
Washington, DC	F. Douglass/Stanton Dwellings	650	$29,972,431	1999

units,[8] and homeownership units.[9] All sites, except one[10] involved plans for on-site family public housing rental units.

The average site is made up of slightly less than 50 percent of family public housing rental units, with the rest roughly evenly divided between other rental units and homeownership units. Mean and median values for the composition of the 51 sites are included in Table I. Individual project composition data for each of the 51 sites, sorted by the percentage of on-site family public housing rental units, appears in Table II. Table II-A lists the 10 omitted developments.

Overall, there is a great deal of variation among the developments surveyed. Developments ranged in size from less than 100 to several thousand. However, one trend did emerge. Chart I is a graphical representation of the percentage reduction in the number of units of all types on each revitalized site versus the percentage reduction in the number of family public housing rental units on each of these sites.[11] Most sites involve an overall reduction in the number of units on-site. In these instances, Chart I shows a positive correlation between the reduction in units overall and the reduction in family public housing rental units. This is to be expected because, with one exception,[12] the 51 sites contained only family public housing rental units. However, when the total number of units on-site is increased (represented in Chart I as a negative percentage reduction) this correlation does not hold: the number of public housing units included on-site is still decreased, typically by nearly half. In fact, on those sites where there is an increase in the total number of units,[13] there appears to be a weak correlation between percentage increases of overall units and percentage reductions in the number of family public housing rental units.

This trend suggests a bias against including family public housing rental units on HOPE VI revitalization sites. The number of units of this type are consistently reduced even when such reductions are not necessary to decrease overall site density or "concentrations of poverty" in revitalization sites.[14] Whether this is reflective of HUD policy, certain features of the application process, or other factors is not clear from the data available. However, to the extent that it indicates that families in the lowest income levels are being excluded from revitalization sites at disproportionately high rates, NHLP views this as seriously unfair and a cause for concern. The purpose of the HOPE VI Program is to "improv[e] the living environment [of] residents of severely distressed public housing," not simply to "reduce [their] concentration" as much as possible.[15] Current residents of public housing should be among the very first to benefit from the revitalization of their homes.

[8]This includes all rental units that are not family public housing rentals, such as market rate rentals, Low Income Housing Tax Credit (LIHTC) rentals, and elderly/disabled public housing rental units.

[9]Homeownership units include market rate homeownership units, designated affordable homeownership units, and public housing homeownership units.

[10]Liberty View in Danville, Virginia.

[11]*E.g.*, if a site containing 100 family public housing rental units is subject to a revitalization plan calling for 60 family public housing rental units, 10 rental units of other types, and 10 homeownership units, this represents a 20 percent reduction in the number of units overall and a 40 percent reduction in the number of family public housing rental units.

[12]Roxbury House and Village in Seattle.

[13]This may or may not result in increased unit-per-acre density because the size of sites may change during the revitalization process.

[14]The HOPE VI goal of deconcentrating poverty may be met either by reducing the numbers of low-income families or by increasing the number of higher-income families.

[15]42 U.S.C. A. § 1437v(a) (West Supp. 2000).

Sources of Data and Method of Presentation

The primary sources of data for this survey were site profiles provided by the Housing Research Foundation[16] and the award summaries prepared by HUD.[17] In most instances, the profiles and award summaries appeared to provide a reasonably complete overview of the planned unit composition of the revitalization sites.[18] Where there was any obvious ambiguity, the 1997 and 1998 HUD Picture of Subsidized Households databases,[19] PHA Web sites, and PHA personnel were consulted for additional information. PHAs' HOPE VI applications were also consulted when available.

Because the data presented in this discussion are based on interpretations of incomplete secondary materials, caution should be exercised with respect to their accuracy. In addition, the data presented are also based on planned revitalization initiatives, the unit composition of projects once they are actually redeveloped may differ. ■

[16]These site profiles are available on-line *at* housingresearch.org/hrf/hrf_SiteProfile.nsf/By+PHA?OpenView. According to the HRF Web site, the Housing Research Foundation is a HUD-funded non-profit organization.

[17]HUD award summaries for 1999 and 2000 are available *at* hud.gov/pih/programs/ph/hope6/fy2000fundinfo_revawards.pdf and hud.gov/pih/programs/ph/hope6/hilrevit.pdf.

[18]Unless other information was available, it was assumed that each development included only family public housing rental units at the time its application was approved.

[19]Available on-line *at* huduser.org/datasets/assthsg/statedata97/index.html and huduser.org/datasets/assthsg/statedata98/index.html. *Picture of Subsidized Households* data was used primarily to determine the number of pre-revitalization units to calculate post-revitalization loss of units figures. Unless other information was available, in those instances where a site profile or award summary did not state that all of a development's existing units were to be demolished and where the number of units to be demolished was less than the number of units listed in *Picture of Subsidized Households*, the difference between the number of units to be demolished and the number of units listed in *Picture of Subsidized Households* was included in the number of family public housing rental units included in the revitalized site.

CONGRESS INCREASES CAPS ON LOW-INCOME HOUSING TAX CREDITS AND PRIVATE ACTIVITY BONDS

On December 21, 2000, President Clinton signed into law H.R. 4577 (Public Law 106-554), thereby increasing the caps on low-income housing tax credits and on private activity bonds. The bill, originally sponsored by Rep. John Porter (R. IL), creates greater tax incentives and resources for developers, owners and purchasers to create, improve, and preserve low-income housing.

New Caps for Low-Income Housing Tax Credits

Prior to the change, each state had a cap on its aggregate credit authority of $1.25 per resident, the total amount of federal tax credits a state could distribute to low-income housing providers. Projects financed with tax exempt bonds under the state's bond cap were exempt from this limit, and remain so. The new law raises the allocable credit cap to $1.50 per resident in 2001 (or $2,000,000 per state, if greater), and $1.75 per resident in 2002. This represents a 20 percent increase for 2001, and a 40 percent increase for 2002 over 2000. Congress has also added a cost-of-living adjustment to both the per capita cap and the $2,000,000 minimum, to be implemented for the years following 2002, thereby assuring an automatic inflationary increase in tax credit resources.

As before, the tax credit applicable to newly constructed or substantially rehabilitated housing can be claimed over a 10-year period, such that the total present day value of the credit usually cannot exceed 70 percent of the total qualified expenditures for an unsubsidized building or 30 percent for a subsidized one. Other projects in qualified census tracts or difficult development areas qualify for enhanced credits at 91 percent and 39 percent of qualified expenditures, respectively.

The new law also includes additional provisions to ease the use of tax credits, effective January 1, 2001. Under the program, buildings must be placed in service within the year of receiving the allocation, or before the end of the second calendar year from the date that the taxpaying owner has received the allocation, provided that the taxpayer has expended at least 10 percent of the reasonably expected basis within the calendar year of the allocation. The new law liberalizes this 10 percent expenditure test for those properties receiving an allocation in the second half of the calendar year to allow the expenditures to have been made within six months of receiving the allocation even if this period runs beyond the end of the calendar year.

Another provision modifies the "stacking rule" to permit aggregate credit authority for each state to include any unused credit cap remaining from the prior year. This will allow states a chance to use their prior year credits before losing them to the national pool.

Finally, the new statute modifies the criteria for the states' qualified allocation plans for the credits. It eliminates the need to consider participation by local tax-exempt organizations, while retaining the 10 percent nonprofit set-aside. However, it adds other criteria: tenant populations of individuals with children and projects intended for eventual tenant ownership. The new law extends preference to projects located in qualified census tracts that contribute to a concerted community revitalization plan.

The new law extends preference to projects located in qualified census tracts that contribute to a concerted community revitalization plan.

Increased Private Activity Bond Limits

The law also increases the annual volume limits on private activity bonds that state and local governments may issue. State and local governments commonly issue bonds, which are sold to private entities to raise proceeds to conduct a variety of activities. Interest on these bonds paid to the investors is excluded from income and taxation if the proceeds of the bonds are used to finance activities conducted by the governmental unit. If the activities financed with bond proceeds are conducted by private parties ("private activity bonds"), the interest is taxable unless the activities are also specified in the *Internal Revenue Code*. Eligible activities for tax-exempt private activity bond treatment include such things as: privately operated transit, airport and railroad facilities, privately owned municipal services and utilities, economic development, low-income housing, and exempt activities of charitable organizations. For these privately conducted activities, the interest on the bonds can be excluded from income, so taxpayers will accept a slightly below-market return, and the government can make available the bond proceeds to private users for exempt activities at a below-market level.

However, except for certain preferred types of expenditures (not including low-income housing), the amount of such funding that can be allocated via tax-exempt private activity bonds in each state is capped by the volume limits imposed by federal law. The prior statewide volume limit on private activity bonds was the greater of $50 per resident or $150 million, and these volume limits were scheduled to increase starting in 2003. The new law accelerates this increase, raising the volume limit to the greater of $62.50 per resident or $187.5 million in 2001, and the greater of $75 per resident or $225 million in 2002. Similar to the low-income housing tax credit, the law also creates a cost-of-living adjustment beginning in 2003. These changes should increase the amount of cheaper funding available for the financing of low-income housing development or rehabilitation. ■

FLORIDA PHA FOUND IN CONTEMPT OF ORDER ENJOINING IT FROM USING LEASE PROVISIONS ON JURY WAIVER AND LOITERING

In *Knight v. Hudson*[1] a federal court in Florida found the Housing Authority of the City of Sanford (PHA) to be in contempt of court for continuing practices and employing leases that contained terms earlier enjoined by the court. The leases contained a clause that prohibited "loitering in a time and place unusual for law-abiding citizens, and which warrants reasonable alarm or immediate concern for the safety of persons or property. . . ." In addition, the leases included a section wherein the tenants waived their right to a jury trial if the PHA took them to court.[2]

The court had enjoined the PHA from employing or enforcing the lease provisions. However, in the contempt hearing, the court found that the PHA continued to employ a lease containing a jury trial waiver. Further, the court found that the PHA's actions of giving a recently hired security guard "unbridled discretion" in his watch and failing to relay to that security guard any information regarding the injunction, were also violations of the court's order not to enforce the "no loitering" provision.[3]

As a result, the federal court found the PHA to be in contempt and ordered it to make several immediate changes. First, the court ordered that the PHA maintain a daily log of the security guard's activities, including any contact he had with residents or other persons on the property and any actions he took, and to "adopt clearly defined policies regarding the duties of security personnel."[4] The court gave the PHA five days to print and receive a new lease without the offensive provisions, and 20 days for the PHA to obtain the residents' signatures on the new leases. The court ordered that the PHA would be fined $500 per day for every additional day it took to implement the court's orders. Finally, the court ordered that the PHA pay reasonable attorneys' fees for the contempt motion and threatened the officers of the PHA with imprisonment if the PHA did not comply before the next hearing date. ■

[1]Case No. 6:97-CV-1225-ORL-19DAB, (M.D. Fla., Jan. 22, 2001).

[2]*Id.*, at 2-3.

[3]*Id.*, at 3-4.

[4]*Id.* at 6-7.

FEDERAL COURT IN FLORIDA ISSUES PRELIMINARY INJUNCTION ORDERING PHA TO CEASE WARRANTLESS SEARCHES

In late November 2000, in *Noble v. Tooley, et al.*,[1] a federal district court in Florida issued a preliminary injunction against the city of Sanford, its housing authority and its police chief, ordering them to cease warrantless searches of residents' apartments. The housing authority's leases contain the following provision: "The Authority may enter Tenant's dwelling unit at any time without advance notification when there is reasonable cause to believe that an emergency exists."[2] The housing authority interpreted this clause as permitting them to enter residents' apartments, with or without a police escort, if the authority has a suspicion of criminal activity, believing that such suspicion is "reasonable cause to believe that an emergency exists."[3]

The court first addressed the question of the residents' standing, as none of the plaintiffs in the suit had actually had their apartments searched under such circumstances. The court held that, because the plaintiffs were under a legitimate, immediate threat of becoming victims of a warrantless, possibly unconstitutional search, they had standing to file for the preliminary injunction.[4]

Next, taking note of the long history of protection of people's privacy in their homes under the *Fourth Amendment*, and even prior to its creation, the court concluded that the plaintiffs had a substantial likelihood of success on the merits of the case and would suffer irreparable harm if subjected to such a search.[5] The court also reasoned that the potential harm to the tenants if no injunction was issued was much higher than the potential harm to the city, and that issuing the injunction served the public interest. Thus, the court granted the motion for a preliminary injunction, ordering the city to refrain from using the lease paragraph as a substitute for consent or probable cause to search public housing apartments. It stressed that the ruling would not interfere with the PHA's ability to conduct searches when exigent circumstances existed—such as flooding or fire—nor would it restrict the Authority from proceeding with the execution of search warrants or with searching apartments with the consent of the tenant.[6] ■

[1]Case No. 6:00-cv-900-Orl-31A (M.D. Fl., Nov. 21, 2000)

[2]*Id.* at 3.

[3]*Id.*

[4]*Id.* at 3-4.

[5]*Id.* at 5-6.

[6]*Id.* at 7-9.

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 2001. 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 Regulations

Revision of Freedom of Information Act Regulations; Delay of Effective Date
66 Fed. Reg. 8175-01 (Jan. 30, 2001)

***Summary*:** This document advises the public that the final rule published on January 22, 2001, which amends HUD's *Freedom of Information Act* (FOIA) regulations, will take effect on April 23, 2001. As provided in the "Supplementary Information" section of this final rule, this delay in the effective date was made in response to a White House memorandum of January 20, 2001.

Discontinuation of the Section 221(d)(2) Mortgage Insurance Program; Delay of Effective Date
66 Fed. Reg. 8175-02 (Jan. 30, 2001)

Summary: This document advises the public that the final rule published on January 19, 2001, which discontinues the section 221(d)(2) mortgage insurance program, will take effect on April 20, 2001. As provided in the "Supplementary Information" section of this final rule, this delay in the effective date was made in response to a White House memorandum of January 20, 2001.

[1]*At* access.gpo.gov/su_docs.

[2]*At* hudclips.org/cgi/index.cgi.

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

[4]*At* rdinit.usda.gov/regs/.

Revision to the Application Process for Community Development Block Grants for Indian Tribes and Alaska Native Villages; Delay of Effective Date
66 Fed. Reg. 8176-01 (Jan. 30, 2001)

***Summary*:** This document advises the public that the final rule published on January 17, 2001, which amends HUD's regulations for *Community Development Block Grants for Indian Tribes and Alaska Native Villages* (the "ICDBG program"), will take effect on April 16, 2001. The amendments made by the final rule will permit the incorporation of the ICDBG grant application and selection procedures into HUD's SuperNOFA process. As provided in the "Supplementary Information" section of this final rule, this delay in the effective date was made in response to a White House memorandum of January 20, 2001.

Determining Adjusted Income in HUD Programs Serving Persons With Disabilities: Requiring Mandatory Deductions for Certain Expenses; and Disallowance for Earned Income; Delay of Effective Date
66 Fed.Reg. 8174-01 (Jan. 30, 2001)

***Summary*:** This document advises the public that the final rule published on January 19, 2001, which amends HUD's regulations in part 5, subpart F, to include additional HUD programs in the list of programs that must make certain deductions in calculating a family's adjusted income, will take effect on April 20, 2001. As provided in the "Supplementary Information" section of this final rule, this delay in the effective date was made in response to a White House memorandum of January 20, 2001.

Notice of Funding Availability Fair Share Allocation of Incremental Voucher Funding Fiscal Year 2001; Amendment and Deadline Extension
66 Fed. Reg. 6645-01 (Jan. 22, 2001)

Summary: On December 13, 2000, HUD published its *Notice of Funding Availability for Fair Share Allocation of Incremental Voucher Funding for Fiscal Year 2001* ("Fair Share NOFA"). This notice amends the December 13, 2000 *Fair Share NOFA* to revise the Multifamily Tenant Characteristics System (MTCS) threshold to include MTCS reporting information ending December 2000, and to extend the application deadline. Applications are due on February 20, 2001. Applicants who have already submitted applications, need not resubmit a new application, and need not amend their applications but may do so if they choose.

Revision of Freedom of Information Act Regulations; Final rule
66 Fed. Reg. 6964-01 (Jan. 22, 2001)

***Summary*:** This final rule amends HUD's *FOIA* regulations in their entirety. It implements the statutory requirements of the *Electronic Freedom of Information Act* (EFOIA) and makes various streamlining and organizational changes to improve the clarity of the regulatory text. Additionally, this rule incorporates a plain language approach to regulatory drafting by adopting a written style that promotes responsive, accessible and understandable written communication. This rule follows the publication of a July 10, 2000 proposed rule and takes into consideration the public comments received on the proposed rule.

Effective Date: February 21, 2001.

Discontinuation of the Section 221(d)(2) Mortgage Insurance Program
66 Fed. Reg. 5912-01 (Jan. 19, 2001); Final rule

***Summary*:** This final rule discontinues HUD's section 221(d)(2) mortgage insurance program. The section 221(d)(2) program is rarely used by homebuyers, primarily due to its low mortgage limits. Accordingly, HUD will no longer enter into new contracts for mortgage insurance under the program. The final rule removes those provisions of the section 221(d)(2) regulations concerning eligibility for participation in the program, and replaces them with a savings clause. The rule, however, retains those regulatory provisions regarding the contract rights and servicing responsibilities for existing program participants. This final rule follows publication of a September 28, 2000 proposed rule. There were no public comments on the proposed rule, and HUD is adopting the proposed regulatory amendments without change.

Effective Date: February 20, 2001.

Determining Adjusted Income in HUD Programs Serving Persons with Disabilities: Requiring Mandatory Deductions for Certain Expenses; and Disallowance for Earned Income; Final rule
66 Fed. Reg. 6218-01 (Jan. 19, 2001)

***Summary*:** This final rule amends HUD's regulations in part 5, subpart F, to include additional HUD programs in the list of programs that must make certain deductions in calculating a family's adjusted income. These deductions primarily address expenses related to a person's disability including, for example, medical expenses or attendant care expenses. The purpose of this amendment is to expand the benefits of these deductions to persons with disabilities served by HUD programs not currently covered by part 5, subpart F. Second, this rule adds a new regulatory section to part 5 to require for some but not all of these same programs the disallowance of increases in income as a result of earnings by persons with disabilities. HUD believes that making these deductions and disallowance available to persons with disabilities through as many HUD programs as possible will assist persons with disabilities in obtaining and retaining employment, which is an important step toward economic self-sufficiency.

Effective Date: February 20, 2001.

Revision to the Application Process for Community Development Block Grants for Indian Tribes and Alaska Native Villages; Final rule
66 Fed. Reg. 4578-01 (Jan. 17, 2001)

Summary: This final rule amends HUD's regulations for the ICDBG program. These amendments will permit the in-

corporation of the ICDBG grant application and selection procedures into HUD's SuperNOFA process. In addition to the SuperNOFA-related amendments, this final rule amends the ICDBG program regulations to remove certain obsolete regulatory provisions and to clarify program requirements. This final rule follows publication of a November 2000 proposed rule and takes into consideration the public comments received on the proposed rule. After careful review of all of the public comments, HUD has decided to adopt the proposed regulatory amendments without change.

Effective Date: February 16, 2001.

Revisions to PHA Project-Based Assistance Program; Initial Guidance
66 Fed. Reg. 3605-02 (Jan. 16, 2001)

Summary: The *HUD Appropriations Act for Fiscal Year 2001* amends the existing laws that govern the amount of tenant-based housing choice voucher funding that may be used for project-based assistance. HUD plans to issue a rule revising the project-based program regulations *at* 24 CFR part 983 in accordance with the new law. However, many of the statutory changes do not involve or require agency discretion on implementation of the new law, and are immediately effective. This notice provides guidance to public housing agencies (PHAs) and other interested members of the public on those provisions that are effective immediately, and identifies statutory changes that require further rulemaking.

Withdrawal of Proposed Rule on Sources of Homeowner Downpayment Pursuant to Section 203 of the National Housing Act
66 Fed. Reg. 2851-01 (Jan. 12, 2001)

***Summary*:** This notice withdraws a proposed rule that would have prohibited gifts from nonprofit organizations being used for the mortgagor's investment in a mortgaged property if the organization received the funds for the gift either directly or indirectly from the seller.

Effective Date: Janaury 12, 2001.

Public Housing Total Development Cost; Proposed Rule
66 Fed. Reg. 1008-01 (Jan. 4, 2001)

***Summary*:** This proposed rule would amend HUD's regulations governing Total Development Cost (TDC) for the development of public housing. The amendments would implement statutory changes made to the statutory TDC requirements. Among other changes, this proposed rule would limit the amount of public housing funds that a public housing agency may use to pay for housing construction costs. The rule would also provide that demolition and environmental hazard remediation costs are included in TDC only to the extent that such costs are associated with the replacement of public housing units on the project site.

Comments Due Date: March 5, 2001.

HUD Federal Register Notices

Mortgage and Loan Insurance Programs Under the National Housing Act--Debenture Interest Rates; Notice
66 Fed. Reg. 6645-02 (Jan. 22, 2001)

***Summary*:** This notice announces changes in the interest rates to be paid on debentures issued with respect to a loan or mortgage insured by the Federal Housing Commissioner under the provisions of the *National Housing Act* (the *Act*). The interest rate for debentures issued under Section 221(g)(4) of the *Act* during the 6-month period beginning January 1, 2001 is 7 1/8 percent. The interest rate for debentures issued under any other provision of the *Act* is the rate in effect on the date that the commitment to insure the loan or mortgage was issued, or the date that the loan or mortgage was endorsed (or initially endorsed if there are two or more endorsements) for insurance, whichever rate is higher. The interest rate for debentures issued under these other provisions with respect to a loan or mortgage committed or endorsed during the 6-month period beginning January 1, 2001, is 6 percent.

Office of the Secretary—Housing-Federal Housing Commissioner; Delegation and Redelegation of Authority Under Section 203(d)(6) of the Federal Property and Administrative Services Act of 1949; Notice
66 Fed. Reg. 6646-01 (Jan. 22, 2001)

Summary: In this notice, the Secretary delegates to the Assistant Secretary for Housing-Federal Housing Commissioner, who retains and redelegates this authority to the Director, Office of Single Family Assets Management, the authority under Section 203(d)(6) of FPASA to recommend to the General Services Administration disposal of surplus real property, including buildings, fixtures and equipment situated thereon and to take all steps necessary, including fixing the sale or lease value, to sell or lease such property of self-help housing.

Effective date: January 12, 2001.

Sections 202 and 811 Capital Advance Programs: Revised Development Cost Limits; Notice
66 Fed. Reg. 6647-01 (Jan. 22, 2001)

***Summary*:** This notice announces changes to the development cost limits for the Sections 202 and 811 Capital Advance Programs. The development cost limits were established in 1989 for the Section 811 group homes and in FY 1999 were increased by 20 percent. Also in FY 1999 the cost limits for elderly projects and independent living projects for persons with disabilities were replaced with the Section 221(d)(3) per unit limits authorized by Congress in 1992. Even with last year's increase in the development cost limits, a number of nonprofit owners still need additional sources of funding to construct their projects. In an attempt to alleviate this problem, the base development limits from 1989 and 1992 respectively have been adjusted to 2000 using the Federal

Reserve Bank of Minneapolis' Consumer Price Index (CPI) calculator.

Effective date: January 22, 2001.

Notice of Certain Operating Cost Adjustment Factors
66 Fed. Reg. 4853-02 (Jan. 18, 2001); Notice

***Summary*:** This notice that establishes factors used in calculating rent adjustments under section 524 of the *Multifamily Assisted Housing Reform and Affordability Act of 1997* (MAHRA) 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* (LIHPRHA), was published on January 10, 2001, but the appendix to the notice was inadvertently not published. This notice is therefore republished with the appendix.

Effective date: January 10, 2001.

Regulatory Waiver Requests Granted for the Third Quarter of Calendar Year 2000
66 Fed. Reg. 5376-01 (Jan. 18, 2001); Notice

***Summary*:** The purpose of this notice is to comply with the requirements of section 106 of the *HUD Reform Act*. This notice contains a list of regulatory waivers granted by HUD during the quarter beginning on July 1, 2000 and ending on September 30, 2000.

Notice of Certain Operating Cost Adjustment Factors
66 Fed. Reg. 1997-03 (Jan. 10, 2001)

***Summary*:** This notice establishes factors used in calculating rent adjustments under section 524 of the MAHRA as amended by the *Preserving Affordable Housing for Senior Citizens and Families into the 21st Century Act of 1999*, and under the LIHPRHA.

Effective date: January 10, 2001.

50th Percentile and 40th Percentile Fair Market Rents for Fiscal Year 2001;
66 Fed. Reg. 162-01 (Jan. 2, 2001); Notice

***Summary*:** Section 8(c)(1) of the *United States Housing Act of 1937* requires the Secretary of HUD to publish FMRs periodically, but not less frequently than annually, to be effective on October 1 of each year. FMRs are used (1) to establish payment standards for the Housing Choice Voucher program; (2) to determine initial contract rents in new commitments for Section 8 project-based assistance (currently available chiefly in the project-based voucher program); (3) to determine whether comparability applies to the adjustment of contract rents during the term of existing HAP contracts for the former new construction, substantial rehabilitation and moderate rehabilitation programs; (4) as a limit on renewal rents for certain Section 8 projects (including mark-up-to-market projects); and (5) to determine the maximum subsidy levels for HOME tenant-based rental assistance, and the maximum rent levels in HOME multifamily rental housing. Other programs may also require the use of FMRs. This notice sets final FMRs that reflect the 50th percentile rent levels for 39 areas, as determined by applying the criteria specified in HUD's interim rule amending the HUD regulation that establishes the methodology for setting FMRs for existing housing (24 C.F.R. § 888.113). The interim rule was published on October 2, 2000 (65 Fed. Reg. 58,870), and became effective on December 1, 2000. To combine final FY 2001 FMRs for all areas in one publication, this notice also re-publishes the 40th percentile rents for all other areas.

Effective date: The 50th percentile FMRs published in this notice are effective on January 2, 2001. The 40th percentile FMRs were previously effective on October 1, 2000.

HUD Notices

Modifications of Terminology and Procedures for Elimination of Lead-Based Paint Hazards in HUD-Owned FHA-Insured Single Family Properties Built Before 1978;
H 01-01 (HUD) (Jan. 2, 2001)

Summary: This notice implements the requirements and terminology established by the Residential Lead-Based Paint Hazard Reduction Act of 1992 (Title X of the Housing and Community Development Act of 1992) and new lead-based paint regulations (the Lead Safe Housing Rule) at 24 C.F.R. Part 35, Subpart F. The regulations establish procedures to eliminate as far as practicable lead-based paint hazards on single family properties built prior to 1978 and sold with FHA-insured mortgages (including 203(b) and 203(k) loans), effective September 15, 2000.

Guidance for HUD Field Offices to Conduct Annual Section 8 Management Assessment Program (SEMAP) Assessments;
PIH 2001-6 (HUD) (Jan. 24, 2001)

Summary: This notice provides guidance for HUD field office personnel who will conduct annual assessments of PHA performance as required under the SEMAP regulation at 24 C.F.R. § 982.105.

Guidance for Implementation of Direction Contained in the Conference Report 106-988 for the Department's Fiscal Year 2001 Appropriations Act
PIH 2001-5 (HUD) (Jan. 19, 2001)

Summary: This notice provides guidance for implementation of the direction contained in the Conference Report 106-988 for the Department's *Fiscal Year 2001 Appropriations Act* which directs the Department not to take adverse action against a public housing authority based solely on its Public Housing Assessment System (PHAS) score pending the submission of information to the Congress. Accordingly, HUD will not take any adverse action against PHAs solely on the basis of Public Housing Assessment System (PHAS) scores.

Instructions for Submitting Second Public Housing Agency (PHA) Plans for PHAs with Fiscal Years beginning on July 1, 2001 and Capital Performance and Evaluation Reporting Requirements for Jan. and April 2001 PHAs;
PIH 2001-4 (Jan. 19, 2001)

***Summary*:** This notice provides instructions to PHAs with fiscal years beginning on July 1, 2001 (July 2001 PHAs) on submission of their second PHA Plans as provided in the PHA Plans Final Rule (issued December 22, 2000 Federal Register (65 Fed. Reg. 81,214)), found at 24 CFR Part 903, Subpart B. Until notification of new instructions, PHAs must use currently available templates and instructions in completing their plans. Guidance included in this Notice covers PHA Plan instructions for: the recent publications of final rules to *Deconcentrate Poverty and Promote Integration in Public Housing and Public Housing Agency Consortia and Joint Ventures*; the recent Federal Register Notice implementing changes to Section 8 Project-Based Assistance; a revised Annual Statement/Performance and Evaluation Report for the Capital Fund Program, including a revised annual Performance and Evaluation reporting requirement; further instructions about Resident Advisory Board(s); and the consequences of Section-8 only agencies' failure to submit an approvable PHA Plan.

Interim Instructions on Distribution and Use of Operating Subsidy Funds Received for Resident Participation Activities
PIH 2001-3 (Jan. 18, 2001)

***Summary*:** The purpose of this notice is to provide PHAs and those Resident Management Corporations (RMCs) that are directly funded by the Department of Housing and Urban Development (HUD) with interim instructions on the distribution and use of operating subsidy funds received for resident participation activities. These instructions will remain in force until such time as HUD can complete rulemaking to revise 24 C.F.R. Part 964. Because HUD has not yet completed rulemaking on 24 C.F.R. 964, this notice provides guidance on how operating subsidy funds received by PHAs and RMCs for resident participation shall be distributed and used. This notice will apply to federal FY 2001 funds distributed under another notice to be published once the Interim Rule implementing an Operating Fund formula is published. This notice assumes that the Interim Rule will contain provisions regarding the $25 per occupied unit per year for resident participation activities.

Prohibition of Discrimination Against Families with Housing Choice Vouchers by Owners of Low-Income Housing Tax Credit and HOME Developments
PIH 2001-2 (Jan. 18, 2001)

Summary: The purpose of this notice is to remind interested parties of federal laws that prohibit discrimination against housing choice voucher-holders by owners of Low-Income Housing Tax Credit and HOME developments. This notice only covers discrimination because of a family's participation in the Housing Choice Voucher program; it does not cover discrimination on the basis of race, ethnicity or other grounds covered by the *Fair Housing Act* and other civil rights laws and regulations.

Guidance for Implementation of the October 2, 2000 Interim Rule on Increased Fair Market Rents (FMRs) and Higher Payment Standards for Certain Areas
PIH 2001-1 (PHA) (Jan. 3, 2001)

***Summary*:** This notice provides guidance for implementation of the Department's October 2, 2000 rule which establishes a new policy on increased payment standards for the housing choice voucher program. The new payment standard policy incorporates two targeted approaches to provide relief from the constraints of the 40th percentile FMR to expand housing opportunities and to help voucher holders successfully lease housing. The new policy increases the HUD-published FMRs to the 50th percentile rent, for at least three years, in certain metropolitan FMR areas that contain at least 100 census tracts. The metropolitan FMR areas that qualify for the 50th percentile FMR are those where relatively few census tracts have a significant number of rental units with gross rents at or below the 40th percentile FMR, and where voucher program participants are relatively concentrated. In addition, the new payment standard policy allows any PHA that is not in an area covered by a new 50th percentile FMR to request HUD approval of higher "success rate payment standard amounts" based on the 50th percentile rent, if the PHA has both (1) established its payment standards at 110 percent of the 40th percentile FMR for a period of at least six months, and (2) established a policy of granting automatic extensions of voucher terms to at least 90 days; but, notwithstanding these actions, the PHA still has less than a 75 percent voucher holder success rate in finding and leasing units.

RHS Administrative Notices

Tenant Self-Sufficiency Initiatives and Multi-Family Housing (MFH) Network Centers
RD AN No. 3605 (1930-C) (Jan. 19, 2001)

***Summary*:** This Administrative Notice (AN) addresses tenant self-sufficiency initiatives and the benefits of MFH Network Centers. This AN replaces AN No. 3443 (1930-C), dated January 19, 1999. Upon receipt of this AN, State Directors are encouraged to inform property owners and management companies of the opportunity to implement tenant self-sufficiency initiatives and develop MFH network centers. The RHS supports promoting and assisting owners in providing services that meet the needs of low-income families and seniors in their communities. The goal is to improve MFH tenants' quality of life and self-sufficiency by providing "on-site" services such as computer training, reading programs for children, resume preparation for job seekers, location of job vacancies, job development and/or readiness

opportunities, tutoring services for school children and adults, health and social services, physical fitness classes, meals on wheels for seniors, drug education programs, and life skills.

Expiration Date: January 31, 2002

Preservation Proposals for Equity Funding
RD AN No. 3606 (1965-B)(Jan.18, 2001)

Summary: The purpose of this Administrative Notice (AN) is to provide guidance on how to access $4.3 million of the FY 2001 Section 515 reserve that is made available to fund innovative approaches to preserve rental housing. For example, providing equity at the time of transfer to a non-profit or public body in exchange for a restrictive-use agreement that assures that the project will remain as affordable housing for its remaining useful life would be considered an innovative approach to preservation. This AN announces that proposals to use these funds should be submitted to the Office of Rental Housing Preservation (ORHP) by March 30, 2001. Expired AN 3492 (1965-E), dated November 8, 1999, provided guidance on how funds may be used to allow for equity at the time of a within program transfer of ownership as referenced in RD Instruction 1965-B. That guidance contained in expired AN 3492 is repeated on the Attachment to this AN. Expired AN 3543 (1965-B), dated April 21, 2000, provided guidance on submitting preservation proposals for equity funding using FY 2000 funds.

Expiration Date: December 31, 2001. ■

The Housing Law Bulletin is published 10-12 times per year by the National Housing Law Project, a private nonprofit corporation of the State of California. Opinions expressed in the *Bulletin* are those of the authors and should not be construed as representing the opinions or policy of any funding source.

A one-year subscription to the Bulletin is $150.

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

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