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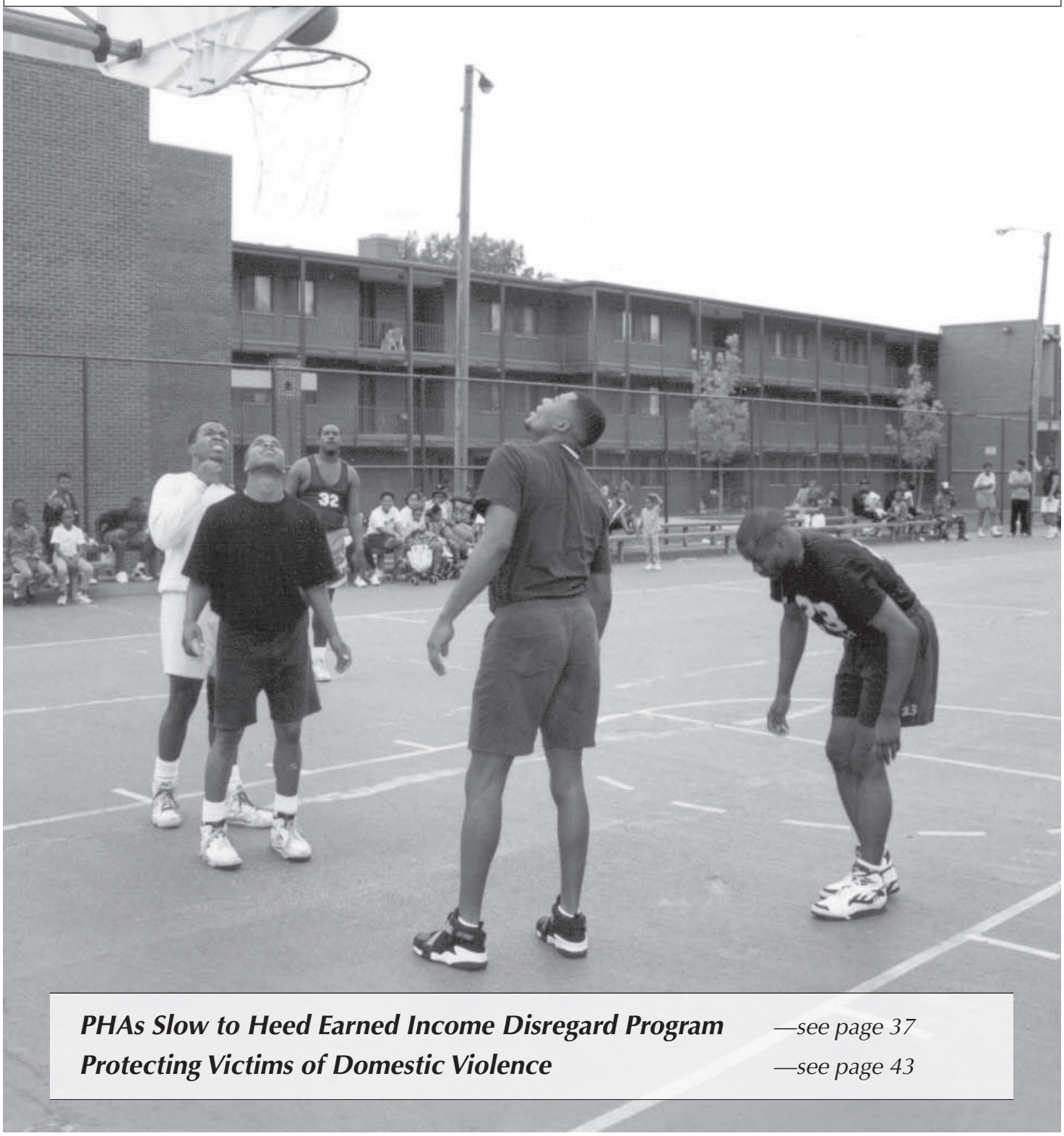

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Cover photo: Harborside Housing, East Chicago, IN. A 252-unit development preserved by the National Housing Trust using HUD-insured mortgage financing, low-income housing tax credits and Section 8 assistance. Photo courtesy National Housing Trust, a national organization formed to preserve multi-family affordable housing.

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PHAs Are Slow to Heed Earned Income Disregard Program

Introduction

Congress enacted the *Quality Housing and Work Responsibility Act of 1998*[1] (QHWRA) more than three years ago. It amended 42 U.S.C. § 1437a to include a new earned income disregard (EID) provision that HUD has made applicable to public housing residents since October 1, 1999.[2] The QHWRA version of the EID generally increases the categories of families that are eligible for the disregard and expands the period of time during which the disregard may be claimed. The statute is applicable to both Section 8 and public housing tenants, but implementing regulations are limited primarily to public housing and voucher recipients. The QHWRA income disregard provision is an update and expansion of similar legislation passed in 1990[3] that was intended to assist public housing residents moving from welfare to work by limiting increases in their rent for 18 months when they secured employment or participated in an employment training program. HUD delayed almost four years before issuing the regulations to implement the 1990 requirement, and legal services providers soon ferreted out implementation problems with the public housing agencies (PHAs).[4]

Perhaps learning from its mistakes with the 1990 law, HUD published regulations for the new disregard for public housing residents in March 2000[5] and published clarifying Frequently Asked Questions (FAQs) in early 2001.[6] The regulations for disabled tenants of the voucher and a few other housing programs were published January 19, 2001, and became effective as of February 20, 2001.[7] Once again, however, there is confusion among tenants, their advocates and PHAs

[1]Title V of *Department of Veterans Affairs, Housing and Urban Development and Independent Agencies Appropriations Act*, Fiscal 1999, Pub. L. No. 105-276, 112 Stat. 2,461 (Oct. 21, 1998).

[2]The amendments are contained in Section 508(b) of the *Quality Housing and Work Responsibility Act of 1998*, 42 U.S.C. § 1437a(d)(West Supp. 2001), *supra* note 1.

[3]42 U.S.C. § 1437(a)(1998), as amended by Pub. L. No. 101-625, § 515(b), 104 Stat. 4199 (Nov. 28, 1990).

[4]For a detailed discussion of the prior legislation and the problems in implementation *see Earned Income Disregards for Public Housing Tenants*, 28 HOUS. L. BULL. 1 (January 1998). There is also more discussion of EIDs at our Web site at www.nhlp.org.

[5]Changes to Admission and Occupancy Requirements in the Public Housing and Section 8 Housing Assistance Programs, 65 Fed. Reg. 16,692 (Mar. 29, 2000). Hereinafter all citations to the final rule will cite only to the section of the regulations; *see* 24 C.F.R. § 960.255 (2001).

[6]*HUD Frequently Asked Questions re: 65 Fed. Reg. 16,692* (Mar. 29, 2000), http://www.hud.gov/offices/pih/phr/about/ao_faq2.cfm, (hereinafter Questions or FAQs). For more in-depth discussion of the FAQs, *see Admission and Occupany FAQs Answered by HUD*, 31 HOUS. L. BULL. 64 (March 2001).

[7]66 Fed. Reg. 6,223 (Jan. 19, 2001) as amended by 67 Fed. Reg. 6,820 (Feb. 13, 2002)(amendment effective Mar. 15, 2002). The EID for disabled families is only applicable to the HOME Investment Partnerships Program (24 C.F.R. part 92 (2001)), the Housing Opportunities for Persons with AIDS

with the program. Under the former income disregard, this confusion led to improper—or a complete lack of—implementation. It also led to litigation.[8] In Connecticut, advocates also obtained statewide compliance with the prior income disregard, including retroactive benefits. The new disregard statute and regulations are showing signs of generating the same problems. Many tenants are not benefitting from the income disregards and, thus, are paying excess rent. Tenants incapable of maintaining their rent payments have been evicted or are under threat of losing their housing. Tenants who have been able to pay their rent are entitled to credit or a refund for the excess amounts they have paid due to inclusion of income in the rent calculation that should have been disregarded. Within the last few months, at least three jurisdictions have made, or are on the verge of making, significant progress in implementing the public housing EID. This article outlines current EID requirements and reviews the litigation and negotiation in four jurisdictions that have addressed the issue of tenants not receiving proper rent calculations under both the old and the new law.

The Statutory and Regulatory Scheme

Most tenant rents in federally assisted housing are calculated as a percentage of household income. Without an EID, tenants' rents rise as they move into employment and self-sufficiency, providing a disincentive for tenants to improve their own economic well-being. Congress enacted the new EID program to remove this disincentive for eligible families by excluding from rent calculations the increased income earned from employment.[9] The statute provided for the program to assist both public housing tenants (as the prior EID program had) and Section 8 recipients.[10] The provision for Section 8 recipients, however, was made subject to appropriations, which have yet to be made available.[11] The EID provisions have been implemented for public housing tenants and voucher recipients who are disabled.[12]

The mandatory EID provisions of the statute[13] and regulations[14] require PHAs and owners of certain other housing[15] to exclude 100 percent of a family's increased income from earnings for a period of 12 months and 50 percent of the increased earned income for an additional 12-month period.[16] A family qualifies for the income disregard if (1) the increased income is due to the employment of a family member who has been previously unemployed,[17] (2) the family received welfare, including such benefits as one-time payments and transportation assistance, during the prior six months,[18] or (3) the family's income increased during a family member's participation in a self-sufficiency or job-training program.[19] Initially, the mandatory EID for the disabled was applicable only for "disabled families;" it was not available to a disabled individual living in a non-disabled family.[20] This provision was corrected and the EID is now available to any disabled individual participating in a covered program.[21]

Litigation and negotiation in four jurisdictions have addressed the issue of tenants not receiving proper rent calculations under both the old and the new law.

The EID is applicable only to the increased income due to earnings and is calculated on the basis of each individual family member's earnings. Thus, for a previously unemployed member of a household who did not have another source of income, all of that member's earned income would be excluded for a period of 12 months and 50 percent for an additional 12 months. For a family member who previously received welfare benefits or child support payments, the amount of income that would be excluded would be limited to the increase in income that is attributable to earnings. The

program (HOPWA)(24 C.F.R. part 574 (2001)), the Supportive Housing Program (24 C.F.R. part 583 (2001)), and the Housing Choice Voucher Program (24 C.F.R. part 982 (2001)). The disregard works virtually identically to the public housing disregard, but applies when a family member who is the actual person with the disability—as opposed to any family member—qualifies for the disregard. Hereinafter all citations to the rule will cite only to the section of the regulations; *see* 24 C.F.R. §5.615.

[8] *See*, *e.g.*, *Watts v. Columbus Metropolitan Housing Authority*, No. 02-00145 (S.D. Ohio, filed February 2000; *Phillips v. Philadelphia Housing Authority*, No. 00-4275 (E.D. Pa., filed August 2000). Also, in Charlottesville, Virginia in 1999, the Charlottesville-Albemarle Legal Aid Society in conjunction with resident groups was able to secure the voluntary dismissal of 28 summonses and $57,883 in refunds for tenants for whom the old EID was not properly applied. *See Enforcement of Income Disregard Provisions Yields $58,000 in Benefits for Charlottesville Public Housing Residents*, 29 HOUS. L. BULL. 72 (April 1999).

[9] 42 U.S.C. § 1437a(d)(West Supp. 2001).

[10] *Id.* § 1437a(d)(3)(A).

[11] *Id.* § 1437a(d)(4)(West Supp. 2001). To date, no funds have been appropriated for non-disabled Section 8 recipients.

[12] 24 C.F.R. §§ 960.255 and 5.619 (2001).

[13] 42 U.S.C. § 1437a(d)(West Supp. 2001).

[14] 24 C.F.R. §§ 960.255 and 5.617 (2001).

[15] The remainder of the article shall refer only to PHAs; the reader should take note that owners or managers would be subject to the same regulations and analysis in the case of HOME, HOPWA, and supportive housing. *See supra* note 7.

[16] *Id.*, §§ 960.255(b) and 5.617(c).

[17] *Id.*, §§ 960.255(a)(i) and 5.617(b)(1).

[18] *Id.*, §§ 960.255(a)(iii)and 5.617(b)(3).

[19] *Id.*, §§ 960.255(a)(ii) and 5.617(b)(2).

[20] 24 C.F.R. § 5.617(b)(2001). *See* 24 C.F.R. § 5.403 for definitions of "family," "disabled family," and "person with disabilities."

[21] 67 Fed. Reg. 6,820 (Feb. 13, 2002)(amendment effective Mar. 15, 2002).

HUD FAQs document makes clear that any member of a tenant household may qualify for the EID, including minors who turn 18.[22]

The new EID also contains a 48-month limit.[23] A tenant can receive only 12 months of 100 percent EID and only 12 months of 50 percent EID during a lifetime 48-month period from the time that the EID first goes into effect. Thus, if a tenant qualifies for the 100 percent EID for 10 months and then loses the job, the tenant is only eligible for another two months of the 100 percent EID, and those two months (as well as the additional 12 months of the 50 percent EID) must fall within the four-year limit.[24]

Who Qualifies for the EID?

Previously Unemployed Household Members

A tenant qualifies for the EID if family income increases as a result of the employment of a family member who was "previously unemployed" for one or more years.[25] There is no other limit on the time that the tenant must have been unemployed prior to gaining work.[26] The definition of previously unemployed includes a person who has earned in the past 12 months no more than the equivalent of 500 hours at the greater of the federal or state minimum wage.[27] The federal minimum wage is currently $5.15 per hour.[28] Thus, if the federal minimum wage is applicable, the earnings for the 12-month period cannot exceed $2,575.[29]

Family Receipt of Welfare Benefits

A household is entitled to the EID if the family's earned income increases and if any member of the household currently receives or in the past six months has received welfare benefits.[30] Thus, to qualify for the EID under the welfare provision, the individual whose income increased does not have to be the one who received welfare benefits.[31] Also, the tenant may qualify for the EID for increases in earned income while still receiving welfare assistance.[32]

Welfare sanctions are a complicating issue with respect to the EID in determining the annual income of a family for rent calculation purposes and HUD has addressed this complication.[33] The fact that a tenant's welfare income is reduced or terminated due to work-related sanctions does not disqualify the family from the benefits of the EID if one of its members, including the sanctioned member, subsequently finds work.[34] However, if a tenant's welfare benefits are reduced for fraud or noncompliance with economic self-sufficiency requirements, the "sanctioned" welfare income will continue to be included in family income for rent-setting purposes.[35] In other words, the tenant will not experience a reduction in rent due to the reduction in welfare precipitated by sanctions for fraud or noncompliance with the economic self-sufficiency requirements and will also not be penalized for responding to the sanction by obtaining work.[36]

The fact that a tenant's welfare income is reduced or terminated due to work-related sanctions does not disqualify the family from the benefits of the EID if one of its members, including the sanctioned member, subsequently finds work.

Covered Participant in Self-Sufficiency Programs

A household may also qualify for the EID if the household income increases due to increased earnings of a household member during that member's participation in job training or an "economic self-sufficiency program."[37] The definition for such programs includes any program designed to assist tenants in gaining their financial independence.[38] This encompasses a large number and a wide variety of programs, including, but not limited to job training, English proficiency, and substance-abuse programs.[39] It may also include enrollment in general non-vocational courses at a community college or training or activities at a sheltered workshop.[40] The increase in earnings to be disregarded may occur after the completion of the primary part of the training program, if the individual continues to receive some amount of training, mentoring, counseling or other assistance from the training program.[41]

[22] *HUD Frequently Asked Questions*, *supra* note 6, Section II.C.Q2.

[23] 24 C.F.R. §§ 960.255(b)(3) 5.617(c)(3)(2001).

[24] *HUD Frequently Asked Questions*, *supra* note 6, Section II.C.Q29.

[25] 24 C.F.R. § 960.255(a)(i)(2001); 42 U.S.C. § 1437a(d)(3)(B)(i)(2001).

[26] *Id.*; *HUD Frequently Asked Questions*, *supra* note 6, Section II.C.Q6.

[27] 24 C.F.R. § 960.255(a)(2001).

[28] *See* 29 U.S.C. §206(a)(1)(2001).

[29] The minimum wage in California is $6.75 per hour; thus the 12-month earnings cannot exceed $3,375. In Washington, D.C. the minimum wage is $6.15 per hour, so the 12-month earnings cannot exceed $3,075.

[30] 24 C.F.R. § 960.255(a)(iii)(2001); 42 U.S.C. § 1437a(d)(3)(B)(iii)(2001).

[31] *HUD Frequently Asked Questions*, *supra* note 6, Section II.C. Q20.

[32] *Id.*, Section II.C. Q8.

[33] 24 C.F.R. § 5.615 (2001).

[34] *HUD Frequently Asked Questions*, *supra* note 6, Section II.C.Q21.

[35] 24 C.F.R. § 5.615(b)(1)(2001).

[36] *Id.* § 5.615(c)(2) requires that PHAs seek written verification of a welfare benefit reduction. If the welfare agency does provide verification in a "reasonable time," the PHA must reduce the rent.

[37] 24 C.F.R. § 960.255(a)(ii)(2001); 42 U.S.C. § 1437a(d)(3)(B)(ii)(2001).

[38] 24 C.F.R. § 5.603(b)(2001)

[39] *HUD Frequently Asked Questions*, *supra* note 6, Section II.C.Q5; *see* 24 C.F.R.§ 5.603(b)(2001).

[40] *HUD Frequently Asked Questions*, *supra* note 6, Section II.C. Q24 and Q25.

[41] 65 Fed. Reg. 16,705 (Mar. 29, 2000).

EIDs and Income-Reporting Requirements

Not surprisingly, the EID intersects with income-reporting requirements. For example, a previously unemployed (for 12 months or longer) family member who becomes employed six months after having been recertified does not report the change in income until the next recertification six months later (because the PHA has no interim reporting requirements). By not reporting the income for six months, the family received the benefit of the disregard for six months prior to the recertification (because the PHA continued to base the family's rent on the income reported at the last recertification). Therefore, HUD concludes that the family would be entitled only to another six months of the 100 percent disregard of the increase in income. After that six-month period, the family would be entitled to a 50 percent disregard of the increase in income for another period of 12 months.[42] Significantly, the result is the same regardless of the PHA's income reporting policies. Thus, tenants whose earned income increases should not be adversely affected for failing to report.[43] In other words, PHAs should not take punitive action against tenants for failing to report increases in income from earnings because the increases would be disregarded whether reported or not.

The date that the first 12-month period begins is when the rent increase would have gone into effect.[44] Thus, if the PHA implements rent increases on the first of the month following the increase in income or after a 60-day notice period, these policies should be taken into consideration in establishing the date that the first 12-month income disregard period begins. During the second 12-month period, when only 50 percent of the increased income is disregarded, the failure of the tenant to report an increase in income may result in a retroactive rent adjustment if the tenant is required to report the income change and failed to do so. The FAQs state that the "earning disregard is effective when the rent increase would otherwise have gone into effect."[45] Thus, it seems that in the second 12-month period, if the tenant's earned income increases and the tenant, contrary to the PHA's reporting and rent change policy, does not report that increase for six months, the tenant could be charged retroactively for rent based on 50 percent of the increase in earned income for the period during which the increase would have gone into effect. If, however, the PHA does not require reporting and/or a change in rent when there is an interim income increase, the tenant's rent for the second 12 months will not change until the next annual recertification.

Old vs. New Earned Income Disregard

HUD's FAQs deal with a number of questions regarding the relationship between the former EID and the newer EID.[46] The most important point is that a tenant's receipt of the benefits under the former EID does not preclude an eligible tenant from also receiving EID benefits under the new program that went into effect on October 1, 1999.[47] In addition, the eligibility requirements for the two EIDs are different. For example, under the new EID, a tenant may qualify for the disregard if income increases during a training program. For the old EID, the tenant could have qualified if the income increased only after completion of the training program.[48] If a family's rent was based on the former 18-month EID when the new policy went into effect on October 1, 1999, the former disregard remained in effect until the expiration of the original 18 months.[49] As noted previously, a tenant is eligible for the new EID during a 48-month period.[50] Receipt of the old, 18-month EID does not count against the four-year limit.[51]

The most important point is that a tenant's receipt of the benefits under the former EID does not preclude an eligible tenant from also receiving EID benefits under the new program that went into effect on October 1, 1999.

The EID and Child-Care Expense Deduction

When determining income for rent-setting purposes, a household may deduct from income certain child care expenses incurred in order to make it possible for the family member to work. A household member receiving the EID cannot use the disregarded income in calculating the limitation for the child care expense deduction. The child care expense deduction is capped at the amount of earned income that the PHA includes in the annual income determination.[52] Thus, for example, a single head of household sole wage-earner whose only earned income is fully disregarded for the first 12 months of employment may not be able to deduct child care expenses since the amount of income used to determine the amount of allowable child care deduction would be zero.

[42] *Id.*, Section II.C. Q4; *see* 24 C.F.R.§§ 960.255(a) 5.617(c)(2001).

[43] *HUD Frequently Asked Questions*, *supra* note 6, Section II.C. Q16.

[44] *Id.*, Section II.C. Q17.

[45] *Id.*

[46] Compare the earlier EID *at* former 24 C.F.R. § 5.609(c)(13)(1997) with the new EID *at* 24 C.F.R. § 960.255 (2001).

[47] *HUD Frequently Asked Questions*, *supra* note 6, Section II.C. Q33.

[48] *See* former 24 C.F.R. § 5.609(c)(13)(1997).

[49] *HUD Frequently Asked Questions*, *supra* note 6, Section II.C.Q13.

[50] 24 C.F.R. § 960.255(b)(3)(2001).

[51] *HUD Frequently Asked Questions*, *supra* note 6, Section II.C.Q33.

[52] *Id.*, Section II.C.Q32; *see* 24 C.F.R. §§ 5.603(b), 5.611(a)(4)(2001).

Individual Savings Accounts

PHAs are permitted to offer tenants who qualify for the mandatory EID the alternative of paying the full rent otherwise due and putting the rent overage in an individual savings account (ISA).[53] The regulations provide that amounts deposited in ISAs may be withdrawn only for the purpose of purchasing a home,[54] paying education costs of family members,[55] moving out of public or assisted housing,[56] or paying any other expense authorized by the PHA for the purpose of promoting the economic self-sufficiency of residents of public housing.[57] However, in the case of a lease breach or if the family is evicted by the PHA, the housing authority may retain the amount of the savings equal to any amounts owed to the PHA.[58] Whether a PHA offers an ISA is at its discretion. The PHA must indicate its choice in the PHA Plan.[59]

PHA Discretionary Income Disregards

PHAs may adopt discretionary policies of EIDs for public housing residents.[60] Such policies must be included in the PHA Annual Plan.[61] PHAs may be reluctant to adopt discretionary EIDs because the Interim Operating Subsidy rule makes it clear that a PHA will not be reimbursed for any reductions in rent due to such discretionary EID policies.[62] However, there may be other funds available to support a discretionary EID: PHAs may retain 50 percent of any increase in rental income and use such retained rent to fund an optional EID.[63] If the discretionary EID works as intended, it is possible that the rental income for the PHA may increase, thus creating more money to continue funding the disregard.

Earned Income Disregard Litigation and Negotiations

As the preceding discussion demonstrates, the mandatory EID regulations and procedures are complex. In order for PHAs to properly apply the statute and regulations, they need to carefully review changes in tenant families' incomes and analyze where new income is coming from. Depending upon a PHA's income reporting requirements, a PHA would be required to account for the disregard from the time the income increases, rather than at recertification. It would also have to disregard all the increased earned income for 12 months, then only half the income for another 12 months, always bearing in mind that those 24 months could be spread out into many small segments over a 48-month period. Not surprisingly, many PHAs have not succeeded in properly implementing the program. Some have not even tried, forging ahead with evictions of public housing tenants for non-payment of rent that may well have been excessive had the mandatory EID been applied appropriately.

Because of the failure of the PHAs to implement the mandatory EID, residents in at least two jurisdictions have addressed the problem head-on with their public housing authorities: Columbus, Ohio and Philadelphia, Pennsylvania. Tenants filed suit against the local PHA in both cities.[64]

The Columbus case has progressed the farthest. In *Watts v. Columbus Metropolitan Housing Authority*,[65] Ms. Watts, a public housing tenant, was the named plaintiff in a class action complaint against the Columbus Metropolitan Housing Authority (CMHA). The suit, filed in February 2000, asked for a declaratory judgment that CMHA's rent calculation procedures were in violation of the *National Housing Act*,[66] *The Family Support Act*,[67] HUD regulations,[68] and Section 1983.[69] It also sought an injunction against CMHA's rent increase policies and an order that CMHA recalculate tenants' rents. Lastly, it sought individual and class-wide damages to compensate for any rent improperly collected by CHMA.

Ms. Watts' particular situation was that she had participated in a job training and supportive services program, successfully completed the program, and gained employment in March 1998. When the PHA calculated Ms. Watts's rent in May 1998, it failed to disregard her increased income pursuant to the former law, and set her rent at $243 per month. In fact, for the subsequent 18 months, Ms. Watts should have been at zero rent because all of her increased income should have been disregarded for rent determination purposes under the old law. When Ms. Watts failed to keep up her rent payments in September 1999, CMHA commenced eviction proceedings against her. The complaint alleged that Ms. Watts was just one of many tenants who were similarly situated.

In late 2001, the parties entered into a consent decree, and as of publication of this article, the parties were in the process of identifying class members—potentially in the thousands—and calculating refunds. The consent decree pro-

[53] 42 U.S.C. § 1437a (2001); 24 C.F.R. § 960.255(d)(2001).

[54] 24 C.F.R. § 960.255(d)(3)(i)(2001).

[55] *Id.*, § 960.255(d)(3)(ii).

[56] *Id.*, § 960.255(d)(3)(iii).

[57] *Id.*, § 960.255(d)(3)(iv).

[58] *Id.*, § 960.255(d)(6).

[59] *See* HUD Form 50075, PHA Plan Template, ¶ 4A(1)(g).

[60] *See* 42 U.S.C. § 1437a(b)(5)(B)(West Supp. 2001); *see also* 24 C.F.R. § 5.611 (2001).

[61] *See* PHA Plans Template (HUD 50075), paragraph 4A(1)d. (03/31/2002), available online *at* www.hud.gov/pih/pha/plans/phaps_templates.html.

[62] 66 Fed. Reg. 17,276 (Mar. 29, 2000).

[63] 24 C.F.R. §§ 990.109(b)(iii) and 990.116(a)(2001).

[64] *See also*, *Earned Income Disregards for Public Housing Tenants*, 28 HOUS. L. BULL. 1 (Jan. 1998), *supra* note 4, and our Web site *at* www.nhlp.org, where there is detailed discussion of the old EID in litigation surrounding that program.

[65] *Supra*, note 8. Ms. Watts is represented by J. Mark Finnegan, who started working on this case through the Equal Justice Foundation in Ohio. Mr. Finnegan welcomes inquiries about this case. He can be reached by contacting Vytas V. Vergeer at NHLP's D.C. office or *at* vvergeer@nhlp.org.

[66] 42 U.S.C. § 1437a (West 2001).

[67] *Id.* § 1437g .

[68] *See* former 24 C.F.R. § 5.609(c)(13)(1997).

[69] 42 U.S.C. § 1983 (West 2001).

vides for the protection of tenants who may have been overcharged for rent, including current tenants and those who may have already left public housing. All pending public housing evictions for non-payment of rent have been suspended. When CMHA chooses to go forward with a non-payment eviction, it notifies the original counsel for plaintiffs, the Equal Justice Foundation of Ohio (EJF). EJF then writes a letter to the tenant, alerting him or her to the potential EID issue. If the tenant consents, EJF reviews his or her file to check whether the rent was properly calculated under the EID provisions. The consent decree covers all tenants' rent calculations back to April 1, 1998, and tenants may receive a credit (if still in public housing) or a refund (if they have moved out of public housing) of up to $4,000. For those who may have been wrongfully evicted because they failed to pay rent that was set too high, the consent decree sets up a special process. If the amount of damages alleged is less than $3,000, the case will be addressed by a special master, who will determine the amount of damages, including compensatory damages. If the amount of damages alleged exceeds $3,000, the tenant could opt out of the consent decree. Plaintiffs' council expects the entire process to be completed by early 2004.

Perhaps an even more important result of the litigation is that CMHA started to use computer-prompted questions in the rent calculation process.

This consent decree with CMHA addresses the many different situations that tenants may find themselves in after a PHA has failed to properly implement an EID. The tenants who have overpaid their rent yet remain in public housing get credit for the overpayments, those who left public housing get refunds, and those who were evicted get compensatory damages and refunds. Perhaps an even more important result of the litigation is that CMHA started to use computer-prompted questions in the rent calculation process. Thus, a case worker trying to assess whether or not a tenant qualifies for an EID is led through a series of questions that are aimed at eliciting the information necessary to make that determination. Effective use of this program should prevent the problem from recurring.

The Philadelphia litigation, *Phillips v. Philadelphia Housing Authority*,[70] was filed in August 2000. Ms. Phillips should have received EIDs under both the old and the new statute. Ms. Phillips received welfare assistance through September 1998. Then she was unemployed from October 1998 through May 1999, with no income. She then enrolled in a job-training program, which garnered her approximately $327 per month. The Philadelphia Housing Authority raised her rent from zero to $98 per month in August 1999. Assuming no change in her income status under the old EID law, Ms. Phillips' rent should have remained at zero for the 18 months following May 1999—or through approximately November 2000. Ms. Phillips then got a job in February 2000, increasing her income, and resulting in the housing authority raising her rent to $201 per month starting in May 2000. Again, had the housing authority properly applied either the old income disregard or the new one, Ms. Phillips' rent would have been set at zero for a period of time.

Plaintiffs filed a complaint based on substantially similar violations to those raised in *Watts*, and added additional causes of action under a third-party beneficiary claim for breach of the Annual Contributions Contract, a claim for violation of the lease, and a Section 1988[71] claim for attorneys' fees. Plaintiffs asked for declaratory relief, class certification, an injunction, and compensatory and punitive damages. After initial settlement negotiations produced no result, the court certified the class on January 30, 2002, and the case is proceeding to trial.

In Washington, D.C., successful negotiation has eliminated, or at least indefinitely delayed, the need for litigation. In spring 2001 after extensive discussion with and the threat of a lawsuit against the D.C. Housing Authority (DCHA), the Legal Aid Society of the District of Columbia with the help of *pro bono* counsel was able to procure a number of positive resolutions regarding how the District will implement the EID. First, DCHA agreed to halt all non-payment public housing evictions until appropriate measures could be taken to address tenants' possible qualifications for a disregard. After cessation of such evictions for approximately two months, DCHA was able to establish an effective protocol for reviewing each tenant's file for income disregard issues. It also contracted with a private consulting firm to conduct a three-day management course for the relevant employees, further reflecting just how difficult understanding the implementation of these regulations and statute can be and how helpful computer-prompted questions could be. In November 2001, DCHA estimated that only 80 to 100 families had benefitted from the income disregard, with the families receiving credits or cash ranging from hundreds to thousands of dollars.[72] There are 10,703 public housing units in D.C.[73] Thus, given that less than 1 percent of the residents have received any relief, it seems that full implementation of the program is still some ways off.

Cincinnati, Ohio has also gained results from their negotiations and threat of litigation with the Cincinnati Metropolitan Housing Authority (CMHA). The Legal Aid Society of Greater Cincinnati was able to get CMHA to agree to take a number of steps to improve implementation of the mandatory EID program. It engaged in extensive outreach with large, colorful

[70] *Supra*, note 8. Ms. Phillips is represented by George Gould, of Community Legal Services, Inc., in Philadelphia, and may be reached through Vytas V. Vergeer at NHLP's D.C. office.

[71] 42 U.S.C. § 1988 (West 2001).

[72] This information was collected through an interview with Eric Angel, Legal Director at the Legal Aid Society of the District of Columbia, who can be reached by contacting Vytas V. Vergeer at NHLP's D.C. office.

[73] *See* http://pic.hud.gov/pic/RCRPublic/rcrstate.asp.

posters about the EID posted around the developments and in the CMHA rental offices and its main office. It included a reduced version of the poster in each tenant's monthly rental statement. Additionally, CMHA froze the rent for 62 families while proper application of the EID could be determined. CMHA even agreed not to increase rent retroactively for any of those families whose rent should have been increased. The CMHA also agreed to give retroactive disregards for those families entitled to them, to update its computer software to properly track the disregards, and to employ outside trainers for its staff. Legal Aid conducted an agreed-upon survey of 30 randomly selected files after these improvements were implemented and found proper compliance with the EID rules.[74]

Conclusion

The EID legislation—both the old and the new—was designed to eliminate disincentives to work for public housing tenants. It has the potential to help thousands of tenants improve their lives and to actually garner more rent for public housing agencies in the long run as more tenants become employed and increase their earning potential. As of January 31, 2002, 14 percent of more than 1.2 million public housing households were receiving welfare; another 6 percent had no income whatsoever.[75] These 240,000 tenants all stand to benefit immensely from EID programs as they move from welfare or unemployment to work. These programs encourage welfare recipients who are moving to work, but unfortunately are extremely complex to administer. HUD seems to have recognized at least some of the problem, as EIDs and other rent calculation difficulties may be addressed through the Rental Housing Integrity Improvement Program (RHIIP).[76] RHIIP's primary goal is to improve the accuracy of rent calculation, and one mechanism by which it may do this is through simplification of the income determination process, which may well include simplified EID provisions. Ideally, RHIIP will assist in making EIDs useful for tenants without the complications the program currently entails, and advocates should continue to work to influence the RHIIP process.

At the local level, legal services providers need to assess their public housing authority's compliance with the EID statute and consider what steps to take in response to any improper or lack of implementation. Whether that entails encouraging training for relevant public housing personnel, education programs for tenants, improved technology, negotiated resolution of the issue, or class action litigation is something that the tenants and their advocates will have to decide on a case-by-case basis.[77] ■

[74]The information in the preceding paragraph was obtained from OSLSA REPORTS, Oct./Nov. 2000, pg. 9.

[75]*See* http://pic.hud.gov/pic/RCRPublic/rcrmain.asp.

[76]For an in-depth discussion of RHIIP, *see HUD Proposes Another Initiative to Improve the Income Verification and Rent Determination Process,* 31 HOUS. L. BULL. 202 (Sept. 2001).

[77]Next month's issue of the Housing Law Bulletin will include an article on the steps that advocates can and should take to determine whether their local PHA has implemented the EID and is applying it correctly and steps that can be taken to ensure compliance with the program.

Responding to Congressional Directive to Protect Victims of Domestic Violence

Introduction

Domestic violence is a problem that disproportionately affects low-income women.[1] It is a terrifying reality and the effects of domestic violence are severe.[2] Victims are battered physically, may be prevented from seeking or maintaining their employment, or may lose their good credit. Further, the abuse often isolates the victims from friends, family and the community at large. Accessing and maintaining housing is a particularly critical problem confronting victims who are seeking to end the cycle of violence.[3]

Congress has recognized in recent years that families subject to domestic violence have unique needs that should be addressed by those administering the federal housing programs. When Congress eliminated the federal preferences in 1998, it stated that:

> It is the sense of Congress that, each public housing agency involved in the selection of eligible families for assistance under the United States Housing Act of 1937 (including residency in public housing and tenant-based assistance under section 8 of such Act) should, consistent with the public housing agency plan of the agency, consider preferences for individuals who are victims of domestic violence.[4]

> More recently, the Conference Committee Report accompanying the Department of Housing and Urban Development (HUD) appropriations legislation for Fiscal Year 2002 "direct[ed] HUD to work with PHAs to develop plans to protect victims of domestic violence from being discriminated against in receiving or maintaining public housing because of their victimization."[5]

HUD has recognized, to a limited extent, that victims of domestic violence have unique needs. For example, under the now-repealed federal preference regulations, individuals and

[1]Callie Marie Rennison and Sarah Welchans, *Intimate Partner Violence*, (May 2000, U.S. Department of Justice, Bureau of Justice Statistics Special Report) NCJ 178247 (Revised on 7/17/2000), available *at* www.usdoj.gov.

[2]*United States Dept. of Hous. Urb. Dev., et al. v. Rucker, et al.*, Nos 00-1770/00-1781, Brief of *Amici Curiae* of the National Network to End Domestic Violence, *et. al.*, in Support of Respondents (Dec. 20, 2001), pg. 3, 2001 WL 1,663,790.

[3]Reif, Susan A. and Lisa J. Krisher, *Subsidized Housing and the Unique Needs of Domestic Violence Victims,* 34 CLEARINGHOUSE REV. 20, 21 (May/June 2000).

[4]Pub. L. No. 276-105, 112 Stat. 2,518, 2,548 (1998), § 514(e) codified at 42 U.S.C.A. § 1437f note (West Supp. 2001); 24 C.F.R. §§ 982.207(b)(4)(Voucher) and 960.206(b)(4) Public Housing)(2001).

[5] H.R. Conf. Rpt. 272, 107 Cong. 1st Sess. 120 (Nov. 6, 2001).

families who were "involuntarily displaced" received an admission preference to all federally assisted and subsidized housing including public housing and the voucher program. This was accomplished by defining "involuntarily displaced" to include victims of domestic violence.[6] Of more immediate relevance, HUD implemented the above-quoted "sense of Congress" provision in regulations governing the voucher and public housing programs.[7] Moreover, the PHA plan template, the document that each PHA must submit annually to HUD regarding certain local policies adopted by the PHA, includes victims of domestic violence as one category of applicants for whom a PHA may adopt a preference.[8]

To date, HUD has not implemented Congress's most recent pronouncement which urges HUD and PHAs to look at the problem with a much broader perspective. To remedy the situation, housing and domestic violence advocates are jointly seeking a commitment from HUD to implement this most recent policy statement at the national level.

Housing and domestic violence advocates working at the local level should use the recent congressional directive to urge PHAs and local HUD officials to review and address the problems attendant to housing and domestic violence. HUD staff in local offices should provide guidance and assistance to local PHAs. They should work with PHAs and local housing and domestic violence advocates to improve the understanding of the problems, identify the relevant issues and then devise appropriate local policies, relying whenever possible on model policies. PHA staff should be trained to provide referrals for victims of domestic violence to court personnel, legal aid, shelters and other agencies that have an expertise in the area. In some jurisdictions it may be possible for PHA staff to receive training on how to provide some other basic services and assistance in the more complicated areas including preparation of an application for a restraining order.

Housing and Domestic Violence Issues

The housing and domestic violence issues that advocates have reported are varied but clearly affect admissions, continued occupancy and evictions and terminations. The following is a brief discussion of some of these issues, most of which could be addressed and resolved through the PHA plan process. Moreover, as noted below, HUD regulations require the PHA to address some of these issues in local rules.

Admissions

Unique issues arise for victims of domestic violence in the admissions context. In general, victims of domestic violence may have poor credit, rental and employment histories that prevent them from passing the tenant screening or that deny them a preference. For example, Oregon advocates have reported that a client was denied admission because a criminal records/court filings review revealed that the applicant had sought a restraining order. This problem is repeated and exacerbated in jurisdictions that routinely arrest both parties in domestic violence cases or routinely restrain both parties when only one seeks a restraining order. Other applicants have confronted problems when the PHA requires the applicant's complete rental history or the names and addresses of prior landlords. In one case, the victim-applicant did not want to reveal the information because she feared that her abuser would track her down through the contact with the prior landlord.

Housing and domestic violence advocates working at the local level should use the recent congressional directive to urge PHAs and local HUD officials to review and address the problems attendant to housing and domestic violence. HUD staff in local offices should provide guidance and assistance to local PHAs.

These and other problems could be minimized if PHAs not only provided an admission preference to domestic violence victims but also advised them that they may mitigate adverse findings by providing explanations for poor prior work history, poor credit information and/or poor landlord references (or the lack thereof). Current public housing and voucher program regulations specifically allow PHAs to review and consider mitigating circumstances.[9] In addition, PHAs should adopt policies designed to protect the privacy of victims of domestic violence. Lastly, because fear and intimidation often persist after separation from the abuser, PHS should give victims of domestic violence a clear notice of their rights, including the right to protect their privacy.

On admission of all families, PHAs' policies should provide for the placement of all adults on the lease. Such a policy would make it is easier for a domestic violence victim to assume the lease if the abuser moves out voluntarily or involuntarily because of an injunction or incarceration. In most instances, all that the victim would have to do is report a change in family composition.

PHAs should be aware of the unique problems of domestic violence victims in administering the voucher program. The orientation for new families should include a discussion of the issue and victims should be given the

[6]61 Fed. Reg. 9,044 (Mar. 6, 1996).

[7]24 C.F.R. § 982.207(a)(3)(2001), 64 Fed. Reg. 56,894, 56,912 (Oct. 21, 1999)(adopted for the voucher program one year after legislative enactment); 24 C.F.R. § 960.206(b)(4), 64 Fed. Reg. 16,726 (Mar. 29, 2000)(adopted for Public Housing effective April 28, 2000 approximately 18 months after legislative enactment); *See also* 24 C.F.R. § 982.315 (2001) (Domestic violence addressed in the context of family break-up).

[8]Form HUD 50075, PHA Plans Template.

[9]24 C.F.R. § 960.205 (Public Housing) and 892.552 (Voucher)(2001).

opportunity to identify themselves in private. When appropriate, victims should be referred to organizations that will assist them in repairing poor rent and credit histories and securing employment. In addition to helping victims of domestic violence, these practices should improve the PHAs' voucher success rate.[10]

Issues Related to Noncitizens

There are some unique issues related to victims of domestic violence who are not citizens. Under Section 214 of the *Housing & Community Development Act of 1980*, as amended,[11] and its accompanying regulations,[12] only certain categories of noncitizens are eligible for public housing and voucher assistance. Generally, ineligible noncitizens may live in public or voucher-assisted housing if another member of the household is a citizen or eligible noncitizen. However, the rent or level of assistance received by such a mixed household is prorated based on the number of eligible household members. Victims of domestic violence and their children may be eligible for public housing and voucher assistance even if they do not fall within one of the categories enumerated in Section 214.[13] The P*ersonal Responsibility and Work Opportunity Reconciliation Act of 1996* (PRWORA)[14] establishes immigrant restrictions in certain government benefit programs and provides that certain abused immigrants are considered "qualified" persons.[15] Under Section 431(a) of PRWORA, persons in this category are eligible for "public or assisted housing." While PRWORA does not directly modify provisions of Section 214, an argument can be made that abused immigrants should be considered eligible for housing otherwise restricted by Section 214.[16] Indeed, some PHAs provide benefits to families in this situation.

Eviction and Voucher Termination

Unfortunately, PHAs have sought to evict victims of domestic violence with a fair degree of regularity. HUD has interpreted the public housing statute that allows PHAs to evict households for any criminal activity by a member of the family or a guest that threatens the health, safety, or right to peaceful enjoyment so broadly as to permit the eviction of victims of domestic violence. As one of the amicus briefs in support of the tenants in *United States Depart. Hous. Urb. Dev. v. Rucker*, points out, such an interpretation of the "one-strike" rule is "absurd in the extreme."[17]

The use of the "one-strike" rule to evict domestic violence victims is based upon the false premise that battered women control the behavior of their attacker. Moreover, such evictions do not promote safer or crime-free public housing. To the contrary, the threat of loss of one's home is so significant that domestic violence victims are afraid to reveal their domestic problem and unintentionally provide abusers with opportunities to commit further crimes. While advocates have raised fair housing claims in response to threats of evictions,[18] such a case-by-case response is hardly as effective as a remedial policy change that protects all victims of domestic abuse. PHAs should be urged, therefore, to revise their eviction policies to exclude victims of domestic violence from the reach of the "one-strike" rule. In support of the policy, they should be reminded that they have other more reasonable tools available to address the problem, such as requiring the victim to exclude the abuser from the household.[19] In appropriate situations the victim may seek a restraining order, but in most situations such an order should not be a condition for remaining in the housing because of the concern that such action may incite the abuser to increased use of violence. PHA policies should provide that they must consider these and other mitigating circumstances before taking any action to evict.[20] PHA policies should also provide that voucher landlords be instructed to consider the same factors before seeking to evict.[21] In addition to having full consideration of the circumstances by the PHA, victims of domestic violence should always be entitled to explain the situation to the court.

In the voucher program, a PHA is required to terminate assistance to a family that is evicted by a private landlord for a serious lease violation.[22] Lease violations arising out of

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[10]24 C.F.R. § 985.3(p)(2001).

[11]Section 214 of the *Housing and Community Development Act of 1980*, Pub. L. No. 96-399, Title II, § 214, 94 Stat. 1637 (Oct. 8, 1980), as amended (codified at 42 U.S.C. § 1436a)(West Supp. 2001).

[12]24 C.F.R. §§ 5.500 *et seq.* (2001).

[13]HUD has not yet adopted this analysis.

[14]Pub. L. No. 104-193, 110 Stat. 2105 (Aug. 22, 1996), as amended by §§ 5564 and 5572 of the *Balanced Budget Act of 1997*, Pub. L. 105-33, and by Section 504 of the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* ("IIRIRA"), Pub. L. 104-208 (codified at 8 U.S.C. § 1601 *et seq.* (West Law Current through P.L. 107-89, approved 12-18-01)).

[15]8 U.S.C. § 1641(c)(West Supp. 2001).

[16]Under PRWORA, qualified immigrants include battered spouses and children with a pending or approved: (a) self-petition for an immigrant visa, (b) immigrant visa filed for a spouse or child by a U.S. citizen or lawful permanent resident, or (c) application for cancellation of removal/suspension of deportation, whose need for benefits has a substantial connection to the battery or cruelty. The parent of a battered child or the child of a battered person is also qualified. *See also* Attorney General Order No. 2131-97, *Guidance on Standards and Methods for Determining Whether a Substantial Connection Exists Between Battery or Extreme Cruelty and Need for Specific Public Benefits,* 62 Fed. Reg. 65,285 (Dec. 11, 1997). The Attorney General recognized the importance of housing when she held that benefits are to be provided: "[w]here the loss of dwelling . . .following a separation from the abuser jeopardizes the applicant's and/or (in the case of an alien child) the applicant's parent's ability to care for his or her children (*e.g.* inability to house . . children . . . for fear of being found by the abuser....)."

[17]*United States Dept. of Hous. Urb. Dev., et al. v. Rucker, et al*, Nos 00-1770/00-1781, Brief of *Amici Curiae* of the National Network to End Domestic Violence *et al.* In Support of Respondents (Dec. 20, 2001), 2001 WL 1,663,790.

[18]*See Domestic Abuse Victim Settles Discriminatory Eviction Claim Favorably*, 31 HOUS. L. BULL. 265 (Nov./Dev. 2001)

[19]*See* for example, 61 Fed Reg. 9,044 (Mar. 6, 1996) § 5.420(b)(4) which, in the admission context, provided that "the applicant must certify that the person who engaged in such violence will not reside with applicant family unless the responsible entity has given advance written approval."

[20]24 C.F.R. § 966.4(l)(5)(vii)(2001)(which authorized the consideration of mitigating circumstances but does not require it).

[21]*See id*. § 982.310(h)(2001)(which authorized the consideration of mitigating circumstances but does not require it).

[22]24 C.F.R. § 982.552(b)(2)(2001).

domestic abuse should not be grounds to terminate victims' voucher assistance. PHAs should be urged to make it clear in any notice of voucher termination that victims of domestic violence will not lose assistance for activities related to the abuse. Moreover, the Section 8 Administrative Plan should be modified to state clearly that any eviction premised upon abusive behavior is not a serious lease violation for the victim.

Continued Occupancy

As already noted, issues relating to the continuation of benefits are most often complicated by the fact that victims of domestic violence may be evicted for the acts of the abuser. As a consequence, many victims are reluctant to reveal the problem and live in fear that revelation will result in homelessness. PHAs may assist domestic violence victims in avoiding their abusers by adopting special transfer, rent payment and damage policies that take into account the victims' circumstances.

Transfer Policies

A good transfer policy will assist victims who are seeking to flee their abusers. Obviously, a transfer policy that only allows a domestic violence victim to transfer to another PHA property will have little effect if a PHA has only one or a few buildings. In such situations, the transferred victims are not likely to obtain the anonymity that they seek. Therefore, the policy should include a preference for receipt of a voucher with which public housing residents who are victims of domestic violence may move to other neighborhoods or even cities or states. The benefits of adopting such a policy have been recognized by Congress.[23]

Rent Payment

Rent payment may be a significant problem for victims of domestic violence who live in public housing because they may have had their income taken by the abuser, often do not have access to the abuser's income, do not have an independent income source, or may not even know if rent has been paid in a timely fashion. Therefore, PHAs should have a policy requiring the review of non-payment of rent cases to determine the cause for the non payment and, if abuse is involved, the policy should call for further review to determine the appropriate course of action. A victim should not be held responsible for rent if income was taken, withheld, or not available.[24] An appropriate PHA response would be a referral, exclusion of the abuser from the unit and a retroactive readjustment of rent or reasonable rent repayment agreement consistent with the victim's current income.

In the voucher program, the PHA policy for dealing with non-payment of rent may be more complex. Victims should be advised that they may seek their own voucher if the family separates from the abuser, and the PHA should make referrals to agencies to assist the victim establish or clean up her credit and rental history.

PHAs may assist domestic violence victims in avoiding their abusers by adopting special transfer, rent payment and damage policies that take into account the victims' circumstances.

Damage Policies

Another issue that may arise for residents of public housing who are victims of domestic violence is the payment for damage to a unit when the damage was caused by the abuser. If the victim has a restraining order or has instructed the abuser to stay away, the PHA policy should be to seek recourse against the perpetrator; failing that, the PHA should pay for the damage as it would in any case of criminal trespass and destruction of property.

Issues Unique to the Voucher Program

There are many issues relating to domestic violence that are unique to the voucher program.[25] Several of these relate to the voucher's portability, which generally refers to the fact that vouchers may be used outside the PHA's jurisdiction—indeed, anywhere in the United States. Typically, though, a voucher may be used only within a PHA's jurisdiction. Such a geographic limitation may prohibit a voucher holder from maintaining independence from the abuser in small rental markets or in markets where voucher holders are clustered into a few discrete neighborhoods. Thus, portability may be critically important to victims of domestic violence.

[23]42 U.S.C.A. § 1437f(o)(6)(West Supp. 2001)(PHAs may provide a preference "for families residing in public housing who are victims of a crime of violence (as such term is defined in section 16 of Title 18) that has been reported to an appropriate law enforcement agency." "The term 'crime of violence' means–

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

18 U.S.C.A. § 16 (West Law Current through Pub. L. 107-56, approved 10-26-01)).

[24]See *e.g. Maxton v. Housing Authority*, 328 S.E. 2d 290 (1985)(resident woman without income was married for a few months to a wage earner who left; resident's default was not her fault thus she should not be evicted for non-payment).

[25]The most recent congressional pronouncement spoke generally of PHA plans and generically of public housing. Because PHAs must plan for the voucher program as well as public housing and the issue of domestic violence is not limited to any one housing program, issues relating to the voucher program are addressed here.

Under ordinary circumstances, a PHA has a choice in dealing with applicants who are not residents of the PHA's jurisdiction when they first receive a voucher. Depending on the PHA's policy, it may allow the applicant to move outside of the jurisdiction immediately or it may restrict the participant to the jurisdiction for a year.[26] If a PHA has the latter policy, it should, at a minimum, make an exception for those applicants who are victims of domestic violence and are seeking to establish a home apart from their abuser.

Except for the optional one-year prohibition and subject to HUD regulations,[27] any voucher participant is entitled to receive a voucher for use outside the PHA's jurisdiction. There is, however, one further statutory limitation on portability: PHA must not provide a portable subsidy to a family that has moved out of an assisted unit in violation of the lease.[28] The regulations repeat the statutory language and do not provide any guidance regarding implementation.[29] This may cause problems for a victim who, for example, fled her abuser and left the unit without notifying the landlord. It may also pose a problem when the actions of the abuser are determined to have violated the lease. PHAs implementing this provision should be encouraged to do so in a manner that does not harm victims of domestic violence. PHA policies should make it clear that this provision applies only to serious violations of the lease and then only if the family has been terminated from the voucher program after notice and an opportunity to be heard. Moreover, a PHA should have a policy that minimizes its exposure to liability for harm to the victim that could have been avoided if the victim was prevented from relocating. Another related issue arises when the victim wants to move during the term of the initial lease, which frequently is one year. Some, if not most, landlords may not give the tenant approval midterm to terminate the lease. Notwithstanding, PHAs that have verified a case of domestic violence should allow the tenant to move and provide the tenant with a new voucher. It may be necessary to inform the participant that she may incur some costs if the landlord does not agree to a mutual release, but she should not be denied the right to move with a new voucher.[30] If necessary, the landlord should be informed of the possibility of abuse and advised of the potential for liability if the victim is harmed during a period that the landlord has prevented the victim from moving.

The voucher regulations provide that "family break-up" is an issue that the PHA must address in the Section 8 Administrative Plan and that family break-up due to abuse is one of the factors that a PHA should consider in developing its policy.[31] In developing a policy, advocates should urge that consideration be given to who gets the voucher and whether two vouchers should be issued, one to each branch of the family. In the event that there is only one voucher, that policy should not require the victim to secure the permission of the abuser to remove his name from the voucher.

Conclusion

Domestic violence is a pervasive problem for many low-income families. Because housing is critical to the victim's ability to gain independence from the abuser, it is very important that HUD and PHAs respond to the congressional commands and develop plans that protect domestic violence victims from discrimination in the process of securing or maintaining public housing or voucher assistance. ■

[26] 42 U.S.C.A. § 1437f(r)(West Supp. 2001); 24 C.F.R. § 982.353(c)(2001).

[27] *See* 24 C.F.R. §§ 982.552 and 982.553 (2001).

[28] 42 U.S.C.A. § 1437f(r)(5)(West Supp. 2001).

[29] 24 C.F.R. § 982.353(b)(2001).

[30] *Id.* § 982.314(b)(ii)(2001)(lease may be terminated by mutual agreement).

[31] *Id.* § 982.315. A family break-up may occur if the abuser leaves, as would happen if he is jailed or if the victim moves out.

Housing Production Campaign Gains Ground

Introduction

The National Housing Trust Fund Campaign (the Campaign) passed its first birthday recently and, like any toddler, it has experienced incredible growth, gained significant knowledge, and shown an impressive ability to adapt to changing circumstances. It also possesses enormous potential for great accomplishments yet unknown. Unlike a child, however, the Campaign is becoming a sophisticated, well-organized entity that has one clear purpose in mind: to re-establish the federal role and responsibility to increase the supply of housing affordable to people with serious housing needs.

Overview of the Campaign's Proposal[1]

The Campaign has developed a policy proposal that advocates for the building and preservation of 1.5 million units of rental housing for the lowest-income families over the next 10 years. The proposal recommends that Congress establish a National Housing Trust Fund to build and preserve these units, funded at least initially by excess Federal Housing Administration (FHA) and Government National Mortgage Association (Ginnie Mae) revenue, above what is necessary to maintain the soundness of the FHA and Ginnie Mae programs. The Campaign contends that, at a minimum, revenue produced by federal housing programs should be used to solve housing problems. The Campaign's proposal provides that the trust fund could by used for the production of new housing, preservation of existing federally assisted housing,

[1] *See* www.nhtf.org for a detailed outline of the Campaign's proposal, a complete list of endorsers, meeting minutes, and other activities of the Campaign. *See also Support Builds for New Production Bills*, 31 HOUS. L. BULL. 210, 213 (Sept. 2001) for more discussion of the Campaign.

and rehabilitation of existing private market affordable housing. Although the money is targeted primarily at rental housing, the Campaign does support allowing between 15 and 25 percent of funds to be used for home ownership activities, so long as low-income people are served.

The Campaign's proposal also emphasizes serving primarily the very lowest-income people. For example, the proposal provides that at least 75 percent of the trust fund dollars should be used for housing that is affordable for extremely low-income households—that is, those with incomes under 30 percent of the area median. The rest of the funds could be used for low-income households with incomes up to 80 percent of the area median provided these funds are restricted to housing production, preservation or rehabilitation in low-income neighborhoods. This policy emphasis does not preclude developments from providing housing for a wider economic mix; it only emphasizes that trust fund resources should not be the source of support for those other units. And in all cases, no one should pay more than 30 percent of income for housing. The Campaign advocates that housing funded through the Trust Fund should be required to remain affordable for the useful life of the property.

Other provisions in the policy proposal include the following: 90 percent of trust fund assistance should be distributed by the federal government to the grantees by formula allocation; the remaining 10 percent should be distributed through a national competition; if a grantee state, locality or nonprofit uses state, local or private revenue, it will receive two federal trust fund dollars for every dollar it provides; if an entity uses locally controlled federal dollars for the match, it will receive one trust fund dollar for every dollar of match it provides; and new housing production and financing should be done in a way that assures that extremely low-income households are not segregated from other income groups.

House and Senate Bills

When the Campaign first started organizing its lobby group and field group in early 2001, no specific legislation had been drafted. By the end of July, however, two bills had been introduced in Congress that embodied some of the Campaign's ideas. The first, H.R. 2349, was introduced in the House of Representatives on June 27, 2001 by representatives Bernard Sanders (I-VT), John McHugh (R-NY), and Barbara Lee (D-CA), together with 73 co-sponsors. The second, S. 1248, was introduced in the Senate on July 25, 2001 by Senator John Kerry (D-MA) with 16 co-sponsors, including James Jeffords (I-VT) and Lincoln Chafee (R-RI). Like the Campaign's proposal, both bills propose to establish a National Affordable Housing Trust Fund from excess FHA revenues.[2]

Gaining Support

Since its sometimes shaky beginnings, as it tried to walk the tightrope of formulating policies that could gain the support of a wide variety of entities, all with slightly differing interests, the Campaign has proven its worth. After carefully crafting its proposal, the Campaign set out to obtain the backing of as many groups, Congress members, and individuals as possible in an effort to make housing a priority issue once again in this country. Through the work of dozens of groups in Washington, D.C. committed to advocating on the Hill for a National Housing Trust Fund, and through the work of hundreds of supporters in the field, the Campaign has built the foundation for the actual passage of Trust Fund legislation.

S. 1248 now has 20 sponsors, including one Republican, and staff members of the bill's sponsor, Senator John Kerry, have set a goal of 50 co-sponsors by the end of 2002. Progress on the House side is even more marked. H.R. 2349 now has 160 co-sponsors from 34 states. These co-sponsors included six Republicans, one of whom is Representative Tom Davis of Virginia, who is the Chair of the Republican Congressional Campaign Committee.[3]

Beyond generating support and interest in Congress, the Campaign has garnered nationwide interest. Over 75 articles about a National Housing Trust Fund have been published in newspapers and periodicals across the country in the past year. And perhaps most impressive is the number of organizations and individuals who have endorsed the Campaign's own proposal: over 1,800 from all 50 states, Puerto Rico, and the District of Columbia.[4] This fact has greatly impressed Congressman Bernie Sanders, one of the original cosponsors of H.R. 2349, who in November said:

> It is almost unprecedented to have such an outpouring of support from over 1,500 groups across this country to endorse a single bill in Congress, particularly a bill to address the affordable housing crisis. I am especially pleased to have such a broad array of groups behind this legislation representing unions, business leaders, the homeless, different religious affiliations, and bankers.[5]

Adjusting to Changing Circumstances

Much has happened since the Campaign began its effort to increase the nation's affordable housing stock. The events of September 11th turned the country's and Congress's interest to other issues for a time. But the Campaign was able to stay on course, continuing to generate support for a National Housing Trust Fund in spite of a diminishing budget "surplus," new expenses faced by the country, and Congressmembers and staffers who were sometimes difficult to find and even more difficult to persuade.

Less dramatic events have also caused the Campaign to adjust, but never halt, its course since its inception. Ironically, the introduction of the two bills necessitated some

[2]For a detailed discussion of each of the production bills, *see Support Builds for New Production Bills*, 31 HOUS. L. BULL. 210 (Sept. 2001).

[3]*See* www.nhtf.org for a complete list of co-sponsors.

[4]*See* www.nhtf.org for a complete list of endorsers.

[5]*Sanders: More Than 1,500 Groups Endorse Affordable Housing Bill*, Press Release of Congressman Bernie Sanders, 11/30/01, at www.bernie.house.gov/documents/releases/20011130121025.asp.

adjustment in the Campaign's lobbying strategy. Although the bills both greatly resemble the Campaign's proposal, there are small differences.[6] Campaign supporters needed to establish just what it was they were supporting: the Senate bill, the House bill, the Campaign's own proposal, some amalgam of the three, or something else altogether. In the end, advocates have tried to build support for both bills, but stressed above all else the need to have some form of production bill to increase the low-income housing stock and to elevate the priority of housing in the national debate.

Perhaps the biggest adjustment—and biggest advance—in the Campaign's policy proposal is the creation of a new operating subsidy.

The bills themselves have or will soon require consideration of other small adjustments in the Campaign's proposal. For example, the provision that trust-funded housing should be kept low-income for the useful life of the property may require further specificity, as both bills only require low-income use for at least 40 years. As another illustration, the Campaign has made small adjustments to the targeting proposals since first establishing its "foundation" principals. The Campaign now proposes that of the 75 percent of total trust fund dollars targeted to extremely low-income households, 30 percent should be set aside for housing that is affordable to households with incomes not exceeding full-time minimum-wage earnings ($10,700 annually).

Perhaps the biggest adjustment—and biggest advance—in the Campaign's policy proposal is the creation of a new operating subsidy. One question faced repeatedly by advocates was, "Even if we can afford to build them, how are we going to pay for maintaining these units as affordable to the targeted groups over time?" In the latter part of 2001, the Campaign formed a working group to address the operating subsidy question. The issue was that the perceived support for project-based Section 8 subsidies similar to those used in the past seemed weak, and that regular Section 8 vouchers, another possible operating subsidy, are relatively expensive in terms of per-unit budget authority, and ill-suited to guarantee the ongoing affordability of trust-funded units because of their portable character. Thus, these more conventional forms of Section 8 provided an inadequate solution.

The working group devised a mechanism called "Thrifty Production Vouchers," based largely on Congress's recent changes to the project-based voucher program. This mechanism, still in draft form, proposes an innovative solution to the difficult operating subsidy issue. Under the Thrifty Voucher, the payment standard for the unit would be based on the property's operating cost, instead of the fair market rent (FMR) used under the regular voucher program. This savings is enabled because the provision of capital subsidies through the trust fund (or any other source such as Tax Credits or HOME) is presumed sufficient to cover virtually all capital costs for the housing, requiring little or no debt service. Operating subsidies must therefore cover only operating costs, similar to the capital advance/project rental assistance contract model used to produce and subsidize units under the Section 202 and 811 supportive housing programs over the past decade. Since operating costs are generally substantially lower than the FMRs and voucher payment standards based on them, Thrifty Production Vouchers could require considerably less budget authority and outlays.

For example, if the FMR is $700 monthly and a tenant contributes $150, a voucher costs the government about $550 (assuming that both the "reasonable rent" and the payment standard equal the FMR). If the operating cost for the property, however, were only $450 of this amount, then a Thrifty Production voucher would cost only $300 ($450 minus the $150 tenant contribution), a savings of 45 percent over a regular Section 8 voucher. Again, this savings is enabled by the separate provision of capital subsidies through the trust fund or some other source. Use of Thrifty Production Vouchers would be limited to only 25 percent of the units in a property (with some exceptions) to create an incentive for the owner to keep operating costs low, since owners would then have to bear at least 75 percent of any unnecessary operating expenses.

In addition, the Thrifty Production Voucher would incorporate the mobility feature of the current project-based voucher program. This permits individual tenants to move and retain their subsidy, while preserving access to a subsidy at the development for new admittees by coordinating the development's admission process with a local PHA's normal voucher allocation system.[7] Proponents believe that this feature brings essential market discipline to owner performance, and broader choice in housing for subsidy recipients.

The merits of so-called Thrifty Vouchers may well find broader support as a stand-alone bill, apart from the Housing Trust Fund Campaign, as Congress looks for ways to improve the targeting of existing capital investment programs, such as HOME and Tax Credits. The proposal may be added to the Campaign's official proposal shortly.

[6]For a detailed comparison of each of the production bills and the Campaign's proposal, *see Support Builds for New Production Bills*, 31 HOUS. L. BULL. 210 (Sept. 2001).

[7]For background, *see Congress Passes Major Revisions to the Project-Based Voucher Statute*, 30 HOUS. L. BULL. 186 (Nov./Dec. 2000).

Next Steps

While the Campaign has made significant strides over the last year, much work remains to be done. Senator Kerry's goal of 50 co-sponsors by year's end will require continued and increased advocacy efforts in the Senate. Although there are 160 co-sponsors in the House, that is far from a majority and the number of Republicans must be increased to make this a truly bi-partisan endeavor. As part of the effort to gain support for a Housing Trust Fund and for housing issues in general, it is important that Congress schedule hearings on the issue and the bills, which seems likely to occur before summer. In the field, the Campaign has set the goal of having 4,000 endorsers by the end of 2002; they are still short of half of that number.

The Campaign hopes to gain the support of the country's mayors as well, something that looks promising given the recent remarks of Mayor Thomas M. Menino of Boston, the incoming President of the United States Conference of Mayors. At the winter meeting of the Conference in January, Mr. Menino stated that housing is the top item on his agenda, calling housing a "basic human right."[8] San Francisco Mayor Willie L. Brown, Jr. called housing the "single most important issue at the local level."[9] Both Mayor Menino and Mayor Brown have endorsed the establishment of a National Housing Trust Fund.

Sheila Crowley, President of the National Low Income Housing Coalition, one of the groups spearheading the effort, summed up the Campaign to date by saying:

> From the beginning, we knew this would be a long and challenging undertaking. So far, we have opened the eyes of thousands of people across the country and on the Hill who have come to realize how crucial increased housing production is for this nation. Already, the Campaign has elevated housing to a more prominent place in the national consciousness. But while that in itself is an accomplishment, it is not nearly enough. We are committed to the National Housing Trust Fund Campaign on a long-term basis in order to help provide homes for millions of poor people across the country.

Conclusion

Now that the National Housing Trust Fund Campaign has found its feet and made great progress, it hopes to take the knowledge and strength it has gained and use them to accomplish the goal it set for itself at birth: to increase the affordable housing stock in this country. Let's all hope it succeeds, and work to ensure that it does. The *Bulletin* will continue to provide periodic updates on the Campaign's continued progress. ■

[8] *Memo to Members*, Vol. 7, No. 4, National Housing Coalition (Jan. 25, 2002).

[9] *Id.*

California Housing Element Law May Help Preserve Federally Subsidized Projects

California land use planning law has features which are useful to advocates seeking to preserve federally assisted housing.[1] The law requires every local government in the state to adopt as part of its land-use plan a "housing element" which details the need for affordable housing, compares the need to the existing stock of affordable housing, and designates adequate sites where developers could construct housing sufficient to meet the unmet need. As part of the plan's assessment of the existing housing stock, the statute requires a detailed review of housing subsidized by the Department of Housing and Urban Development (HUD) or other federal programs, and an assessment of the risk that the housing may lose its subsidy.

This California law functions as a tool to preserve federally assisted housing for a number of reasons. First, the information contained in a recent plan may be a useful starting point for advocates to assess the scope of the risk of conversion in the city or county. Second, the required studies and policies, and the incentives allowable under the law, may help persuade a local governmental entity to use local resources to support a preservation transaction. Third, to the extent that the inventory analysis or preservation efforts are inadequate, advocates may take steps to enforce the law and thereby prompt the locality to become active in preservation. Finally, the elements of this law may serve as a model for other states for use in their planning laws.

Each municipality must update its housing element every five years, and the revision must be developed with participation by representatives of all economic segments of the community.[2] The update schedule is set by statute, with the deadline for municipalities divided into five groups, so some jurisdictions are revising their plan each year.[3] The California Department of Housing and Community Development (HCD) is the state agency responsible for collecting Housing Elements and reviewing them for compliance with state law. While HCD determines whether each plan complies with state law, actual enforcement of the law has, for all practical purposes, been left to private lawsuits that can seek several remedies, including a freeze on building permits until compliance is achieved. Such a serious consequence makes the prospect of housing element litigation a concern for any locality where builders have an active interest in construction of any type.

[1] CAL. GOV'T CODE §§ 65580-65589.8. (West, WESTLAW, through ch. 2 of 2002 Reg. Sess. urgency legislation & ch. 1 of 3rd Ex. Sess.) The California Code is available online at www.leginfo.ca.gov/calaw.html.

[2] CAL. GOV'T CODE § 65583(c)(6)(B).

[3] *Id.* § 65588(e) sets the housing element revision schedule. It is revised from time to time, frequently to allow localities additional time to prepare their plans. An online summary of the schedule is maintained by the California Department of Housing and Community Development, and is available at housing.hcd.ca.gov/hpd/hrc/plan/he/he_time.htm.

Preservation Provisions of the California Statute

The California statute requires that the general plan housing element contain an inventory of three categories of federally assisted developments which may become unassisted within 10 years: (1) HUD-assisted housing, consisting of housing financed or subsidized by project-based Section 8, Below-Market-Interest-Rate Section 221(d)(3), Section 236, Section 202, and rent-supplement programs; (2) the Rural Housing Service Section 515 program; and (3) tax credit projects subsidized through Section 42 of the Internal Revenue Code.[4]

The plan must evaluate each such property individually, including an identification of the location, type of government subsidy, and earliest date the project could become unassisted, along with "the total number of elderly and nonelderly units that could be lost from the locality's low-income housing stock in each year during the 10-year period."[5] The plan must estimate the production costs for new rental housing of comparable size and rent levels to replace units at risk of conversion, and an estimated cost to preserve the existing housing. Preservation purchasers with capacity to acquire the projects must also be identified, as well as amounts available in federal, state and local subsidy programs which may be utilized for preservation.[6]

The plan must contain a statement of the community's goals, quantified objectives, and policies relative to housing preservation.[7] There should be a specific goal and policy related to any resource inadequacy or constraint identified in the needs portion of the plan. Finally, local governments must include a five-year action program that preserves these developments by using all of the identified available financing and subsidy programs, to the extent necessary, except where such funds are required for other urgent needs.[8]

The incentive for a locality to fund housing preservation first requires some further explanation of how the statutory scheme functions. A driving factor of the housing element planning process is the "adequate sites" requirement, whereby the locality must designate specific parcels of land as available for development of housing to meet the identified need for affordable housing. Localities are often quite reluctant to designate sites for affordable housing, for familiar reasons: low-income housing development is widely perceived as decreasing the value of proximate parcels,[9] lowering the locality's tax base, and increasing the burden on public services. The amount of housing need is determined by HCD in consultation with the regional Council of Government (COG), if applicable. There are five such COGs covering metropolitan California jurisdictions in the areas around San Diego, Los Angeles, the Monterey Bay, the San Francisco Bay and Sacramento. To allocate the housing need which gives rise to the adequate sites obligation, a "fair share" negotiation occurs between local governments in a planning process within each COG. For areas without a COG, HCD may either determine the housing need or delegate the responsibility to the cities or counties. Once the locality negotiates its "fair share" obligation, it has a fixed number of affordable housing units it must accommodate and must then designate sufficient sites for new affordable housing development.

The California statute requires that the general plan housing element contain an inventory of three categories of federally assisted developments which may become unassisted within 10 years: HUD-assisted housing, the Rural Housing Service Section 515 program, and tax credit projects.

A locality may ease this sometimes painful process of designating adequate sites for its fair share obligation by substituting rehabilitation or preservation of existing housing in lieu of specifying parcels available for development. These units may fall into three categories: (1) rehabilitation of extremely dilapidated units which will remain affordable for 20 years, or at a discounted rate for shorter periods;[10] (2) conversion of unaffordable, market-rate multifamily projects with more than 16 units to housing affordable to low or very-low income households and restricted for such use for a term of 30 years; or (3) preservation of existing government subsidized units for a period of at least 40 years. A locality may satisfy up to 25 percent of its adequate sites requirement through preservation of existing housing, so long as funds are dedicated for that purpose, and subject to approval by HCD.[11]

Except for those jurisdictions which choose to substitute housing preservation for adequate sites, the California planning law does not directly *require* local governments to preserve federally subsidized housing. Instead it requires an assessment of the stock at risk for conversion and adoption of corresponding policies aimed at preservation. The failure to comply with these requirements would subject the plan

[4] *Id.* § 65863.10.

[5] *Id.* § 65583(a)(8).

[6] *Id.*

[7] *Id.* § 65583(b)(1).

[8] *Id.* § 65583(c)(6).

[9] HCD has conducted a survey of research on this issue, which is available upon request. *See* housing.hcd.ca.gov/hpd/hrc/otherRep.html for ordering instructions.

[10] Tenants living in these units prior to rehabilitation must be given full relocation benefits with the right to return to the units after rehabilitation.

[11] CAL. GOV'T CODE § 65583.1(c). For additional guidance on this provision, HCD wrote an interpretation letter soon after it was adopted as Chapter 796, Statutes of 1998. Letter from Richard E. Mallory, Director, Department of Housing and Community Development to Planning Directors and Interested Parties (October 26, 1998)(available upon request from HCD).

to a legal challenge. Once adopted, the policies of the locality are binding upon the later decisions of the locality, and when considering discretionary actions with respect to the fate of a specific project, a well-drafted policy may compel preservation of the development. California advocates should review the general plan housing element of the jurisdictions in which they work to see if those plans may assist their efforts or are amenable to advocacy due to their deficiencies.[12]

Other States

The concepts incorporated in California law may be useful for advocates in other states which have regional or state-wide planning laws. While not purporting to be an inclusive or exhaustive list, housing advocates have described experiences[13] with the following state laws that require planning documents to account for affordable housing to one degree or another: Massachusetts,[14] Rhode Island,[15] Connecticut,[16] Oregon,[17] Florida,[18] New Jersey[19] and Pennsylvania.[20] Other jurisdictions have statutes which require a housing element in municipal planning documents, though we have no information regarding compliance or enforcement of these laws. These include: Arizona,[21] Minnesota,[22] South Carolina,[23] Vermont,[24] Washington[25] and Wisconsin.[26] Still other states have partial or non-binding planning requirements, for example counties in Delaware[27] and non-binding housing plans in Kentucky[28] and Maryland.[29] This partial list of jurisdictions illustrates that many states have a planning framework in place to allow pursuit of reporting requirements similar to California, as another strategy to help stem the loss of the federally assisted housing stock. ■

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[12]NHLP is available to provide assistance with such a review of housing elements for preservation content. For further guidance on housing elements generally, the California Affordable Housing Law Project in Oakland has prepared an advocacy guide, the *California Housing Element Manual* (January 2000), and provides technical help to advocates working to evaluate local elements or enforce the state's legal requirements. (Contact Michael Rawson at (510) 891-9794 Ext. 145).

[13]*See e.g.* Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. New England L. Rev. 65, 68-72 (2001).

[14]Mass. Gen. Laws ch. 40B, §§ 20-23 (West, WESTLAW through c. 122 of the 2001 First Annual Session of the General Court).

[15]R.I. Gen. Laws § 45-53-1 to -8 (West, WESTLAW through 2001 Reg. Sess.)

[16]Conn. Gen. Stat. § 8-30g (West, WESTLAW through 2001 January Regular and June Special Sessions).

[17]Or. Rev. Stat. § 197.303-.320 (West, WESTLAW 1999).

[18]Fla. Stat. Ann. § 163.3161-.3215 (West, WESTLAW through End of 2001 1st Reg. Sess.).

[19]N.J. Stat. Ann. § 27.27D-301 to -329 (West, WESTLAW Current through L.2001, c. 276)(§ 40.55D-28 of Municipal Land Use Law requires a housing plan element of the land use master plan).

[20]35 Pa. Const. Stat. Ann. §§ 1691.1 -1691.6 (West, WESTLAW through Act 2001-116) (§ 1691.3 (a) Responsibilities of department. The department shall be responsible for preparing the Commonwealth's five-year Comprehensive Housing Affordability Strategy and annual plan updates. The CHAS shall contain a needs assessment of housing and supportive services for housing, information on housing market conditions and a strategy to meet identified needs using available resources. This comprehensive planning document shall describe and define the anticipated use of Federal funds received directly by the Commonwealth for housing purposes, including, but not limited to, the HOME Investment Trust Fund moneys. This comprehensive planning document may also include the anticipated use of other available funding sources for housing purposes.)

[21]Ariz. Rev. Stat. Ann. § 9-461.05 (West, WESTLAW, through End of the Forty-Fifth Legislature, First Regular Session and First Special Session (2001)).

[22]Minn. Stat. Ann. § 473.859 (West, WESTLAW, through End of 2001 1st Sp. Sess.).

[23]S.C. Code Ann. § 6-29-510 (West, WESTLAW through End of 2001 Reg. Sess.)

[24]Vt. Stat. Ann. tit. 24 §§ 4341-4351 (West, WESTLAW through end of 1999 Adjourned Session (2001 Regular Session))(§ 4348a regional planning requirement for all economic groups, based on data).

[25]Wash. Rev. Code Ann. §36.70A.010-70A.902 (West, WESTLAW through End of 2001 Third Special Session) (§ 36.70A.070 - plans must include

> "(2) A housing element ensuring the vitality and character of established residential neighborhoods that: (a) includes an inventory and analysis of existing and projected housing needs; (b) includes a statement of goals, policies, objectives, and mandatory provisions for the preservation, improvement, and development of housing, including single-family residences; (c) identifies sufficient land for housing, including, but not limited to, government-assisted housing, housing for low-income families, manufactured housing, multifamily housing, and group homes and foster care facilities; …").

[26]Wis. Stat. Ann. 66.1001 (West, WESTLAW through 2001 Act 15, published 8/31/01)(Requires an assessment of housing, stock and needs, and policies to address needs of all income levels; no apparent implementing or enforcement provisions).

[27]Del. Code Ann. tit. 9 § 2656 (West, WESTLAW through 2001 Regular Session of the 141st General Assembly)(New Castle County only) § 4956 (Kent County), § 6956 (Sussex County only).

[28]Ky. Stat. Ann. § 198A.025 (West, WESTLAW through End of 2001 Reg. Sess.).

[29]Md. Ann. Code art. 66B, § 3.05 (West, WESTLAW through the Regular Session of the 2001 General Assembly).

Settlement Preserves Four Threatened Sacramento Properties

In July of 2001, tenants in four Department of Housing and Urban Development (HUD) insured Section 236 projects and a nonprofit advocacy organization secured a preliminary injunction in federal court against the owner of the developments who sought to prepay the HUD-insured loans and terminate the developments' Section 8 rental assistance contracts. The plaintiffs in that litigation have recently settled their claims with the owner.[1] Pursuant to the settlement agreement, the four developments, all located east of Sacramento, California, and containing a total of 351 units, have been sold by their prior for-profit owner, Apartment Investment Management Company (AIMCO),[2] to another for-profit owner, U.S. Housing Partners ("Bridge Partners")[3] subject to 30-year use and rent restrictions. While the litigation sought to block the sale between these parties altogether, the settlement ensures that the development will maintain far more stringent affordability restrictions than the original sale between the parties contemplated.

Less than a month after the district court issued its preliminary injunction, which was based primarily on the owner's failure to comply with state notice law,[4] the California legislature amended the law[5] to allow prepayment of HUD-insured mortgages without complying with the otherwise required one-year notice, if an owner agrees to:

- not involuntarily displace tenants;
- accept project-based Section 8 contract renewals, provided the rents under the renewed contracts are sufficient to maintain the project's fiscal viability (the statute provides that fiscal viability is presumed if the owner receives rents set in accordance with Section 8 rules);
- accept tenant-based Section 8 vouchers;
- not terminate tenant leases without demonstrating a breach;
- maintain rents affordable to household earning 60 percent of area median income (AMI) for units with Section 8 assistance; and
- maintain rents affordable to those earning 50 percent of AMI for those without any form of Section 8 subsidy.

The settlement agreement substantially complies with the terms of the new legislation (S.B. 429). While the plaintiffs and the purchaser agreed that the statutory conditions should attach as deed restrictions to the property, the seller, AIMCO, was unwilling to attach the restrictions to its deed of conveyance. The issue was resolved by having AIMCO transfer the properties to an affiliate of Bridge Partners, who, after incorporating the restrictions in its deed of conveyance, transferred the properties to Bridge Partners.

In order to make the project feasible under the rent restrictions, the new owners agreed to enter into a five-year "Mark Up to Market" Section 8 contract for the number of units that were already assisted by the Section 8 program, which is approximately two-thirds of the units in the four developments. Under that contract, HUD will raise the rents paid under the Section 8 contract for the project up to negotiated "market" levels. Bridge Partners, and any successor in interest, is obligated to continue to abide by the restrictions, including renewal of the project-based Section 8 contracts, for a period of 30 years.[6]

It should be noted that the use of deed restrictions in the settlement agreement was necessitated because HUD declined to incorporate the provisions of S.B. 429 in the use agreement that it executed with the owners in exchange for its accepting the prepayment of the Section 236 loan. That use agreement contained rent restrictions that were substantially weaker than those incorporated into the deed restrictions by the settlement agreement. However, the use agreement required by HUD did contain occupancy restrictions that were incorporated into the settlement.

The settlement provides substantial tenant protections, but also reflects a compromise. The tenants had preferred that a nonprofit purchaser acquire the projects, but there was not sufficient funding from state and local sources for a nonprofit to make a competitive purchase offer. Tenant participation in management and a substantial rehabilitation plan were also excluded from the settlement. On the other hand, the tenants gained substantial and enforceable use restrictions. Prior to the litigation, the owner only agreed to rent restrictions that would have kept the project affordable for those earning less than 80 percent of AMI. Moreover, the owner was only willing to provide a non-binding promise to accept tenant-based vouchers. In light of the fact that the tenants' claims in the litigation were based primarily on the owner's failure to give proper notice—which the owner could have cured and, thereafter, would have allowed the owner

[1]For background, *see Opt-Out and Prepayment of Four Section 8 Projects Preliminarily Enjoined*, 31 HOUS. L. BULL. 180 (Jul/Aug 2001).

[2]In 1997, AIMCO purchased a controlling interest in the National Housing Partnership (NHP) and subsequently merged NHP into AIMCO, giving it control over all former NHP properties, including the four involved in the litigation. *See* www.aimco.com.

[3]The general partner for U.S. Housing Partners is "Bridge Partners II, LLC,"a real estate investment and development company headquartered in Walnut Creek, California.

[4]CAL. GOV'T CODE § 65863.10. (West, WESTLAW through ch. 2 of 2002 Reg. Sess. urgency legislation & ch. 1 of 3rd Ex. Sess.)

[5]S.B. 429 (July 30, 2001), codified at CAL. GOV'T CODE § 65863.13, available online at www.leginfo.ca.gov/bilinfo.html. The measure was an urgency statute, becoming effective upon enactment.

[6]The time period in which an owner must accept project-based Section 8 contract renewals is not specified by S.B. 429, so parties utilized the 30-year time period contemplated elsewhere in the California notice law. CAL. GOV'T CODE § 65863.11(e).

to sell the projects without any affordability restrictions—the settlement provides the tenants with tangible and substantial relief. It substantially preserves the affordability of all the units in the developments through deed restrictions and, with respect to two-thirds of the units continues the project-based Section 8 contracts for the next 30 years. For the remaining units, which were formerly subsidized only under the Section 236 program, existing tenants in need of assistance will receive an enhanced voucher. Moreover, the rents for those persons not qualifying for the Section 8 program will be set at 30 percent of 50 percent of AMI.

Throughout the litigation and settlement, tenants were represented by Legal Services of Northern California, which received assistance from both the Minnesota Housing Preservation Project and the National Housing Law Project. A copy of the pleadings and settlement agreement in the case can be obtained from the NHLP Web site. ■

Second Circuit Bars Working Family Admission Preference in NYC Public Housing on Fair Housing Grounds

In a January 2002 decision, *Davis v. New York City Housing Authority*,[1] the Second Circuit Court of Appeals barred the use of a working family admissions preference in 14 New York City public housing developments where this preference would have perpetuated racial segregation. This January 2002 decision is the latest in a case that began with a 1992 consent decree,[2] which required the New York City Housing Authority (NYCHA) to cease its practice of assigning public housing applicants to developments on the basis of race.[3] In 1995, NYCHA sought to amend this consent decree to allow it to include a working family public housing admissions preference in its tenant selection and assignment plan (TSAP) for the stated purpose of "promot[ing] financial and social stability" in its public housing developments.[4]

Plaintiffs opposed this amendment and NYCHA was ultimately enjoined from applying a working family preference in 20 "predominantly white" public housing developments where the preference would impede desegregation.[5] NYCHA challenged this injunction, arguing, *inter alia,* that its working family preference would not have a significant segregative effect.[6]

The January 2002 decision addressed three principal issues raised by NYCHA: the lower court's determination of which developments were segregated, the lower court's determination as to the effect NYCHA's working family preference would have on the demographic composition of the 20 developments, and the lower court's determination as to the legal significance of the projected demographic effects of the preference.[7] The Second Circuit upheld most of the lower court's reasoning and left intact the injunction against application of the working family preference in all but six of the 20 developments.

The Second Circuit's Perpetuation of Segregation Analysis

In reaching its decision, the Second Circuit relied on a discriminatory effect[8] theory of the Fair Housing Act,[9] as set forth in *Huntington Branch, NAACP v. Town of Huntington*.[10] Under *Huntington* and related cases, a fair housing plaintiff is not required to show any discriminatory purpose on the part of a defendant. It is sufficient to show that the defendant's conduct has the effect of discrimination.[11] One way this may be done is to show that the defendant's conduct perpetuates racial segregation.[12]

In its January 2002 decision, the Second Circuit examined statistical projections submitted to the district court and determined that 14 of the 20 developments subject to the

[1]278 F.3d 64, 2002 WL 5719 (2nd Cir. 2002)(Kearse, J.)(Walker, CJ.filed a dissenting opinion).

[2]*Davis v. New York City Housing Authority,* 1992 WL 420,923 (S.D.N.Y. 1992).

[3]*See Davis v. New York City Housing Authority,* 2002 WL 5,719, *1-13 (2nd Cir. 2002) (summarizing the prior decisions, *Davis I-VII*).

[4]*Id* at *3.

[5]*Id* at *6 (citing *Davis v. New York City Housing Authority,* 60 F. Supp. 2d 220 (S.D.N.Y. 1999)).

[6]*See id.* at *12.

[7]*See id* at *13.

[8]*See generally* NHLP, *Fair Housing Litigation to Prevent the Loss of Federally Assisted Housing: The Duties of Public Housing Authorities and Project Owners, Part One: Federal Fair Housing Law* ("Fair Housing Litigation: Part One"), 31 HOUS. L. BULL. 73, 73-86 (Apr. 2001).

[9]Title VIII of the Civil Rights Act of 1968, 42 U.S.C.A. § 3601, *et seq.* (West Supp. 2001).

[10]844 F.2d 926, 936 (2d Cir.), *aff'd,* 488 U.S. 15 (1988)(*per curiam*).

[11]Every federal appellate court that has considered the issue has held that discriminatory effect alone is sufficient to establish liability under the Fair Housing Act. *See, e.g., Langlois v. Abington Housing Authority*, 207 F.3d 43, 51, n.4 (1st Cir. 2000); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2nd Cir. 1988); *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 148 (3rd Cir. 1977); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988, n.5 (4th Cir. 1984); *Arthur v. City of Toledo*, 782 F.2d 565, 575 (6th Cir.1986); *Metropolitan Housing. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1289–90 (7th Cir. 1977); *Gamble v. City of Escondido*, 104 F.3d 300 (9th Cir. 1997); *Mountain Side Mobile Estates Partnership v. Sec'y of HUD*, 56 F.3d 1243, 1251 (10th Cir. 1995); *Jackson v. Okaloosa County,* 21 F.3d 1531, 1543 (11th Cir. 1994).

[12]*See Fair Housing Litigation: Part One,* 31 HOUS. L. BULL. 73, 79-80 (Apr. 2001).

injunction against the working family preference would remain permanently segregated[13] or would take significantly longer to desegregate.[14] These projections were extrapolations of historical data showing that families of color are significantly less likely to qualify for the working family preference than non-minority families.[15] Based on this determination, the court reversed the district court's injunction as to six developments[16] and affirmed the injunction as to the remaining 14.[17]

Congressional Authorization for Admissions Preferences: *Davis* and *Langlois* Contrasted

The Second Circuit's January 2002 decision in *Davis* stands as an encouraging counterpoint to a 2000 fair housing decision by the First Circuit, *Langlois v. Abington Housing Authority*.[18] Both decisions involved the use of admissions preferences by public housing authorities that, while authorized by Congress as a general matter, had fair housing effects in the circumstances under which they were applied.

In discriminatory effect cases under the *Fair Housing Act*, a defendant may escape liability, even if the plaintiff establishes that the defendant's conduct perpetuates segregation or has a disparate adverse impact on members of classes protected under the Act, if the defendant puts forth a sufficient justification for its conduct. A majority of the Circuits, including the First and Second Circuits, use a rebuttal framework familiar from the federal employment discrimination case law to assess the sufficiency of the defendant's rebuttal; other Circuits employ a multi-factor balancing test.[19]

In *Langlois*, plaintiffs challenged local residency preferences used by suburban public housing authorities (PHAs) in eastern Massachusetts in their Housing Choice Voucher admissions policies on grounds that the use of these preferences disproportionately excluded families of color who were less likely to live in these suburban communities. The First Circuit determined that "absent intentional discrimination" the use of a residency preference in this case did not violate the *Fair Housing Act* because statutory authorization for PHA-determined admissions preferences in the *Quality Housing and Work Responsibility Act* (QHWRA) of 1998[20] was sufficient justification to overcome a showing of discriminatory effect.[21] The court stated:

> [B]y the 1998 amendment [to the U.S. Housing Act, 42 U.S.C. § 1437f(o)(6)] Congress itself endorsed the use of locally determined preferences in distributing section 8 vouchers. It is hard not to treat Congress's own enactment as justification enough to satisfy a statutory impact discrimination claim of the kind before us.[22]

In its January 2002 decision, the Second Circuit addressed essentially the same issue of statutory authorization, but did not allow NYCHA to rely on this authorization to justify its policy and defeat the lower court's injunction. The Second Circuit recognized that PHAs are prohibited by statute from concentrating low-income families in public housing developments and are required to develop plans for the deconcentration of poverty.[23] However, having recognized the statutory authorization for income deconcentration, the court stated: "At the same time, we think it plain that Congress did not mean to cause public housing agencies to implement plans for financial deconcentration in a way that would violate the civil rights laws."[24]

Conclusion

Because of the large amount of administrative discretion PHAs have been given under the QHWRA, the Second Circuit's 2002 decision is particularly important.[25] The decision places limits on PHAs' new discretion and stands for the proposition that this discretion must be exercised in accordance with the Fair Housing Act and other civil rights authorities. ■

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[13]The Second Circuit upheld the district court's determination that developments with more than 30 percent non-minority households were segregated. In doing this, the Second Circuit relied on the fact that the 30 percent figure was included in the 1992 consent decree and the fact that non-minority households constituted only 7 percent of NYCHA's public housing resident population, as well as other factors. *See Davis v. New York City Housing Authority,* 2002 WL 5,719, *15 (2nd Cir. 2002).

[14]*See id* at *21-22.

[15]*See id* at *10 (citing lower court's finding that the working family preference would "more than double white admission rates" *Davis v. New York City Housing Authority*, 60 F. Supp. 2d. 220, 238-9 (S.D.N.Y. 1999)).

[16]These six developments were either no longer segregated according to the court's definition, *see* n. 13, *supra*, or were expected to remain segregated only a few months longer if the working family preference were applied. *See id* at *21.

[17]*See id* at *23.

[18]207 F.3d 43.

[19]*See Fair Housing Litigation: Part One,* 31 HOUS. L. BULL. 73, 82-84 (Apr. 2001).

[20]Pub. L. No. 105-276, Title V, § 545, 112 Stat. 2,518, 2,596-604.

[21]Section 545 of the QHWRA does not expressly authorize local residency preferences specifically. It merely authorizes PHAs to set their own preferences in the administration of their voucher programs.

[22]*Langlois*, 207 F.3d 43, 51 (1st Cir. 2000)(footnote omitted).

[23]*See Davis v. New York City Housing Authority,* 2002 WL 5,719, *19 (2nd Cir. 2002)(citing 42 U.S.C.A. §§ 1437n(a)(3)(A), 1437n(a)(3)(B)(i)(West Supp. 2001)). The court noted that 42 U.S.C.A. § 1437d(c)(4)(A)(iv)(West 1994), *repealed, Balanced Budget Downpayment Act*, I, Pub.L. No. 104-99, § 402(d)(1)(1996), which was in effect "at the time the WFP was proposed, provided that public housing authorities 'to the maximum extent feasible, ... will include families with a broad range of incomes and will avoid concentrations of low-income and deprived families with serious social problems.'" *Id.* The court also acknowledged that current HUD regulations, 24 C.F.R. §§ 960.205(a), 960.206(b)(2)(2001), "explicitly permit a preference for 'working families.'" *Id.*

[24]*Id.* at *20.

[25]The two decisions are distinguishable in certain ways, most notably because of the NYCHA consent decree. On the other hand, the statutory authorization for income deconcentration was much more explicit that the authorization for PHA-determined admissions preferences relied upon in *Langlois.*

ELIHPA's Prepayment Restrictions May Subject RHS to Damages

The Court of Federal Claims recently held that the *Emergency Low Income Housing Preservation Act of 1987* (ELIHPA)[1] was not a "public and general" act within the meaning of the sovereign acts doctrine and that, as a consequence, the Rural Housing Service (RHS) was not shielded from Section 515 Rural Rental Housing owners' damage claims predicated on the proposition that ELIHPA's passage, which restricted the owners' prepayment rights, breached their contracts and constituted a taking under the Fifth Amendment's due process clause. *Grass Valley Terrace v. United States*.[2] The ruling, which denied RHS' motion for summary judgment seeking dismissal of the owners' claims, is surprising because it departs from prior Court of Federal Claims decisions and comes on the heels of the court's earlier ruling in the same case denying the owners' motion for summary judgment on the grounds that their claims were barred by the unmistakability doctrine.[3] If allowed to stand, the decision means that the court must now decide whether the passage of ELIHPA constituted a compensable taking and the damages that RHS may have to pay the owners.

The Grass Valley Terrace Litigation

Grass Valley Terrace was filed in 1998 by two groups of Section 515 owners. The first received loans from the Farmers Home Administration (FmHA), RHS' predecessor agency, prior to December 21, 1979 (pre-1979 owners). At the time these loans were entered into, the owners had an absolute right to prepay their loans and they were not obligated to operate the housing as affordable housing for any period of time. The second group consisted of owners whose loans were entered into after December 21, 1979 (post-1979 owners). They also had a right to prepay their loans but that right was subject to 20-year use restrictions. ELIHPA, which was enacted in early 1988, in part to preserve the affordable nature of the RHS rental housing stock and protect its residents from displacement, restricted the prepayment rights of the pre-1979 owners, and the *Housing and Community Development Act of 1992* (HCDA) extended the same restrictions to the post-1979 owners.[4] Both sets of owners claimed that ELIHPA's and HCDA's passage constituted an anticipatory repudiation of their contracts as of the date that each owner would prepay the loan and that RHS' conduct was "an applied" taking of their property requiring compensation under the Fifth Amendment.

In *Grass Valley I*, the court rejected the owners' claims when they were made in a motion for summary judgment. First, with respect to the pre-1979 owners, the court held that ELIHPA's passage was not an anticipatory breach but rather an actual breach of their contract. Accordingly, it held that the federal six-year statute of limitations, which began to run at the time of ELIHPA's passage in 1988, barred their claims against RHS.[5] Second, with respect to the post-1979 owners, whose claims were filed in 1998—less than six years after the passage of HCDA—the court denied their motion for summary judgment on the ground that the unmistakability doctrine, a doctrine of contract construction, immunized the government from liability for its purported breach of contract.[6] The decision in *Grass Valley I* closely followed the analysis and conclusions reached in two earlier Court of Federal Claims decisions in cases involving RHS and owners of Section 515 housing.[7]

Taking its cue from the court's denial of the post-1979 owners' motion for summary judgment, RHS filed its own motion for summary judgment seeking dismissal of their claims on the grounds that RHS is shielded from liability by the unmistakability doctrine. Surprisingly, the court, in *Grass Valley II*, also denied RHS' motion. Adopting the analysis of an intervening decision by the Court of Federal Claims in *General Dynamics v. United States*,[8] a case that did not involve RHS or consider ELIHPA, the court concluded that the unmistakability doctrine does not shield the government from liability unless the act that gives rise to the plaintiffs' claim, in this case the extension of ELIHPA's restrictions to post-1979 owners by the HCDA, was a sovereign act. Next, relying on part of the decision in *Adams*, a 1998 Court of Federal Claims case that found that ELIHPA was not a sovereign act, the court concluded that its *Grass Valley I* opinion was wrong in so far that it prematurely reached the question of whether the unmistakability doctrine shielded the government from liability. Thus, without reversing its earlier finding with respect to the unmistakability doctrine, the court denied RHS summary judgement motion on the grounds that ELIHPA was not a sovereign act.

The Unmistakability and Sovereign Acts Doctrines

Historically, the sovereign acts and unmistakability doctrines have different origins and their analytical frameworks yield independent results, although as a practical matter, the

[1]Pub. L. No. 100-242, 101 Stat. 1877 (1988), codified as amended at 42 U.S.C. § 1472(c).

[2]*Grass Valley Terrace v. United States*, 51 Fed. Cl. 436, 2002 WL 29,657 (Jan. 2, 2002)(Grass Valley II).

[3]*Grass Valley Terrace v. United States*, 46 Fed. Cl. 629, 640 (2000)(Grass Valley I).

[4]Pub. L. No. 102-550 § 712, 106 Stat. 3,672, 3,841 (1992) (codified in relevant part at 42 U.S.C. § 1472(c)).

[5]46 Fed. Cl. 629, 636. The court's decision with respect to the statute of limitations was upheld by the Federal Circuit, 240 F.3d 1358 (Fed. Cir. 2001), and is currently under review in the Supreme Court. *Franconia Associates v. United States*, 70 U.S.L.W. 3,426 (Jan. 4, 2002)(No. 01-455).

[6]46 Fed. Cl. at 640.

[7]*See Adams v. United States*, 42 Fed. Cl. 463 (1998) and *Franconia Associates v. United States*, 44 Fed. Cl. 315 (1999), *aff'd* 240 F.3d 1,358 (Fed. Cir. 2001), *petition for cert. granted in part*, 70 U.S.L.W. 3,426 (U.S. Sept. 10, 2001)(No. 01-455)

[8]47 Fed. Cl. 514 (2000).

affirmative application of either one shielded the government from liability in breach-of-contract damage cases. The sovereign acts doctrine is best understood as an exception to a general principle of contract law regarding the effect of a supervening government act on the obligation of a contractor to perform its duties. Under that rule, performance on a contract will be excused where some government act after the contract was formed would forbid such performance or render it impracticable.[9] The general rule poses problems in the context of government contracts because it would grant the government a means to have its performance automatically excused on any contract.

Until very recently, the courts, including the Supreme Court, have consistently considered the sovereign acts and unmistakability doctrines independently and have limited the government's liability for damages in breach of contract claims if either doctrine was found to apply.

The sovereign acts doctrine addresses this problem by imposing an *exception* to the general rule. In order for a government act to be the basis for discharging the government's performance on a contract, the act in question must be "public and general."[10] If the act is not sufficiently "public and general," the government will not be permitted to rely on it to discharge its obligation to perform on its contract.[11] The purpose behind the sovereign acts doctrine is to allow the government to continue to act in the public interest but not to act to discharge itself from its contractual duties.

The unmistakability doctrine, on the other hand, is a rule of contractual interpretation whose purpose is to protect the sovereign power of the government. In an action against the government on a contract where the relief sought by the plaintiff would impinge upon a sovereign power the contract must authorize such relief in unmistakable terms.[12] Where the contract does not include an unmistakable authorization, the plaintiff is denied any relief that would impinge upon a sovereign power of the government.[13]

Until very recently, the courts, including the Supreme Court, have consistently considered the two doctrines independently and have limited the government's liability for damages in breach of contract claims if either the sovereign acts or unmistakability doctrine was found to apply. In *Winstar*, a case arising out of the thrift industry failures of the 1980s and the most recent Supreme Court case to consider the doctrines, a four-Justice plurality of the Court concluded, after considering both doctrines independently, that under the facts of that case neither doctrine shielded the United States from liability. Three Justices concurred in the conclusion by finding that the sovereign acts doctrine was inapplicable to the contracts at issue and that the United States unmistakably promised to compensate the contracting parties in the event it breached the contracts through subsequent legislation or executive action. Two dissenting Justices concluded that the unmistakability doctrine alone shielded the government from liability.

While seven Justices in *Winstar* agreed in the result reached in the case, the Justices' three widely differing positions with respect to the sovereign acts and unmistakability doctrines have left courts and commentators confused and searching as to the meaning and reach of the decision with respect to both doctrines and the interrelationship between them.[14] This is notwithstanding the fact that all the Justices in *Winstar* considered the two doctrines independently and only the three concurring Justices suggested, in passing, that the two doctrines are at all related.[15]

Since *Winstar*, the Court of Appeals for the Federal Circuit and a senior judge on the Court of Federal Claims have led the way in seeking to connect and apply the two doctrines in an interdependent framework. Without citing to any precedent and without drawing attention to its analysis, the Court of Appeals for the Federal Circuit, in *Yankee Atomic Electric Co. v. United States*,[16] a case involving Congress' enactment of legislation affecting the contracts of nuclear power generators with the federal government, appears to have linked the two doctrines. The court concluded that its inquiry as to whether the government is shielded from liability is not ended by a finding that the sovereign acts doctrine applied to the legislation but is dependent on its also finding that the government had not waived its right to alter the contracts in unmistakable terms.[17] Perhaps because the court ultimately found the unmistakability doctrine to apply and to shield the government from liability, the case did not draw significant attention and its analysis was ignored in three subsequent Court of Federal Claims decisions, each of which, including *Grass Valley I*, considered the doctrines independently in cases

[9] *See Restatement (Second) of Contracts*, §§ 261, 254 (1979).

[10] *See United States v. Winstar,* 581 U.S. 839, 891 (1996). A corollary to the sovereign acts doctrine is that a government act discharging the government's performance will not itself be the basis for contractual liability. *See Winstar,* 518 U.S. at 891 (citing *Jones v. United States,* 1 Ct. Cl. 383, 384 (1865): "Whatever acts the government may do … so long as they be public and general, cannot be deemed specially to … violate the particular contracts into which it enters with private persons.")

[11] It is clear that the sovereign acts doctrine represents a special exception. The general rule, when applied to private contracting parties, requires no such analysis of the "public and general" nature of a law before the law will be treated to discharge a party's duty to perform.

[12] *See Winstar,* 518 U.S. at 879.

[13] *See id.* ("The application of the doctrine thus turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the Government.")

[14] *See General Dynamics v. United States,* 47 Fed. Cl. 514, 540 (2000).

[15] *See Winstar at* 923-24.

[16] 112 F.3d 1569 (1997).

[17] *Id. at* 1577.

brought by Section 515 owners who claimed that ELIHPA had breached their contracts by eliminating their unrestricted right to prepay their loans.[18]

In *General Dynamics Corp. v. United States*,[19] a case in which a subsidiary of General Dynamics Corporation sought damages from the government after Congress enacted legislation that capped the compensation of senior executives that the subsidiary could charge on its government contracts to design nuclear submarines, the Court of Federal Claims appears to have explicitly linked the two doctrines for the first time. After a lengthy discussion of the two doctrines and an analysis of several decisions, including *Yankee Atomic Electric*, the court concluded that the two doctrines are interdependent and that a court considering the two doctrines must first determine whether an act of Congress was a sovereign act. If it is not, the court need go no further and must find that the government is bound by ordinary principles of contract law and may be held liable for damages resulting from its breach of the contract into which it has entered. Only if the act is a sovereign act must the court consider whether the government made an unmistakable promise to be bound in contract despite subsequent legislative change.[20] The court in *General Dynamics* concluded that the legislation that limited the subcontractor's compensation was not a general act and thus found that the government may be held liable for its breach of that contract without consideration of the unmistakability doctrine.[21]

As noted earlier, in ruling upon RHS' motion for summary judgment in *Grass Valley II* the court abandoned its earlier decision to treat the sovereign acts and unmistakability doctrines independently in favor of the analysis adopted in *General Dynamics*. The court concluded that since a final judgment had not been reached in *Grass Valley I*, it was free to modify its earlier decision with respect to the analysis that should be followed in the case.[22] While acknowledging that in enacting ELIHPA Congress clearly acted in the public welfare and did not target a particular group of contracts, the court, following *Adams*, found that insufficient to make the act "public and general." It found that the prepayment provision was material to the contract and that the impact of ELIHPA and HCDA fell substantially on the government's contracting partners and relieved the government of its contractual obligation.[23] Moreover, following *Adams*' inquiry into ELIHPA's legislative history, the court found that Congress was aware of the fact that it was impairing a contractual obligation and that it did so precisely because FmHA believed that it was obligated to honor the owners' prepayment rights. Thus, it concluded that the case was more like *Winstar* than *Yankee Atomic Electric* and that ELIHPA's extension by HCDA was not a sovereign act.

Conclusion

It is beyond the scope of this article to undertake a critical analysis of the issues raised by *Grass Valley II.* Nonetheless, there are a number of issues that are worth noting. First, the Supreme Court, which has considered the unmistakability and sovereign acts doctrines as recently as six years ago in *Winstar,* has treated the doctrines separately and has never linked them, let alone conditioned the unmistakability doctrine upon a finding that the sovereign acts doctrine applies. Second, the court's unquestioned adoption of the *Adams* decision with respect to the sovereign acts doctrine is dubious. It ignores the fact that *Adams* decided the sovereign acts issue independently of the unmistakability doctrine and with the knowledge that the court's decision with respect to the unmistakability doctrine would shield the government from liability regardless of its conclusion with respect to the sovereign acts doctrine. Third, the opinion seems to foreclose the possibility that Congress can ever enact legislation that would pass the "public and general" test of the sovereign acts doctrine when the legislation only affects parties who have entered into contracts with the United States. In other words, regardless of motive, Congress can never regulate an industry whose sole business is with the government because the industry was effectively created by federal legislation in order to meet a perceived social need. Such a result is inconsistent with the Court's decision in *Bowen v. Public Agencies Opposed to Social Security Entrapment*,[24] which was cited with approval by both the plurality and dissent in *Winstar* and not questioned by the concurring Justices. In *Bowen*, the Court relied on the unmistakability doctrine to deny California damages arising from Congress' abridgement of the state's contractual right to withdraw its employees from coverage under the Social Security program. Lastly, the court's heavy reliance on statements by members of Congress as to the impact of the legislation on government contractors is also questionable. In this case the statements were all made by opponents of ELIHPA who sought to protect the interests of the owners. To rely on those statements to deny the government relief under the sovereign acts doctrine provides unprecedented powers to any member of Congress. Simply by suggesting that an act will impair a contract, an opponent of the legislation can effectively deny the government the shield of the sovereign acts doctrine.

It is expected that the government will appeal the decision in *Grass Valley II* and that it may ultimately reach the Supreme Court. NHLP will monitor the case and report on further developments. ■

[18] *See* fn. 7 *supra.*

[19] 47 Fed. Cl. 514 (2000).

[20] *Id. at* 541.

[21] *Id. at* 545.

[22] 51 Fed. Cl. 439-40.

[23] *Id. at* 442-43.

[24] 477 U.S. 41, 52, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986).

Recent Housing Cases

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

United States v. McKay, 274 F. 3d 755 (2d Cir., Dec. 21, 2001). The United States Court of Appeals for the Second Circuit upheld the conviction of a man who embezzled Section 8 funds, holding that the funds were, indeed, money "of the United States" for purposes of the criminal statute. The defendant was the nephew of the chairman of the Board of Commissioners of the Huntington Housing Authority (HHA). The defendant, a landlord, embezzled Section 8 monies by continuing to accept housing assistance payments on behalf of a relative (itself an illegal practice) after that relative moved out and another tenant was paying the full market rent for the property. Specifically, the defendant was accused of violating 18 U.S.C. § 641, which makes it criminal to steal money from the "United States or any department or agency thereof." The Defendant argued that, because HUD had transferred the money embezzled to HHA before he embezzled it, the money was no longer property of the United States. Thus, he contended, he could not be convicted under the statute. The Second Circuit rejected this argument, holding that the United States continued to exercise considerable control over the money in the form of HUD restrictions on HHA in its role as administrator of the program and in the form of HUD regulations over landlords who receive the Section 8 payments. Thus, the money was still United States property for purposes of § 641.

Edgewood Village, Inc. v. Housing Authority, 2001 WL 1,743,155 (Conn. Super., Dec. 27, 2001). The court denied without prejudice a neighborhood association motion for summary judgement in their suit against the Housing Authority of New Haven (HANH) for failure to give proper notice of its intent to purchase a property. HANH purchased a single-family dwelling that abutted the area represented by the neighborhood association. HANH, however, failed to give 10 days notice of hearing before acquiring the property, as required by Connecticut law. It gave only nine days notice. The plaintiffs sued, asking the court to order HANH to divest itself of ownership of the property. The court questioned whether the plaintiffs had standing to sue, as the statutory scheme gave no explicit right to sue for violation of the notice provision and the neighborhood association had not shown that it was affected by the violation in a specific and personal manner. Holding that the issue of subject matter jurisdiction needed to be addressed before any further ruling, the court permitted the parties to address the issue and denied the plaintiffs' motion for summary judgment without prejudice.

Cincinnati Metropolitan Housing Authority v. Browning, 2002 WL 63,491 (Ohio App. 1 Dist., January 18, 2002). The court reversed the lower court's dismissal of the housing authority ejectment action against a public housing tenant in a one-strike case involving a juvenile offender. Pursuant to the lease and federal law, the tenant was subject to eviction if she, "any members of her household, a guest, or another person under her control" engaged in any criminal activity that threatened the health or safety of other public housing tenants or any drug-related criminal activity. The tenant's 15-year-old son was caught with 3.51 grams of marijuana on the housing authority property and subsequently was adjudicated a delinquent in juvenile court. The housing authority then commenced eviction proceedings against the tenant. The tenant successfully argued at the trial level that, because federal and state law prohibited her son's behavior from being deemed "criminal" because he was a juvenile, she could not be evicted for his actions. The appeals court rejected this argument, holding that the acts of a child can be considered "criminal activity" although the child cannot be criminally charged. The court thus reversed the granting of judgment to the tenant and remanded the case to the trial level. ■

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 through January 31, 2002. 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.

[1]www.westlaw.com.

[2]www.lexis.com.

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

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

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

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

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

Office of Federal Housing Enterprise Oversight Regulations

67 Fed. Reg. 3,587 (January 25, 2002)
Prompt Supervisory Response and Corrective Action

***Summary*:** This final rule sets forth the procedures by which the Office of Federal Housing Enterprise Oversight (OFHEO) administers the *Federal Housing Enterprises Financial Safety and Soundness Act of 1992*, under which OFHEO takes prompt corrective action in response to specified declines in the capital levels of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises). The rule also implements a system of prompt supervisory responses to be taken whenever developments internal or external to an Enterprise, as identified by the agency on a case-by-case basis, may warrant special supervisory review by OFHEO.

Effective Date: February 25, 2002.

HUD Federal Register Proposed Rules

67 Fed. Reg. 2,958 (January 22, 2002)
Requirement of HUD Approval Before a Grantee May Undertake CDBG-Assisted Demolition of HUD-Owned Housing Units

***Summary*:** The Department of Housing and Urban Development (HUD) proposes to amend the Community Development Block Grant (CDBG) Entitlement program regulations by requiring grantees to obtain HUD's approval to demolish HUD-owned housing units. The proposed amendment will ensure that HUD receives notification of a grantee's intent to use CDBG funds to demolish HUD-owned housing units. In addition, the application of this rule will aid in preserving the supply of affordable housing that is available to low and moderate-income persons.

Comments Due Date: March 25, 2002.

HUD Federal Register Notices

67 Fed. Reg. 4,548 (January 30, 2002)
Notice of Regulatory Waiver Requests Granted for the Third Quarter of Calendar Year 2001

***Summary*:** This notice contains a list of regulatory waivers granted by HUD, pursuant to Section 106 of the *HUD Reform Act of 1989*, during the quarter beginning on July 1, 2001 and ending on September 30, 2001.

67 Fed. Reg. 4,458 (January 30, 2002)
Announcement of Funding Awards for Fiscal Year 2001 for the Housing Choice Voucher Program

***Summary*:** This document notifies the public of funding awards for Fiscal Year (FY) 2001 to housing agencies (HAs) under the Section 8 Housing Choice Voucher Program. Included are the names, addresses, and the amount of the awards to housing agencies for housing conversion actions, special housing conversion fees, public housing relocations and replacements, litigation, and litigation counseling.

67 Fed. Reg. 4,164 (January 28, 2002)
Statutory and Regulatory Waivers Granted to New York State for Recovery From the September 11, 2001 Terrorist Attacks

***Summary*:** This notice advises the public of waivers of regulations and statutory provisions granted to the State of New York for the purpose of assisting in the recovery from the September 11, 2001, terrorist attacks on New York City.

67 Fed. Reg. 2,899 (January 22, 2002)
Announcement of Funding Awards for Fiscal Year 2001 Research and Technology Unsolicited Proposals

***Summary*:** This document notifies the public of funding awards for Fiscal Year 2001 Research and Technology unsolicited proposals. It includes the names and addresses of the organizations that have been awarded cooperative agreements based on their submission of unsolicited proposals for research funding.

67 Fed. Reg. 2,228 (January 16, 2002)
Housing Counseling Program Announcement of Funding Awards for Fiscal Year 2001

***Summary*:** This announcement notifies the public of funding decisions made by HUD in a SuperNOFA competition for funding of HUD-approved counseling agencies to provide counseling services. It contains the names and addresses of the agencies selected for funding and the amount. Additionally, this announcement outlines various noncompetitive housing counseling awards made by the Department.

HUD Notices

Notice PIH 2002-01 (HA) (January 22, 2002)
Accessibility Notice: Section 504 of the Rehabilitation Act of 1973; the Americans with Disabilities Act of 1990; the Architectural Barriers Act of 1968 and the Fair Housing Act of 1988

***Summary*:** The purpose of this notice is to remind recipients of federal funds of their obligation to comply with pertinent laws and implementing regulations which provide for non-discrimination and accessibility in federally funded housing and non-housing programs for people with disabilities. Additionally, this notice provides information on key compliance elements of the relevant regulations and examples and resources to enhance recipients' compliance efforts.

Expires: January 31, 2003.

Notice PIH 2001-44 (HA) (December 28, 2001)
Reinstatement—Notice PIH 2000-31 (HA), Implementation of the Special Application Center (SAC)

***Summary*:** This notice reinstates Notice PIH 2000-31 (HA), dated August 14, 2000, which expired August 31, 2001.

***Expires*:** December 31, 2002.

HUD Mortgagee Letters

Mortgagee Letter 2001-30 (December 31, 2001)
Nonprofit Organization and Government Entity Participation in Single Family FHA Activities: Clarification of Net Development Cost Calculation; Expansion of the Use of the Net Development Cost Calculation and Land Use Restriction Addendum to Properties Sold at a Discount of 10 percent or more; Program Definitions; and List of Relevant Documents

***Summary*:** This Mortgagee Letter clarifies the calculation of Net Development Cost and expands the use of the Net Development Cost calculation to HUD properties sold at a discount of 10 percent or more. It applies to government entities and qualified nonprofit organizations that have been pre-approved by HUD to purchase HUD Homes (also referred to as Real Estate Owned, or REO properties in other Mortgagee Letters). Nonprofit organizations and government entities must pass on the discount received from HUD to increase homeownership opportunities for low and moderate-income families and individuals. Appendix A to this Mortgagee Letter provides a detailed list of the costs allowed in the Net Development Cost calculation.

This Mortgagee Letter also expands the use of the Land Use Restriction Addendum to all HUD homes sold to nonprofit organizations and government entities at a discount of 10 percent or greater, effective for all sale contracts executed on or after one month from the date of this Mortgagee Letter. The addendum, to be attached to all Sales Contracts for these discounted properties, stipulates that the property be utilized to expand affordable housing opportunities as stated in 24 C.F.R. 291.301(3). The Land Use Restriction Addendum is set forth in Appendix B to this Mortgagee Letter. Discounted homes purchased through the Dollar Homes, Asset Control Area (ACA), and Officer/Teacher Next Door programs continue to be exempt from these restrictions.

Mortgagee Letter 2001-01 (January 9, 2002)
Nonprofit Participation in Single Family FHA Activities—New Requirements and Restrictions

***Summary*:** This Mortgagee Letter clarifies the requirements that new nonprofit applicants must meet to participate in FHA's Single Family activities, including purchasing discounted HUD Homes, serving as mortgagors, and offering secondary financing assistance. Nonprofits that are seeking FHA approval, and FHA-approved nonprofits currently listed on the nonprofit roster seeking re-approval at the expiration of their current certification, must meet the requirements of this Mortgagee Letter and Mortgagee Letter 00-08. Mortgagees must assure that nonprofit mortgage loan applicants meet the eligibility criteria and comply with the required disclosures. The changes described in this Mortgagee Letter and attachments are effective 30 days from the date of this letter.

Mortgagee Letter 2002-02 (January 16, 2002)
Credit Policy Issues—Payment of Borrower Obligations by Nonprofits

***Summary*:** The purpose of this Mortgagee Letter is to clarify and amplify existing FHA policy regarding mortgage credit underwriting. FHA has become aware of some nonprofit entities providing gifts to homebuyers for the purpose of paying off installment loans, credit cards, collections, judgments, and similar debts. The nonprofit receives a contribution for the payment of these debts from the seller of a property. This practice raises underwriting issues and also falls within the guise of an inducement to purchase a property.

RHS Unnumbered Letters

Guideline for the Development of FY 2001 Civil Rights Implementation Plan Update and Supporting Workload and Performance Data (January 18, 2002)

***Summary*:** The Department's Office of Civil Rights will soon request Rural Development's 2001 Implementation Plan in order to make preparations for the annual Civil Rights Implementation Plan submission as required by the Department of Justice. ■

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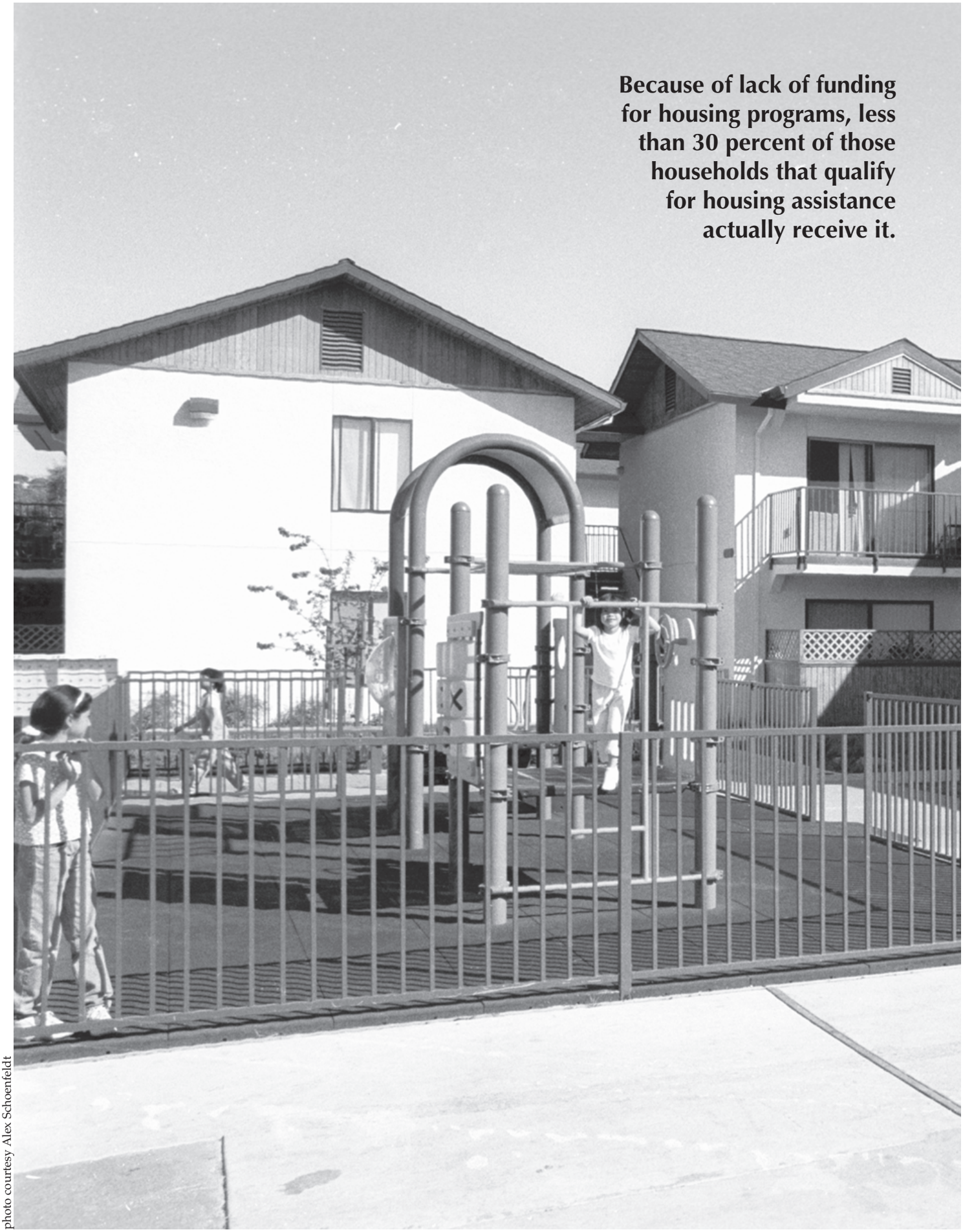

Because of lack of funding for housing programs, less than 30 percent of those households that qualify for housing assistance actually receive it.

photo courtesy Alex Schoenfeldt

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