



# Housing Law Bulletin

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 614 Grand Avenue, Suite 320, Oakland, California, 94610  
 (510) 251-9400 • www.nhlp.org • nhlp@nhlp.org

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## THE SECTION 8 HOMEOWNERSHIP DEMONSTRATION PROGRAM: A SELECTIVE REVIEW OF ITS SUCCESS

### Introduction

As part of the *Quality Housing and Work Responsibility Act of 1998* (QHWRA), Congress sought to provide more low-income families nationwide with an opportunity to become homeowners by creating a new homeownership option for families receiving federal Section 8 tenant-based assistance. The new program allows families receiving Section 8 voucher

assistance to convert their federal rental subsidy to a mortgage subsidy to buy their own home.<sup>1</sup>

Nearly two years later, the Department of Housing and Urban Development (HUD) published the final regulations implementing the program.<sup>2</sup> Under these regulations, public housing authorities (PHAs) are permitted to convert any portion of their Section 8 voucher rental assistance to homeownership assistance. To do so, however, the PHA must first adopt mandatory policy changes that amend its Administrative and Annual Plans, develop its own program requirements and determine eligibility policies for participating families. Unfortunately, HUD does not provide any additional funding for this program, providing PHAs with no incentive to implement the homeownership program.

Despite these hurdles, PHAs are choosing to adopt the homeownership program for a variety of reasons. First, in some areas, it provides broader opportunities for Section 8 participants who are facing increasingly unaffordable rents and a growing number of private landlords who are refusing to accept Section 8 rental assistance. Second, it promotes new homeownership and self-sufficiency opportunities for very low-income households. At the same time, the Section 8 Homeownership Program is receiving an enthusiastic response from local real estate and lending communities, community-based organizations as well as families participating in the Section 8 tenant-based voucher program.<sup>3</sup>

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<sup>1</sup>Public Law 105-276, Title V, § 501 *et seq.*, 112 Stat. 2518 (approved Oct. 21, 1998). The QHWRA amended the *United States Housing Act of 1937* (42 U.S.C.A. §§ 1437 *et seq.*). The homeownership option is authorized under § 8(y) of the *United States Housing Act of 1937*, 42 U.S.C.A. § 1437f(y)(1)(B), as amended by § 555 of the QHWRA.

<sup>2</sup>See 24 C.F.R. Parts 5, 903 and 982; 65 Fed. Reg. 55,134 (Sept. 12, 2000). The Section 8 Homeownership Program regulations became effective on October 12, 2000. For an in-depth discussion of the final HUD Section 8 homeownership regulations, see 30 HOUS. L. BULL. 127 (Sept. 2000), at [nhlp.org/html/sec8/homeownership.htm](http://nhlp.org/html/sec8/homeownership.htm).

<sup>3</sup>Pursuant to the final regulations, the Benicia (CA) Housing Authority recently adopted a Section 8 Homeownership Program. The relevant portion of the Benicia PHA administrative plan is available for review and downloading at [nhlp.org/html/sec8/sampleplan.htm](http://nhlp.org/html/sec8/sampleplan.htm).

## The Demonstration Programs

When it enacted the homeownership option in late 1998, Congress also authorized HUD to begin implementing the program immediately by conducting homeownership demonstration programs with approved PHAs.<sup>4</sup> Between August of 1999 and July 2000, HUD authorized 15 PHAs to develop pilot programs pursuant to that authority.<sup>5</sup> These demonstration programs have had varying degrees of success. For example, the Burlington Housing Authority (BHA) in Burlington (VT), reports that as of December 31, 2000, eight families have closed escrow on their new homes with two more closings anticipated in early 2001. In Syracuse (NY), six escrows have closed and three families have pending escrows due to close in the near future. Other PHAs report only one or two closings, and some none at all. Several of the PHAs that were granted demonstration authority have yet to implement a pilot program at all and therefore, must do so in compliance with the final rule.

While each participating PHA adopted its own standards and eligibility policies for its demonstration program, it is already clear that a successful Section 8 homeownership program depends, in large part, on community and state participation as well as creative financing packages. What follows is a description of programs implemented by five of the demonstration program PHAs. These programs were selected because they have produced the greatest number of escrow closings or they demonstrate creative program implementation.

When reviewing these programs, it is important to remember that these programs were designed to conform to the proposed Section 8 Homeownership rules that were published for comment on April 30, 1999.<sup>6</sup> The final program rules differ significantly from the proposed regulations on a number of issues. As a result, the demonstration programs that have been implemented may not be in conformance with the program's final regulations. Most notably, they do not incorporate a lower minimum income requirement or the 10-year "recapture" provision set out in the final rule.<sup>7</sup>

<sup>4</sup>Pub. L. 105-276, Title V, §555(b), 112 Stat. 2613 (Oct. 21, 1998). Furthermore, in December 2000, H.R. 5640, the *American Homeownership and Economic Opportunity Act*, was passed by the 106<sup>th</sup> Congress which also created a new three-year pilot homeownership program for persons with disabilities. Pub. L. 105-569, Title III, §302 (Dec. 27, 2000). The new pilot program is comparable to the Section 8 homeownership program except that it permits participation by families with incomes up to 99 percent of the median income and requires that voucher payments be made directly to the mortgagee and not the participating family. The bill also makes changes to the existing homeownership program, granting PHAs the authority to make grants to participants in the homeownership program equal to 12 months of voucher housing assistance for downpayment of a new home, in lieu of the monthly assistance. A copy of the bill may be obtained from the Library of Congress' THOMAS Web site at [thomas.loc.gov](http://thomas.loc.gov). For a summary of H.R. 5640, see *Congress Also Passes H.R. 5640 Affecting Homeownership and Elderly Housing*, 30 HOUS. L. BULL. 189 (Nov./Dec. 2000).

<sup>5</sup>See box at right for a list of these PHAs.

<sup>6</sup>See 64 Fed. Reg. 23,487 (Apr. 30, 1999).

<sup>7</sup>See 65 Fed. Reg. 55,163, 55,167 (to be codified at 24 C.F.R. §§982.627(c) and 982.640).

Nonetheless, it is useful to review features of the pilot demonstration programs because they demonstrate differing programmatic, financing and lending strategies that can be used in the program. Moreover, while several PHAs are electing to redesign the local demonstration program to comply with the final rule, other PHAs with demonstration programs have decided to continue operating their programs

## PHAS GRANTED DEMONSTRATION PROGRAM APPROVAL

The following PHAs were granted demonstration program approval by HUD:

Syracuse (New York) Housing Authority  
(approved August 25, 1999);  
Burlington (Vermont) Housing Authority  
(approved October 14, 1999);  
Housing and Community Development Corporation  
of Hawaii (approved December 1, 1999);  
Montgomery County (PA) Housing Authority  
(approved December 2, 1999);  
Danville (VA) Redevelopment and Housing  
Authority (Approved December 6, 1999);  
Colorado Department of Human Services  
(approved January 3, 2000);  
Philadelphia (PA) Housing Authority  
(approved February 17, 2000);  
Metropolitan Development and Housing Agency  
in Nashville, TN (approved February 29, 2000);  
Mississippi Regional Housing Authority in Jackson,  
Mississippi (approved February 29, 2000);  
Charlottesville (VA) Redevelopment and Housing  
Authority (approved April 19, 2000);  
The "Little Ten" Redevelopment and Housing  
Authorities of Southwest Virginia (Approved  
April 19, 2000); Vermont State Housing  
Authority (approved April 19, 2000);  
Yonkers (NY) Housing Authority  
(approved May 16, 2000);  
Las Vegas (Nevada) Housing Authority  
(approved July 10, 2000).

In addition, the New York State Division of Housing and Community Renewal (NYS DHCR) received demonstration program approval on February 29, 2000. However, NYSDHCR is operating its Section 8 homeownership program only in Suffolk County. For contact referral and specific information for each of the PHA Demonstration Programs, contact Lynn Martinez at the National Housing Law Project at (510) 251-9400, ext. 110 or by e-mail at [slmartinez@nhlp.org](mailto:slmartinez@nhlp.org).

under the demonstration authority granted by HUD. Therefore, each program should be considered independently to determine whether the homeownership option under the demonstration authority is more beneficial to Section 8 participants or if the PHA should be urged to convert its existing pilot program to bring it into compliance with the final regulations.

### Burlington Vermont: Utilizing the Land Trust Concept

In Burlington, the BHA works in partnership with the NeighborWorks Homeownership Center and the Vermont Development Credit Union to provide homeownership opportunities to existing Section 8 participants and new applicants, as well as public housing residents. The BHA Section 8 Homeownership Option<sup>8</sup> is limited to first-time homeowners or residents of limited equity cooperatives who have been continuously employed full-time for at least one year prior to entering the program. Senior and disabled heads of household are exempt from the employment requirement and families with a disabled household member may request an employment exemption as a reasonable accommodation.

To participate, the family must earn at least 40 percent of the median income for the family's Section 8 unit size as determined by HUD.<sup>9</sup> Families with a disabled household member may request an exemption as a reasonable accommodation. In addition, the PHA may waive the minimum income requirement for an otherwise eligible household which has obtained preapproval for mortgage financing and can demonstrate that its household budget assures housing affordability.<sup>10</sup> Public assistance may not be used to meet the income requirement unless the head or spouse of the family is elderly or disabled or the household otherwise includes a disabled person.<sup>11</sup>

After receiving HUD approval of its program, BHA sent a targeted mailing to current participants and families on its waiting list who appeared to meet the initial income and

employment requirements. BHA also advertised the option at local homeownership centers and with area realtors. After determining initial family eligibility, the housing authority refers the families for homeownership counseling.

To participate in the program, participants must enroll in the NeighborWorks Homeowners Center of Vermont for homeownership education. Families attend a one-hour orientation at no cost and an eight-hour workshop for a \$50 fee. Thereafter, participants design a "personal plan of action" with a housing counselor and are referred to the Vermont Development Credit Union (VDCU) to resolve any financial barriers to homeownership. Applications are also made to VDCU for mortgage preapproval. Once the NeighborWorks Homeownership Center or VDCU determines that the family is "mortgage ready," a Section 8 homeownership voucher is issued for the family. Each family may choose its own method of finding an appropriate home by either locating a home on its own or working with a real estate agent and selecting a lending institution.

Of the first eight BHA escrow closings, four homes have been purchased through the Burlington Community Land Trust (BCLT),<sup>12</sup> which has an inventory of homes that are

<sup>12</sup>With the exception of one mobile home, the homes purchased under the Section 8 homeownership program have all been single family houses. Currently, the housing authority permits the purchase of single family units, homes occupied under lease-purchase agreements and cooperative units.

## EN BANC 9<sup>TH</sup> CIRCUIT REVERSES PANEL'S EARLIER DECISION IN RUCKER V. DAVIS

In a major victory for residents of public housing, an *En Banc* panel of the United States Court of Appeals for the 9<sup>th</sup> Circuit has found HUD's "one-strike" regulations, as applied to the eviction of innocent tenants, to be inconsistent with the authorizing statute. It therefore, upheld a district court decision to preliminarily enjoin the Oakland (CA) Public Housing Authority from evicting four residents under HUD's one-strike rules. *Rucker v. Davis*, No. 98-16322, \_\_\_F.3rd \_\_\_ (9<sup>th</sup> Cir. Jan. 24, 2000). An analysis of the comprehensive and well reasoned 70-4 decision will appear in the February issue of the *Bulletin*. A copy of the decision is available from the National Housing Law Project's Web site at [nhlp.org/html/pubhsg/rdcases.htm](http://nhlp.org/html/pubhsg/rdcases.htm). For an analysis of the earlier split panel decision from the same court, which was previously withdrawn, see 30 HOUS. L. BULL. 24 (Feb. 2000).

<sup>8</sup>Addendum 1 to the Burlington Housing Authority Administration Plan. Unless otherwise noted, all information regarding the various demonstration programs was obtained through the PHA Administrative Plan or related documents and by PHA staff or sub-contracting or partnering entities.

<sup>9</sup>For example, to purchase a three-bedroom home, a family must have an annual minimum income of \$23,952, or \$1,996 per month.

<sup>10</sup>The final regulations mandate that, in order to participate in the Section 8 homeownership program, the adult family members who will own the home at commencement of the homeownership assistance must have an annual (gross) income that is not less than the federal minimum hourly wage multiplied by 2,000 hours (*i.e.* \$10,300 per year). 65 Fed. Reg. 55,163 (Sept. 12, 2000) (to be codified at 24 C.F.R. 982.627(c)). Welfare assistance may not be included in determining annual income unless the participating family is elderly or disabled. *Id.*

<sup>11</sup>As defined in the BHA Administrative Plan, public assistance includes federal housing assistance or the housing component of a welfare grant, TANF assistance, SSI that is subject to an income eligibility test, food stamps, general assistance or other assistance provided under a federal, state or local program that provides assistance to help the family meet its living or housing assistance.

available for purchase. If a family finds a Section 8 eligible home, it may also be added to the existing BCLT network of homes. Under the land trust concept, the family purchases the home but not the land. BCLT provides a home land grant of up to \$30,000, which is used to meet any downpayment requirement and to bring down the initial loan amount. In exchange, the family agrees to lease the land on which the home sits from BCLT for \$25 per month. Upon resale of the property at any time in the future, the family also agrees to repay 75 percent of the increased equity in the home to BCLT.

Three of the eight purchasing families received loans on the private market: two qualified for loans from credit unions that manage their own loan portfolios and one was obtained from a private lender.<sup>13</sup> All of the other Section 8 homeownership participants obtained their financing through the Vermont Development Credit Union (VDCU), which is one of several lenders that participate in lending programs offered by the Vermont Housing Finance Agency (VHFA) that are designed for low and moderate-income homebuyers.<sup>14</sup> Similar to BCLT, VHFA also requires repayment of a portion of the equity upon resale of the home.

In addition to credit problems, BHA has found that downpayment requirements are a barrier for the families who want to participate in the program since they generally do not have the cash resources to pay “up-front” money. The problem is alleviated however by the fact that VHFA allows 3 percent of the family’s downpayment to be subsidized through nonprofit grants or by the BCLT. The BCLT land trust grant is, as a result, an essential resource for meeting or minimizing any required downpayment. However, it comes at a high price—a willingness to forgo a substantial portion of the equity appreciation in the home.

BHA gives a family 60 days to find a home and to enter into a sales contract. If the family is unsuccessful, it is provided another 60 days (or longer at the discretion of the authority) to either find a home to purchase or to find a rental unit. Consistent with the final HUD regulations, the home must be inspected by the BHA for compliance with the *Housing Quality Standard* (HQS) and the family must obtain an independent professional inspection of the home prior to finalizing the sale. Under the BHA demonstration program, the family may only receive Section 8 homeownership assis-

tance for a maximum of 10 years. Elderly and disabled families are exempt from this time limit.<sup>15</sup>

A family participating in the BHA program must execute a “statement of homeowner obligations” and comply with such obligations in order to continue receiving homeownership assistance. Under these obligations, the family is unable to sell or transfer any interest in the home to any entity or person (other than another member of the assisted family who is residing in the home) as long as the family is receiving homeownership assistance.<sup>16</sup> Other family obligations include:

- compliance with the terms of any mortgage or refinancing debt;
- reporting information regarding purchase mortgages or loans and any sale or transfer of interest in the home; and
- notification of the BHA of any defaults on a mortgage securing any debt incurred to purchase the home.<sup>17</sup>

The family must also continue to supply required Section 8 recertification information such as family income and composition. As with the Section 8 tenant-based program, this information is used to calculate the total payment to the homeowner and the amount of the homeowner assistance payment. Finally, at the annual recertification, the family must document that it is current on its mortgage, insurance and utility payments.

The average annual income of families participating in the BHA homeownership program is \$26,973, while the average price of the purchased homes is \$115,600. Under the Section 8 homeownership program, expenses, other than principal and interest, for homeownership are considered in determining the family’s share of the mortgage payment. The Burlington homeownership option includes:

- principal and interest on the mortgage debt;
- refinancing charges;
- taxes and other public assessments;
- insurance, maintenance and major repair expenses; and
- a utility allowance.

<sup>13</sup>Generally, under the BHA program, the authority makes the housing assistance payment (HAP) directly to the lender. However, in this case the lender requested that the HAP payment be made directly to the family so it is able to make one mortgage payment and the lender does not have to process two payments. This practice is likely to be followed by other private lenders. However, according to BHA, so far the participating credit unions are willing to accept dual payments.

<sup>14</sup>Created by the Vermont State Legislature in 1974, VHFA provides low-interest loans with a minimal downpayment requirement for low and moderate-income people living in Vermont. For more information about the Vermont Housing Finance Agency, visit [vhfa.org](http://vhfa.org). Most states have similar housing finance agencies which serve low and moderate income households within the state.

<sup>15</sup>Under the final regulations, and except in the case of an elderly or disabled family, Section 8 homeowners may receive Section 8 homeownership assistance for a maximum of 15 years if the initial term of the purchase mortgage is 20 years or longer. 65 Fed. Reg. 55,166 (Sept. 12, 2000)(to be codified at 24 C.F.R. §982.634).

<sup>16</sup>The family may, however, purchase another home with Section 8 assistance provided there is no mortgage loan default and the family is in compliance with the statement of homeowner obligations.

<sup>17</sup>If the family defaults on a mortgage obtained to buy a home under the Section 8 homeownership option, the family will not be permitted to convert its Section 8 voucher to a tenant-based subsidy but will be permitted to reapply for the Section 8 waiting list. Similarly, the family is barred from future participation in the Section 8 homeownership option if it has previously defaulted on a mortgage obtained through the Section 8 homeownership program.

The Homeownership Center provides BHA with recommended allowances for maintenance expenses, major repair and replacement costs for each home. BHA also includes the \$25 lease payment for the real property for homes purchased through the land trust as well as lease payments for mobile home spaces. Condominium homeowners' association fees are also included in the family's homeownership expenses. The homeowner expenses for the purchasing families averaged \$1,204 per month with housing assistance payments ranging between \$230 and \$512 per month.

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BHA reports that it has many families who are eligible and willing to participate in the program and that the program is becoming even more desirable as rental housing in the area becomes scarce and families are unable to use their Section 8 vouchers. Moreover, the housing authority has a relatively short list of families waiting for Section 8 vouchers. BHA promotes interest in the program by employing a local "homeownership" preference which can be used, in conjunction with other local preferences, by up to 10 percent of its waiting list families.<sup>18</sup> Under the final regulations, a PHA may not set aside program funding or create special program slots (including the establishment of a separate waiting list) for the Section 8 homeownership option. 65 Fed. Reg. 55,162 (Sept. 12, 2000)(to be codified at 24 C.F.R. §982.601(c)(2)). Thus, eligible families can quickly move to the top of the waiting list to receive a Section 8 voucher for homeownership purposes.

Since BHA believes its program to be successful as adopted, it does not plan to revise its demonstration program to comply with the final HUD regulations. Furthermore, since most participant families are already subject to recapture requirements imposed by the BCLT and by the VHFA, the Housing Authority does not plan to recapture any of the Section 8 homeownership assistance as required under the final regulations.<sup>19</sup>

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<sup>18</sup>The BHA sets forth its "local preferences" in its Administrative Plan, stating that "For up to 10 percent of applicants admitted in each fiscal year, BHA elects to extend consideration for a Local Preference to: (1) applicants [with] an emergency housing situation not resulting from the family's actions or inaction . . . (2) applicants and residents of public housing who have been determined to be eligible for the Section 8 Homeownership Option and have been determined to be 'mortgage ready' by the NeighborWorks Homeownership Center of Vermont . . ." Burlington Housing Authority Administrative Plan, page 4-2. See also 24 C.F.R. §5.410 *et seq.* for Section 8 participant selection and local preferences guidelines.

<sup>19</sup>The recapture provision included in the final regulations will be codified at 24 C.F.R. §982.640 (65 Fed. Reg. 55,167).

### Homeownership Opportunities for Disabled Families in Colorado

The Section 8 homeownership demonstration program was initiated by the Colorado Department of Human Services Supportive Housing and Homeless Programs (SHHP) in January 2000. SHHP administers HUD housing programs for more than 2,300 people with disabilities and other special needs throughout Colorado. In addition to providing housing assistance, SHHP offers a variety of other services to its clients, including:

- case management;
- counseling;
- budget assistance;
- health assistance; and
- employment assistance.<sup>20</sup>

To participate in the SHHP Section 8 Homeownership Program, prospective homeowners must be current Section 8 participants who have received Section 8 tenant-based assistance for at least one year and qualify as "first time homebuyers."<sup>21</sup> They do not have to meet a minimum income requirement as is now mandated by the final HUD regulations. Participants must participate in four hours of pre-purchase and four hours of post-purchase homeownership counseling classes. In addition, two hours of "one-on-one" education is required. Classes include information on default avoidance and home repair and maintenance.

Participants must pay a cash downpayment toward the purchase of their home of either \$750 or 5 percent of their assets, whichever is greater. However, as long as they do not own an interest in the home, non-occupying family members can assist with the downpayment and/or co-sign on the purchase loan for the home. In addition, HUD Community Development Block Grant (CDBG) funds and other federal, state or local funding—including grants from non-profit agencies—can be used toward the purchase of the home for downpayment purposes.

Homebuyers may choose a real estate professional of their choice. However, they must choose a lender that is working with SHHP's partner in the Section 8 homeowner-

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<sup>20</sup>Colorado Department of Human Services, *Supportive Housing and Homeless Programs: Section 8 Homeownership Handbook* (Revised Oct., 2000).

<sup>21</sup>"First-time homeowner" is defined in the homeownership option as a family which has not had an ownership interest in a home for at least three years. A single parent or displaced homemaker who, while married, owned a home with his or her spouse, or resided in a home owned by his or her spouse is also included as a first-time homeowner. 65 Fed. Reg. 55,161 (Sept. 12, 2000)(to be codified at 24 C.F.R. §982.4). Members of cooperative housing and a family member with a disability in need of a reasonable accommodation also qualify for the Section 8 homeownership program. *Id.* at 55,163.

ship program, the Colorado Housing and Finance Authority (CHFA).<sup>22</sup> CHFA offers financing through its HomeAccess Pilot Program for disabled home buyers or for parents of a disabled child. Due to funding limitations, preference is given to borrowers who are receiving, or are eligible to receive, federal benefits for people with disabilities; namely Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI).

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*By early January 2001, SHHP had closed four home purchases through its program. The first purchasers were a very low-income couple, both with developmental disabilities, with a combined income of \$14,890.*

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Through HomeAccess, CHFA offers first mortgage loans at a 3 percent fixed interest rate. A deferred second mortgage at 1.5 percent is available for up to \$10,000 to assist with closing costs and downpayment. The deferred second mortgage, however, can only be used in conjunction with a HomeAccess Pilot Program first mortgage loan that, except in certain circumstances, is due upon the sale of the property, death of the disabled borrower or upon refinancing of the first mortgage. As with SHHP, the borrower must contribute a minimum of \$750 toward the sales transaction (including amounts paid for escrow deposits, appraisal, inspection or credit report fees) although the contribution can be a gift and does not necessarily need to come from the borrower's funds.<sup>23</sup>

In determining the family's income for loan qualification, lenders must consider public assistance, employment and other eligible income sources under the Section 8 program. The Section 8 housing assistance payment itself, however, may be used as a direct reduction or "buydown" of the house payment and not as a source of income. The Section 8 payment is used to assist borrowers in qualifying for higher first mortgages by applying the assistance directly against their mortgage payment. As a result, the family needs only to qualify for the mortgage payment remaining after the Section 8 assistance is applied. This form of underwriting allows the family to maintain its other income for bill

payments, living expenses and the remaining portion of the mortgage payment.

CHFA services all mortgage loans after purchasing them from the participating lenders at 100 percent of the unpaid principal balance. SHHP makes the housing assistance payment directly to CHFA. Moreover, the participating family must agree to allow CHFA to withdraw the tenant portion of the mortgage payment directly from the family's bank account.<sup>24</sup>

By early January 2001, SHHP had closed four home purchases through its program. The first purchasers were a very low-income couple, both with developmental disabilities, with a combined income of \$14,890. The couple purchased a home in rural Montrose, Colorado, for \$81,500. Using a creative financing packaging that is described below, the total monthly mortgage payment is \$362, of which the homeowners pay \$242 per month while the remaining \$120 is paid by the Section 8 assistance.

The family used CHFA HomeAccess financing, provided by one of the SHHP listed lenders, to obtain a \$17,100 first mortgage at 7.3 percent interest. It secured a deferred second loan for \$10,000 at 1.5 percent interest and a \$51,800 subsidized loan from the Rural Housing Service (RHS) at 1 percent interest for 38 years.<sup>25</sup> The purchase also included a deferred \$3,500 no-interest loan from the Federal Home Loan Bank for \$3,500.

Another Section 8 participant with an annual income of \$6,384 was able to purchase a home for \$68,000 in the City of Pueblo, Colorado.<sup>26</sup> This purchase also included creative local financing. The first mortgage is a \$63,899 CHFA loan at 3 percent interest. The second mortgage is a combination loan through the County of Pueblo servicing agency, Colorado BlueSkies Enterprises, using HOME funds and other matching local funds. The third mortgage is a 10-year \$7,000 deferred loan at 1 percent interest.

SHHP also intends to continue operating its current program under the pilot plan and avoid the requirements of HUD's final regulations. SHHP also plans to expand the program to non-disabled families participating in its other programs. The new program will, however, operate in compliance with the Section 8 homeownership final regulations. For example, SHHP operates a welfare-to-work Section 8 program for families (both disabled and non-disabled) who receive TANF funds, were previously homeless, and are now live in transitional housing. Once the families have participated in SHHP for one year, they will be eligible to transition into homeownership under SHHP's new Section 8 homeownership program.

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<sup>22</sup>SHHP provides a list to prospective homebuyers which designates the names and phone numbers of loan specialists working specifically with the Section 8 homeownership program. These lenders are selected by CHFA because of their experience in lending to the disabled community and for performing hardship loans, and for their ability to provide statewide coverage. For information about the Colorado Housing and Finance Agency, visit colohfa.org.

<sup>23</sup>Colorado Housing and Finance Authority—HomeAccess Pilot Program, *HomeAccess Pilot Program Directive* (May 1, 2000).

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<sup>24</sup>If the family does not have a bank account, it is required to open and maintain an account in order to participate in the program.

<sup>25</sup>See 42 U.S.C.A. §1490a (West 2000 Supp.)

<sup>26</sup>Although mostly utilized in rural Colorado areas, the Section 8 homeownership program was also used to purchase a condominium unit in Denver.

**Nashville: Involving the Local Real Estate and Lending Community**

The Metropolitan Development and Housing Agency (MDHA) in Nashville (TN) has closed three escrows (with two expected to close by mid-February 2001) since receiving program approval from HUD in February 2000. Each of these homes are three-bedroom single-family units. One of the units is an existing home and one unit is newly constructed by the PHA through a HOPE VI project.<sup>27</sup> The third home was constructed by MDHA's partner, Affordable Housing Resources, Inc. (AHR), in an area targeted by Nashville for revitalization. After the home was built by AHR, it was resold to the Section 8 purchaser.<sup>28</sup>

The Housing Authority reports that it has 16 families who are in the process of obtaining lender approval and are looking for homes to purchase. It anticipates that these families will close escrow by June 30, 2001. The Housing Authority's goal is to reach 33 purchases by the end of 2001.

To participate in the MDHA program, eligible families must be enrolled in the Family Self-Sufficiency Program (FSS) and have an annual income of at least \$15,000.<sup>29</sup> If a family is interested in participating in the homeownership program but does not earn \$15,000 per year, the participant is encouraged to utilize the FSS program to increase his or her employment hours or wages to meet the program guidelines. The family must also have saved at least \$3,000 in its FSS escrow account or remain employed in the same job for 36 months.

The key to this program is community participation. Eligible families are referred to the AHR, which has also been operating low and moderate-income first-time homebuyer programs since the mid-1980s. AHR completes an intake interview, determines homeownership criteria, provides both pre and post-purchase counseling and obtains credit reports for the families. If the credit report is unsatisfactory,

families are invited to join a homeowner's club to repair their creditworthiness. In most cases, an unsatisfactory credit ratings can be resolved within 18 months.

Since the Section 8 homeownership program differs substantially from the traditional home purchase transactions, the Housing Authority also provides training programs about the Section 8 homeownership option to local real estate agents. Once an agent completes the training program, the agent is listed as a resource to the Section 8 participants. Participants are also informed about local lenders and loan products offered through the Tennessee Housing Development Agency.

To purchase a home, the Section 8 family obtains a conventional 30-year first mortgage of up to 80 percent of the purchase price based upon its income and ability to pay the loan. Gap financing is provided by AHR through a 6 percent second mortgage that is expected to be paid off with the Section 8 subsidy over a period of 15 years.<sup>30</sup>

The Housing Authority expects the participant family to make a downpayment toward the home purchase. The funds, however, can come from the family's FSS escrow account (if available), paid with the assistance of family or friends, or from an AHR downpayment grant. To comply with the final regulations, MDHA now also requires recapture of the applicable portion of Section 8 assistance from the equity received upon sale or refinance of the home.<sup>31</sup>

In addition to the participants who have already purchased homes or have pending escrow closings, 69 individuals were actively participating in the MDHA Section 8 to Homeownership Program as of December 2000. Thirty-four of those participants should be ready to purchase homes within the next year. The average income of a participating family is \$21,400, most have worked for an average of five years and the average purchase price is \$73,500. A typical purchase proforma is as follows:

Purchase Price	\$73,000
First Mortgage	\$40,000
Second Mortgage	\$30,000
FSS Escrow toward downpayment	\$3,000
FMR for a 3-bedroom unit	\$730
First Mortgage payment (Principal, interest, taxes & insurance)	\$400
Second Mortgage (Supported by Section 8 payment)	\$330

<sup>27</sup>The HUD HOPE VI program was implemented in 1993. The program provides funding and increased flexibility for PHAs to revitalize severely distressed public housing developments. Funding includes revitalization and demolition-only grants. The grants may be used for activities such as demolition, sale or lease of a site, construction, rehabilitation and other physical improvements, replacement housing and community and supportive services, among other things. See 42 U.S.C.A. §1437v (West Supp. 2000). The most recent HOPE VI Revitalization Notice of Funding Availability (NOFA) is published at 65 Fed. Reg. 9320, 9597 (Feb. 24, 2000)[Fiscal Year (FY) 2000 HUD SuperNOFA].

<sup>28</sup>Section 8 participants may use their assistance to purchase their choice of housing types. Mobile homes are permissible as a purchase option if the coach meets local codes and requirements (such as having tie-downs and under-pinning). In the Nashville area, mobile homes on vacant lots provide a viable source of affordable housing.

<sup>29</sup>The Family Self-Sufficiency (FSS) Program assists public housing residents and Section 8 voucher participants move from welfare assistance to work. 42 U.S.C.A. §1437u (West 1994 and 2000 Supp.); 24 C.F.R. Part 984 (2000). If a FSS participant increases her earnings from work, an amount equal to 30 percent of her net increase in income will be deposited into an escrow account for her use upon successful completion of the FSS program. See 24 C.F.R. §984.305 (2000).

<sup>30</sup>AHR has a revolving loan fund capitalized with monies from local lenders, the Federal National Mortgage Association ("FannieMae" or FNMA) and other sources, including HUD HOME Investment Partnerships program funds. Under the HOME program, HUD allocates federal funds by formula to eligible states and local governments to "strengthen public-private partnerships and to expand the supply of decent, safe, sanitary, and affordable housing" for very-low and low-income families. See 24 C.F.R. Part 92 (2000).

<sup>31</sup>See 65 Fed. Reg. 55,167 (to be codified at 24 C.F.R. §982.640).

## Suffolk County: Early Intervention and Financial Management

The New York State Division of Housing and Community Renewal (NYSDHCR) operates a state-wide program with approximately 25,000 units in 50 counties. NYSDHCR subcontracts its Section 8 homeownership demonstration program in Suffolk County to a local nonprofit, the Community Development Corporation (CDC) of Long Island. It hopes to use the Suffolk County demonstration program as a model for other counties throughout the state.<sup>32</sup>

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*Like many other places in the United States, high housing costs on Long Island are a major obstacle for a Section 8 participant's ability to purchase a home.*

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Like many other places in the United States, high housing costs on Long Island are a major obstacle for a Section 8 participant's ability to purchase a home. The median home sales price in rural and suburban Suffolk County is over \$170,000.<sup>33</sup> The cost of housing, together with high property taxes, required the CDC to develop a unique, flexible financing program that takes into account the family's income, the price of the house, the property taxes, the current prevailing interest rate and the amount of funds available for downpayment. In short, if the family qualifies, the program can be adjusted to the family's particular circumstances.

The Suffolk County program focuses heavily on early intervention so families can avoid post-purchase financial difficulties. To qualify for the program, the family must be a current Section 8 participant and either be enrolled in, or have graduated from, the FSS program. They also must have an annual income of at least \$20,000 and enrollment in the CDC Homeownership Center is also required. Homeownership pre-purchase counseling includes, among other things, home maintenance, budgeting and money management, credit counseling, financing options, and how to locate and negotiate the purchase of a house. Once a family receives a Certificate of Completion from the counseling program (which deems the family to be "mortgage ready"), it is issued a Homeownership Option Voucher.

In most instances the family is given 120 days to find a home to purchase. During its search, the family is required to make monthly reports on its progress in locating a home

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<sup>32</sup>In early 2001, the Suffolk County demonstration program will be converted to adopt the Section 8 homeownership final regulations. It also plans to begin permitting the purchase of condominiums and cooperatives with Section 8 assistance.

<sup>33</sup>To date, the average sale price of homes purchased through the Section 8 homeownership program is \$130,000.

to the CDC. In the interim, or if the family is not successful in locating a house, the family may continue receiving Section 8 tenant-based assistance.

Once the family finds a home, CDC conducts an HQS inspection. If the house passes, the family must obtain an independent professional home inspection. The family is allowed to purchase a home in need of repairs if the family agrees to utilize an acquisition and rehabilitation mortgage product designed to bring the home up to the required health and safety standards.<sup>34</sup> If acquisition and rehabilitation lending is used, CDC acts as the construction supervisor and administers the funds on behalf of the bank. The funds are escrowed for payment to a contractor that is identified and retained by the family.

CDC requires that a minimum downpayment of at least two percent of the sale price come from the family's own funds. The family must secure a fixed-rate 30-year fully-amortized first mortgage through a conventional or FHA-insured lender for an amount which can be supported by their total monthly income.<sup>35</sup> Not more than 30 percent of the family's monthly gross income can be paid toward mortgage principal, interest, taxes and insurance. As with the Nashville program described above, the gap amount—or the difference between the affordable conventional mortgage amount and the purchase price, less the down payment—determines the amount of a second mortgage needed for the purchase. Accordingly, the amount of the second mortgage may exceed the amount of the first mortgage.

CDC's lending affiliate, CDCLI Funding Corporation, makes second mortgages available through a revolving fund supported by a variety of sources, including the Neighborhood Reinvestment Corporation.<sup>36</sup> The second mortgage is offered for a term of up to 10 years (concurrent with the Section 8 assistance payment) at a 3 percent interest rate. The Section 8 subsidy is paid directly to the homeowners and is

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<sup>34</sup>Acquisition and rehabilitation mortgage products are available from local lenders, with the FannieMae HomeStyle mortgage or through the FHA-insured 203(k) program. Typically, the loan amount is not based on the purchase price but the anticipated, increased value of the home after the repairs are completed.

<sup>35</sup>CDC will also consider and approve seller financing on a case by case basis. Under the final regulations, seller financing is permitted at the discretion of the PHA. See 65 Fed. Reg. 55,135 (Sept. 12, 2000).

<sup>36</sup>The Neighborhood Reinvestment Corporation is a national non-profit corporation created by Congress to revitalize older distressed communities through the support of local non-profit organizations. The NeighborWorks network (an affiliate of which participates in the Burlington Vermont Section 8 Homeownership Program described above) is supported by the Neighborhood Reinvestment Corporation and its sister organization, Neighborhood Housing Services of America (which operates a secondary mortgage market that purchases housing loans from NeighborWorks organizations). See [nw.org/nrc/](http://nw.org/nrc/).

This year, Congress authorized allocation of \$90 million to the Neighborhood Reinvestment Corporation for use in neighborhood reinvestment activities, of which \$5 million was designated for use with the Section 8 homeownership program. FY 2001 Appropriations Bill (H.R. 4635), Pub. Law No. 106-377 [The Department of Veteran's Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2001] (Oct. 27, 2000). For a summary of this bill, see *Congress Passes Modest Fiscal Year 2001 HUD Budget*, 30 HOUS. L. BULL. 184 (Nov./Dec. 2000).

used to pay for the second mortgage payment as well as any other incurred housing expenses.

After purchasing the home, the family is required to submit to annual HQS inspections at recertification and to attend post-purchase counseling. Through post-purchase counseling, CDC provides regular classes geared toward the Section 8 homebuyer, including home repair instruction. The intent of the classes is to keep the buyer in touch with the CDC Homeownership Center and to create an on-going relationship between the purchaser and the center.

To maintain a delinquency safety net, the CDC promotes early intervention if the family faces financial difficulties. As a requirement of participating in the homeownership program, the family agrees to notify CDC immediately if it is having problems making its mortgage payments. Authorization is also given to the lender to notify CDC if the family is more than 15 days late with its payment so early intervention procedures may be initiated. The family must then work with the CDC's housing counselors to implement a financial arrangement for keeping the mortgage current.

Ten months after initiation of its program, Suffolk County had two Section 8 participants close escrow on the purchase of their new homes.

### Syracuse, NY: Homeownership Through Successful FSS Program Participation

In terms of numbers of closings, one of the most successful demonstration programs is located in Syracuse. Now nearly one-and-a-half years old, the Syracuse Housing Authority (SHA) credits its Section 8 homeownership success to its flourishing FSS program which includes approximately 500 people of which 68 percent are currently contributing to an FSS escrow account totaling \$1 million.<sup>37</sup> SHA also is convinced that its minimum annual income requirement of \$15,000 is necessary to achieve homeownership through the program.<sup>38</sup> The low cost of housing in Syracuse, where the average purchase price is \$49,000, and the fact that the average mortgage payment of \$520 is less than the average rent of \$734, also contributes to the success of the program.

To implement the program, SHA sent letters to all Section 8 FSS participants inviting them to discuss a homeownership path. After holding several meetings with groups of 20 individuals, the Housing Authority ended up with a core group of 60 participants. It met with each of the participants individually to determine financial and mortgage qualification criteria, credit ratings and to obtain police

<sup>37</sup>The Housing Authority reports that through its successful FSS program, many families have already purchased homes without the help of Section 8 assistance.

<sup>38</sup>Although the Syracuse Housing Authority continues to operate its demonstration program under the proposed rule, it may change to the final rule in the future for new applicants. However, SHA disagrees with the recapture requirements and the lower income levels set forth in the final rule. As noted in footnote 10 same as note 37 *supra*, the final Section 8 regulations include a minimum annual income requirement of \$10,300 (2000 hours at the current Federal minimum hourly wage of \$5.15).

report history.<sup>39</sup> Those who would otherwise be able to participate in the program except for unsatisfactory credit were provided the opportunity to attend credit repair classes to enable them to utilize the program six or 12 months later.

Home Headquarters, Inc. (HHQ), a local NeighborWorks organization which partners with the Housing Authority in administering the Section 8 homeownership program, provides homeownership counseling and introduces local banks and lending institutions to Section 8 program borrowers. All of the banks in the area are competing to work with the Section 8 homeownership program and as a result, are offering loan products and other concessions that increase the affordability of traditional mortgages. To satisfy the banks and lending institutions, SHA makes the Section 8 homeownership assistance payment directly to the homeowner who, in turn, makes one payment to the mortgagee. In addition, HHQ offers a variety of loan products and services, including home repair loans, downpayment and closing costs loans for first time homebuyers.

Through its Home Headquarters partnership, the SHA also partners with the *Syracuse Weed and Seed program*, a U.S. Department of Justice initiative to revitalize neighborhoods through, among other things, law enforcement and neighborhood restoration. The *Syracuse Weed and Seed program* focuses largely on local housing issues and two of the homes purchased with Section 8 assistance are in *Weed and Seed* revitalized neighborhoods. In addition, an anticipated partnership with the Syracuse Model Neighborhood Corporation (SMNC) will extend homeownership opportunities for Section 8 families by utilizing homes owned and resold by SMNC. Similar to the *Weed and Seed program*, the SMNC provides a variety of affordable housing and neighborhood revitalization opportunities in Syracuse.

<sup>39</sup>It is unclear why all adult household members must submit to and pass a police background check before participating in the homeownership program. Although families must comply with the family obligations set forth generally for the Section 8 voucher program (*see* 24 C.F.R. 982.551), police background checks are not required under either the Section 8 homeownership proposed rule or the final HUD regulations.

## UPDATED RESIDENTS' GUIDE TO PHA PLANS

The *Residents' Guide to the New Public Housing Authority Plans*, originally published in June 1999, was updated in June 2000. The six-page update is now available from the Center for Community Change Web site [communitychange.org/index.html](http://communitychange.org/index.html).

The Guide is a very useful booklet describing the PHA Plan process. It is clearly written so that tenants and local housing advocates may easily use it.

Six families participating in the SHA homeownership program have closed escrow and three more families have closings pending. Despite the low cost of housing, only one of these homes was in need of rehabilitation with \$110 in required repairs. Under the program requirements, however, the family was prohibited from paying for these repairs. As a result, the Housing Authority obtained local funds to make the repairs and the family was able to purchase the home for \$33,000.

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*Despite its delayed start and the financial barriers facing most Section 8 participants, the Section 8 pilot programs have, for the most part, demonstrated success—at least for families on the higher income end of the Section 8 program.*

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## Conclusion

Despite its delayed start and the financial barriers facing most Section 8 participants, the Section 8 pilot programs have, for the most part, demonstrated success — at least for families on the higher income end of the Section 8 program. The most successful programs have created local community partnerships, ensuring smoother implementation of the program and easier transition to homeownership for Section 8 participants. Enthusiastic support from the real estate and lending community has helped efforts to move lower-income first-time purchasers into homeownership. The use of existing loan products and grant sources as well as some creative financing can help other PHAs to adopt viable homeownership programs designed to bring greater housing opportunities to their Section 8 clients. PHAs can also help ensure that families will be able to remain in their homes and continue to receive Section 8 homeownership assistance by employing intensive post-counseling and delinquency avoidance programs.

For more information about the Section 8 Homeownership Program, contact Lynn Martinez at the National Housing Law Project by telephone at (510) 251-9400, ext. 110 or by e-mail at [slmartinez@nhlp.org](mailto:slmartinez@nhlp.org). ■

# DECONCENTRATION FINAL REGULATIONS ARE PUBLISHED

## Introduction

In the final days of the Clinton Administration, the Department of Housing and Urban Development (HUD) published final regulations on the obligation of public housing authorities (PHAs) to deconcentrate public housing by income and to affirmatively further fair housing through admissions.<sup>1</sup> In the admission context, deconcentration of income primarily means bringing higher-income tenants into developments that are lower-income and lower-income tenants into higher-income developments. Nevertheless, the regulations acknowledge that deconcentration and income-mixing may also be achieved by increasing the income of public housing residents.<sup>2</sup> PHAs subject to the regulation must amend their PHA Plans and adopt a deconcentration policy that conforms to the regulation.<sup>3</sup> Because deconcentration policies must be part of the PHA's Annual Plan, they are subject to review and comment by the Resident Advisory Board (RAB), and to public hearing and comment process.<sup>4</sup> The final deconcentration regulations are effective January 22, 2001.

## Covered and Exempt Developments

In general, the public housing developments which are subject to the regulation are general occupancy family developments.<sup>5</sup> Certain public housing developments are exempt based upon size, location and the characteristics of the resident population. The exempt developments include:

- developments operated by a PHA which have, overall, fewer than 100 public housing units;
- developments which house only elderly persons or persons with disabilities or both;
- developments operated by a PHA that operates only one general occupancy family public housing development;

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<sup>1</sup>*Rule to Deconcentrate Poverty and Promote Integration in Public Housing*, 65 Fed. Reg. 81,213 (Dec. 22, 2000). This rule is part of the PHA Plan regulation. For clarity, HUD republished in the December 22, 2000 Federal Register all of Part 903—*Public Housing Agency Plans*.

<sup>2</sup>*Id.* at 81,223, § 903.2(c)(1)(iv)(B) (hereinafter, the citation will only refer to the section number that appears in the Federal Register).

<sup>3</sup>The regulations do not make clear whether PHAs may wait to amend their plans until their next annual plan is adopted or whether they must do so in the interim.

<sup>4</sup>§§ 903.13 and 903.17.

<sup>5</sup>*Id.* at 81,222, § 903.2(b)(1).

- developments approved for demolition or for conversion to tenant-based assistance; and
- certain developments operated in accordance with a HUD-approved, mixed-finance plan using public housing funds (including HOPE VI) which were awarded before January 22, 2001.<sup>6</sup>

All general occupancy family developments that do not fit into one of the above categories are considered a “covered development.”<sup>7</sup>

### Implementation of Deconcentration and Income-Mixing

To comply with the regulation, a PHA with covered developments must submit with its Annual Plan an admissions policy designed to provide for deconcentration of poverty and income-mixing by bringing higher-income tenants into lower-income developments and lower income-tenants into higher-income developments.<sup>8</sup> To do this, a PHA must determine the average income of the families residing in all “covered developments” and the average income of each covered development.<sup>9</sup> The PHA has the option of using average or median income but must justify the use of median.<sup>10</sup> Adjustments may be made in the income analysis to account for various unit sizes.<sup>11</sup>

The PHA must then determine whether each covered development falls within, above, or below the “Established Income Range,” (EIR); which is 85 to 115 percent of the PHA-wide average income.<sup>12</sup> If the development falls within the EIR, the PHA is not required to take any additional action to promote deconcentration of income.<sup>13</sup>

<sup>6</sup>“HUD . . . is not granting a blanket exemption for all mixed finance or HOPE VI developments.” 65 Fed. Reg. at 81,220 (right column). A PHA must submit a certification as part of the PHA Plan that an exemption is necessary to honor an existing contract or to be consistent with a mixed-finance plan. The mixed-finance plan must include provisions regarding the incomes of the public housing residents to be admitted and must have been developed in consultation with the tenants and other interested persons. *Id.* at 81,223, § 903.2(b)(2)(v). Local advocacy will be important to ensure that this provision is used to exempt only selected mixed-finance developments funded prior to January 22, 2001.

<sup>7</sup>§ 903.2(b)(1).

<sup>8</sup>It is unclear what a PHA with only exempt developments must do. These PHAs may not be required to revise their Annual Plans but may be required to submit evidence that all of their developments are exempt.

<sup>9</sup>§ 903.2(c).

<sup>10</sup>§ 903.2(c)(1)(i).

<sup>11</sup>§ 903.2(c)(1)(ii). The adjustment for units size must be done in accordance with HUD procedures which have not yet been made public.

<sup>12</sup>§ 903.2(c)(1)(iii).

<sup>13</sup>§ 903.2(c)(2)(i).

If a development is outside the EIR, the PHA may justify or explain the income profile for that development so as to avoid the obligation to adopt policies to deconcentrate poverty and provide for income mixing. The explanation or justification must demonstrate that the income profile is consistent with and furthers the dual goals of the deconcentration of poverty and income mixing, and the local goals and strategies contained in the PHA Plan.<sup>14</sup>

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*In the final deconcentration regulation, HUD lists specific types of developments for which the income profile may be justified or explained.*

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The explanation or justification may support a claim by the PHA that deconcentration and income mixing have been achieved and thus no further action is necessary. Such an explanation or justification may arise if a project, because of location or size, is promoting deconcentration. Under this situation, a PHA may explain, for example, that a scattered site or a smaller development that houses families with average incomes below the EIR may be meeting a deconcentration goal because the development is located in a higher-income area. Thus, it would contend that higher-income families should not be given an admissions preference.

Alternatively, the explanation or justification may demonstrate that the PHA is taking steps in accordance with programs, strategies or activities which are consistent with and will further deconcentration and income mixing policies. In this situation, a PHA may explain, for example, that it is promoting self-sufficiency strategies or increasing the incomes of public housing residents. Thus a development with average income that is below the EIR may not be subject to a requirement to prefer higher-income applicants so as to target the available self-sufficiency services to those tenants most in need.

In the final deconcentration regulation, HUD lists specific types of developments for which the income profile may be justified or explained.<sup>15</sup> The developments include mixed-income or mixed-finance developments and homeownership programs. These developments do not automatically avoid the requirements of the deconcentration regulations; as the

<sup>14</sup>§ 903.2(c)(2)(vi) (emphasis added).

<sup>15</sup>*Id.*

regulations state that these classifications are “elements of explanations or justifications that may satisfy” the dual requirements of deconcentration and mixed-income and local goals and strategies.<sup>16</sup> The majority of developments listed may only be justified if they are operated pursuant to statutorily authorized programs or are “subject to individual review and approval by HUD.”<sup>17</sup> Local advocacy will be essential to ensure that the justification or explanation for these developments, especially the mixed-finance developments, is consistent with these regulations and is not treated as a loophole through which PHAs may seek to avoid the need to take any action to deconcentrate poverty and mix income. The concern here is that PHAs will seize upon the mixed-finance label to avoid the deconcentration obligation to institute an admissions preference for lower-income families in public housing developments that are part of a mixed-finance development; which by definition will necessarily also include higher-income tenants.

In those situations where there are developments outside the EIR which are not justified or explained, the PHA must include in its PHA Plan a deconcentration policy which may include the following actions:

- providing incentives, including rent incentives, for lower-income families to move into higher-income developments and for higher-income families to move to lower-income developments;
- targeting investment and capital improvements in developments with average income below the EIR so as to attract high-income families;
- establishing a working preference in developments with incomes below the EIR;
- allowing for the skipping of families on the waiting list to achieve deconcentration goals; and
- other strategies developed in the PHA Plan process.<sup>18</sup>

Again local advocacy will be important to ensure that the policies adopted are fair, reasonable and protect the rights of the lowest-income families and those with the greatest housing need.

### Determination of Compliance

The regulations provide that HUD must consider the PHA to be in compliance with the deconcentration obligations if all the developments are within the EIR, the PHA has developments outside the EIR which it has justified or explained in a manner consistent with the regulation, or the PHA has adopted a deconcentration policy that includes

<sup>16</sup>§ 903.2(c)(1)(iv) (emphasis added).

<sup>17</sup>§ 903.2(c)(1)(iv)(B).

<sup>18</sup>§ 903.2(c)(1)(v).

strategies that can be expected to promote deconcentration and income mixing in developments with average income outside the EIR.<sup>19</sup>

### Right to Return to a Revitalized Site

HUD stated in draft documents that tenants who are displaced as a result of HOPE VI revitalization grants have the right to return to the revitalized site and that PHAs should “maximize” that opportunity if the tenants wish to return.<sup>20</sup> In the deconcentration regulations, HUD is adopting a policy consistent with that view. The deconcentration regulations provide that if a PHA provides a tenant with the right to return to a revitalized site, the requirement to deconcentrate poverty should not interfere with that right.<sup>21</sup> Nevertheless, to support the right of tenants to return to all revitalized sites, including those funded under HOPE VI, local advocacy will be critical.

### Family’s Discretion to Refuse a Unit

The regulation implements the statutory prohibition of penalizing a family because it refused an offer of a unit which was made in an effort to deconcentrate poverty.<sup>22</sup> However, the regulation further explains that a PHA may adopt policies that uniformly limit the number of offers received by a family.

### Income Targeting

Nothing in the deconcentration policy is intended to relieve a PHA from the obligation to admit annually at least 40 percent of families whose incomes are below 30 percent of area median income.<sup>23</sup>

### Fair Housing Requirements

The fair housing provisions of the regulations are identical to those published in the proposed rule.<sup>24</sup> The final regulation provides that PHAs must comply with the non-discrimination requirements of the federal civil rights laws and thus cannot assign families to a development or portion

<sup>19</sup>§ 903.2(c)(2).

<sup>20</sup>Draft Recommendations on HOPE VI Relocation (11/14/2000) posted on NHLP Web site under materials for LALSHAC meeting.

<sup>21</sup>§ 903.2(c)(3).

<sup>22</sup>§ 903.2(c)(4).

<sup>23</sup>§ 903.2(c)(5); 42 U.S.C.A. § 1437n(a)(3)(B)(iii) (West Supp. 2000).

<sup>24</sup>The proposed regulations, including the fair housing requirements, appeared at 65 Fed. Reg. 20,685, 20,689 (Apr. 17, 2000).

of a development based on race, color, religion, sex, disability, familial status or national origin if such an assignment has the purpose of segregating populations.<sup>25</sup>

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*The regulations also recognize the obligation of PHAs' to affirmatively further fair housing by providing that PHAs' policies for eligibility, selection and admission should be designed to reduce racial and national origin concentrations.*

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### Affirmatively Furthering Fair Housing

The regulations also recognize the obligation of PHAs' to affirmatively further fair housing by providing that PHAs' policies for eligibility, selection and admission should be designed to reduce racial and national origin concentrations. The regulations further provide that PHAs should take affirmative steps to overcome the effects of conditions which resulted in limiting participation of families because of race, national origin or any other basis that the civil rights laws intend to protect. The affirmative steps that a PHA may take include:

- affirmative marketing;
- additional applicant consultation and information; and
- additional supportive services and amenities to the development.

Any steps that a PHA plans to take must be set forth in its admission policy.

Significantly, the regulations provide that HUD may challenge a PHA's civil rights certification—which is a required element of the PHA Plan and is submitted to HUD<sup>26</sup>—if it appears that the PHA Plan or its implementation does not reduce racial and national origin concentration and is perpetuating segregated housing or is creating new segregation. If there is a HUD challenge, the PHA must establish that it is providing a full range of housing opportunities to applicants and tenants or that it is implementing affirmative steps to overcome the segregation.

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<sup>25</sup>§ 903.2(d)(1).

<sup>26</sup>§ 903.7(o).

### The Relationship Between Poverty Deconcentration and Fair Housing

The regulations state that the relationship between poverty deconcentration and fair housing is independent.<sup>27</sup> In practice, what this should mean is that a PHA must conform to both statutory and regulatory obligations and may not claim that it may pursue one to the exclusion of the other.

The final regulations did not address, as advocates urged,<sup>28</sup> the potential importance of a regional approach to fair housing, but the introductory comments emphasized that PHAs should consider:

providing lists of other public housing agencies and federally assisted housing in the metropolitan area and participating in regional counseling and mobility efforts to assist voucher holders.

With respect to voucher holders, housing counseling and transportation assistance may help accomplish these goals and contribute to voucher holders' success. Such expenses are eligible voucher administrative fee expenses. In addition, HUD may allow PHAs to convert voucher program funds to administrative fees for this purpose where the PHA shows that these expenditures will not reduce the number of families that otherwise would receive and successfully use vouchers in that fiscal year.<sup>29</sup>

### Conclusion

The deconcentration of income and income-mix regulations are complex and will require interpretation when applied locally. They provide numerous opportunities for local advocacy through the PHA plan process. Local advocacy will be necessary to ensure that benefits for very low-income tenants are preserved and maximized. In addition, the enforcement of a PHA's obligation to affirmatively further fair housing in the admission process also presents substantial opportunities to ensure that clients are provided with the full protection of the federal civil rights laws. The authority of HUD to challenge a PHAs certification also provides new opportunities for advocates. ■

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<sup>27</sup>*Id.* at 81224, § 903.2(e).

<sup>28</sup>*See* Comments of the Loose Association of Legal Services Housing Attorneys and Clients (LALSHAC) on the *Proposed Rule to Deconcentrate Poverty and Promote Integration in Public Housing*, posted on the NHLP Bulletin board at [nhlp.org/lashac/members.htm](http://nhlp.org/lashac/members.htm) (accessible to LALSHAC members only).

<sup>29</sup>"HUD will issue further guidance on this matter by January 15, 2001." 65 Fed. Reg. 81,213, 81,216 (Dec. 22, 2000).

# CALIFORNIA ADOPTS IMPROVED NOTICE REQUIREMENTS FOR FEDERAL HOUSING CONVERSIONS

## Introduction

Prior *Bulletin* Articles have reviewed a variety of state and local initiatives to preserve privately owned multifamily housing that is at risk of conversion to market-rate use under laws passed by Congress since 1996.<sup>1</sup> One typical regulatory initiative undertaken by state and local governments has been to improve the notice, required by federal law, that an owner must provide to tenants and localities prior to converting a development.

Current federal law, as revised in 1998 and 1999, requires any owner who anticipates a "termination" of a project-based Section 8 contract to provide a one-year notice to tenants and to the Department of Housing and Urban Development (HUD).<sup>2</sup> For certain types of properties with HUD-subsidized mortgages, another 1998 federal law requires owners to provide written notice of prepayment to tenants, HUD and local governments between five and nine months prior to any prepayment<sup>3</sup>.

State and local notice laws typically supplement the federal requirements by providing:

- a longer notice period;
- more information;
- broader distribution (*e.g.*, to state or local government, tenant organizing projects, or legal services offices); or
- more explicit remedies for violation.<sup>4</sup>

<sup>1</sup>See, *e.g.*, *Preserving Federally Assisted Housing at the State and Local level: A Legislative Tool Kit*, 29 HOUS. L. BULL. 183 (Oct. 1999) (survey of recent state and local preservation initiatives); *State and Local Initiatives to Preserve Subsidized Rental Housing*, 19 HOUS. L. BULL. 1 (Jan. 1989); and *Update on State and Local Initiatives to Preserve At-Risk Housing*, 23 HOUS. L. BULL. 59 (Sept. 1993). Much useful information about pre-1993 initiatives can still be obtained from the older articles.

<sup>2</sup>42 U.S.C.A. § 1437f(c)(8)(West Supp. 2000). Under federal law, a "termination" includes both ordinary expiration of a contract of limited duration, as well as an owner's decision not to renew the contract.

<sup>3</sup>Pub. L. 105-276 § 219(b)(3), 112 Stat. 2488 (1998).

<sup>4</sup>See California Gov't. Code 65863.10 and .11 (nine months); Connecticut P.A. No. 88-262 (one year); Maine Rev. Stat. Ann. tit. 30-A, §4973 (90 days); Maryland Ann. Code Art. 83B §9-103 (one to two years, plus detailed statement of reasons and tenant impact); Minnesota Stat. 566.17 (one year), and Minn. 1998 Laws, Chap. 389, Art. 14, §6 (effective July 1, 1998) (mandatory "tenant impact statement" to residents, to the state housing agency, and to local government); 1988 Rhode Island Pub. L. ch. 88-508 (two years); Washington Rev. Code § 59.28 (one year) (injunctive relief and damages available for violations); San Francisco Admin. Code § 60 (12 to 18 months). See also

California had enacted such a law several years ago, which required nine months notice prior to termination of a project-based Section 8 contract or prepayment of certain HUD mortgages.<sup>5</sup> Subsequent changes to the federal requirements had made this state requirement cumbersome, as it did not permit easy and simultaneous satisfaction of both federal and state requirements with a single combined notice, primarily due to timing incompatibilities. In addition, the prior law, similar to all other state notice laws, failed to cover the expiration of rent restrictions on the many thousands of units developed with subsidies under the federal Low-Income Housing Tax Credit program (LIHTC) (Internal Revenue Code Section 42).

The California law had also provided a "right of first refusal" for certain qualified entities to purchase such a development for preservation, but only where the owner proposed to sell or otherwise dispose of the property in a manner which would result in a conversion.<sup>6</sup> Since many owners were able to convert the property prior to a sale, or by retaining ownership, the "right of first refusal" was easily avoided, frustrating the intent of the law to promote preservation purchases. Both the notice provisions and the "right of first refusal" provisions were scheduled to "sun-set" in the near future.

Since the preservation threat has loomed especially large in California's strong real estate market, California planning law also requires local governments to identify threatened conversions and take steps to address them. The state *Housing Element law*<sup>7</sup> requires local governments to prepare a 10-year downstream analysis of possible changes to low-income use by property, including identification and consideration of all federal, state and local financing and subsidy programs for preservation. It also requires a five-year action program to preserve these developments; utilizing all identified available financing and subsidy programs, except where those funds are needed for other urgent priorities.

To bolster these efforts, California has recently sought to address shortcomings in existing laws by revising the procedural requirements. The California legislature passed a bill, SB 1572, sponsored by Senator Alarcon, in September, 2000, and Governor Davis signed the bill into law later that month. The changes took effect on January 1, 2001, and will remain in effect until January 1, 2011. The following briefly summarizes California's new requirements.<sup>8</sup>

Oregon H.B. 2636 (pending) (allowing local governments to require owners to provide up to 210-day notice of conversion); Hawaii SB 1519 (presented and vetoed, 1998) (one year); Massachusetts Senate No. 547, House No. 4271 (filed in 1996 for the two-year session ending July, 1998, but failed to pass; would have required two-year notices for prepayments and opt-outs, barring any rent increases until two years after the later of a proper notice or the conversion).

<sup>5</sup>California Gov't. Code § 65863.10.

<sup>6</sup>*Id.* § 65863.11.

<sup>7</sup>*Id.* §§ 65583(a)(8) and (c)(6).

<sup>8</sup>Full bill text is available at [leginfo.ca.gov](http://leginfo.ca.gov).

## Purpose

The purpose of the improved notice provisions is to provide tenants and public agencies with sufficient advance notice that an owner is intending to terminate existing federal rent restrictions or subsidies, so that local preservation actions can be explored or tenant protections can be provided while harmonizing with the federal notice requirements, where possible, to facilitate easier compliance. The purpose of the revised “right of first refusal” requirements is to provide prospective preservation buyers with an opportunity to make an offer to purchase and to match other offers, in order to promote preservation sales as an alternative option to market-rate conversion.

## Notice Provisions

The new law makes several changes to the prior law by:

- extending the notice period from nine months to 12 months. This conforms to the current federal notice requirements for terminating a Section 8 contract, while requiring a longer initial notice than is federally required for mortgage prepayments. The state’s 12-month initial notice requirement can be satisfied by fulfilling federal notice requirements for Section 8 terminations or prepayments, so long as 12 months notice is provided;
- requiring a second notice to tenants and affected public agencies at least six months prior to prepayment or termination, providing more specific information about the impact of the conversion<sup>9</sup> and owner’s final decision to convert. Any significant changes to the information contained in this notice must be provided to tenants and public agencies within seven business days;
- expanding the coverage of the law to include terminations of rental restrictions on federal LIHTC program units; and
- clarifying that injunctive relief is available to tenants or public entities aggrieved by any noncompliance.

Thus, as revised, California law now requires owners to provide two notices with specific content to tenants and affected public entities (state and local government and the local housing authority) prior to termination of numerous federal subsidies from HUD, the Rural Housing Service (RHS), or the Tax Credit program. Careful preparation can

<sup>9</sup>The owner’s second notice to the affected public entities must provide more information than that provided to the tenants, including the number of affected tenants, their ages and incomes, the number of units that are government assisted, the type of assistance, the bedroom sizes, and the number of other units. The notice must also briefly describe the owner’s plans for the project, including any timetables or deadlines, the specific governmental approvals required, the reason the owner seeks to terminate or prepay, and any contacts the owner has made or is making with other governmental agencies or other interested parties in connection with the notice. The owner must also attach a copy of any federally required notice of termination or prepayment that was provided at least six months prior to the proposed change. The notice’s required information comes from data that is reasonably available from existing written tenant and project records.

ensure that federal Section 8 termination notices can fulfill the state’s initial 12-month notice requirement, and that, if a mortgage prepayment is involved, the state’s second notice can be fulfilled by sending a federal prepayment notice that includes the state’s required content, which includes legal services contact information.

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*California law now requires owners to provide two notices with specific content to tenants and affected public entities prior to termination of numerous federal subsidies*

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## “Option to Make Offer to Purchase” Provisions

The new law significantly changes and clarifies the prior law by:

- requiring owners who seek to sell properties for conversion by the purchaser, or who seek to convert properties themselves by terminating or prepaying, to provide a notice of “opportunity to offer to purchase” to interested “qualified entities”<sup>10</sup> at least 12 months prior to conversion, which must also be posted on the property;
- specifying the content of this notice to include statements that the owner will provide certain project financial information within 15 days to requesting qualified entities, that qualified entities have right to make an offer, that all other notice requirements have been satisfied unless they have not yet matured;
- allowing qualified entities that agree to continued restrictions the exclusive right to make a purchase offer for the first 180 days from the date of the owner’s notice;
- providing a “right of first refusal,” meaning that, during the next 180 days, the owner can accept an offer from anyone, or from no one, but qualified entities that submitted an offer during the initial period have a “right of first refusal” to match any accepted offer within 30 days;
- expanding the list of “qualified entity” to include for-profit entities upon certain conditions; and
- clarifying that an owner generally does not have to accept any offer.<sup>11</sup>

<sup>10</sup>A “qualified entity” is a purchaser that is capable of owning and managing the property for the long term, and who commits to maintaining affordability restrictions and any rental assistance for at least 30 years; for the same income profile of tenants currently required by existing restrictions or served by the property. They can be drawn from a state-maintained list or can contact an owner directly.

<sup>11</sup>An apparent exception to the owner’s ability to decline any offer to purchase is the situation in which an owner intending to sell has accepted an offer from a non-qualified entity, and a qualified entity tenders a match during the second 180-day period after the notice was served.

By providing a clearer process and timetable for notices and information concerning threatened developments, these separate procedural requirements should create more local activity around specific developments and hopefully encourage some owners to consider more seriously a preservation transfer as an alternative to conversion or sale for conversion.

The law designates the California Department of Housing and Community Development (HCD) as the agency responsible for administering the state requirements. The agency's Web site provides background information on the problem and the law, lists of interested purchasers and sample notices.<sup>12</sup> Although this information has not yet been updated to account for the new revisions, the Department will develop and post forms to facilitate compliance with the law. ■

## CRIMINAL ACTIVITY MUST BE WITHIN "IMMEDIATE VICINITY" IN ORDER TO MERIT SECTION 8 TERMINATION

Last summer, the Commonwealth Court of Pennsylvania upheld a decision establishing that, in order to be subject to Section 8 termination, criminal activity by a tenant or her family must be within the "immediate vicinity" of the family's apartment and also upheld a decision that eight-tenths of a mile from the apartment did not constitute the "immediate vicinity." *Powell v. Housing Authority of the City of Pittsburgh*, 760 A.2d 473, 2000 WL 1,224,725 (Pa.Cmwlth. 2000). In a case pitting the Department of Housing and Urban Development (HUD) regulations against congressional statutory intent, the court concluded that the HUD regulations in question went beyond the scope of the statute when they permitted Section 8 termination on the basis of any violent criminal activity, rather than violent criminal activity that threatened the health and safety of other residents in the immediate vicinity of the premises.

Beverly Powell was a Section 8 tenant of the Housing Authority of the City of Pittsburgh (HACP). The case stems from an incident involving her two teenage sons, who carjacked a vehicle in the parking lot of a supermarket eight-tenths of a mile (or six-tenths of a mile as the crow flies) from their home. They attacked the 75-year-old occupant of the car with pepper spray, forced her out of the car, and took the vehicle. They drove around for a short time, then abandoned the car less than four blocks from their Section 8 residence. The owner of the vehicle (the occupant's daughter) lived two-tenths of a mile from the Powells.

<sup>12</sup>The Web site address for HCD's preservation information is [hcd.ca.gov/hpd/hrc/tech/presrv/](http://hcd.ca.gov/hpd/hrc/tech/presrv/).

As a consequence of her sons' actions, HACP terminated Ms. Powell's Section 8 assistance pursuant to federal regulations that authorize a PHA to terminate assistance due to violent criminal activity (Both boys were convicted of a juvenile offense. That the carjacking qualified as "violent criminal activity" was not a hotly contested issue in the case).<sup>1</sup> Ms. Powell filed a grievance with HACP, but the hearing officer upheld the termination of her benefits.

The tenant then appealed to the Pennsylvania Common Pleas Court raising two issues. First, she contested that the crime had taken place in the "immediate vicinity" of the premises. Second, she raised the question of whether a PHA may terminate Section 8 assistance based on any violent criminal activity, rather than only violent criminal activity in the "immediate vicinity" of the premises, alleging that HUD lacked the authority to promulgate such a regulation. The Common Pleas Court sided with Ms. Powell, concluding that, in order to lead to Section 8 termination, the crime must indeed have occurred within the "immediate vicinity" of the premises, and remanded the case to determine the exact location of the criminal activity in relation to the Powell's residence. On remand, the hearing officer made specific findings as to the location of all actions (as noted above) and made a specific finding that the violent criminal activity had, in fact, occurred in the immediate vicinity of the Powell residence. Powell appealed again to the Common Pleas Court, which held, as a matter of law, that the violent criminal activity did not take place in the immediate vicinity of the premises, and overturned the hearing officer's decision. HACP appealed.

The Commonwealth Court of Pennsylvania upheld the Common Pleas Court's decision. The court first considered the federal statutes brought into play by the issues presented:

[D]uring the term of the lease, any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other tenants, any criminal activity that threatens the health, safety or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises, or any drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.<sup>2</sup>

Additionally, Congress enacted legislation permitting a PHA to elect not to enter into a housing assistance payment contract with an owner who refuses to take action to terminate the tenancy of a tenant who, essentially, is in violation of the above-cited statute.<sup>3</sup>

<sup>1</sup>Violent criminal activity is defined as "any criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force against the person or property of another." 24 C.F.R. § 882.102. (2000).

<sup>2</sup>42 U.S.C.A. § 1437f(d)(1)(B)(iii) (West Supp. 2000).

<sup>3</sup>*Id.* § 1437f(o)(6)(C).

Another statute governing Section 8 assistance authorizes a PHA to deny admission to criminal offenders:

[I]f the public housing agency or owner of such housing . . . determines that an applicant or any member of the applicant's household is or was, during a reasonable time preceding the date when the applicant household would otherwise be selected for admission, engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, other owner, or public housing agency employees, the public housing agency or owner may – (1) deny such applicant admission to federally assisted housing.<sup>4</sup>

The court also carefully considered the impact of the HUD regulations regarding the administration of Section 8 programs, in particular those dealing with criminal activity and termination of benefits. Two, in particular, were relevant. HUD regulations state: "The members of the family may not engage in drug-related criminal activity, or violent criminal activity (see Sec. 982.553)."<sup>5</sup> Also, "[a]t any time, the HA may deny assistance to an applicant, or terminate assistance to a participant family if any member of the family commits: . . . (2) Violent criminal activity."<sup>6</sup>

The court rejected HACP's argument that the statutes, denying housing assistance to an applicant if the applicant or any household member recently engaged in violent criminal activity<sup>7</sup> and providing that housing providers may refuse to enter into HAP agreements with owners who do not take action against families who engage in criminal conduct,<sup>8</sup> showed a specific congressional intent to exclude all violent criminal actors from Section 8 housing. HACP had argued that the HUD regulations were a valid implementation of this alleged specific congressional intent.<sup>9</sup> The court did not agree. After a careful reading of the applicable statutes, it concluded "that Congress did not specifically, by statute, authorize a housing authority to terminate Section 8 assistance if one of the tenants engages in violent criminal activity."<sup>10</sup>

<sup>4</sup>*Id.* § 13661(c).

<sup>5</sup>24 C.F.R. § 982.551(1) (2000).

<sup>6</sup>*Id.* § 982.553(a)(2).

<sup>7</sup>42 U.S.C. § 13661(c) (West Supp. 2000).

<sup>8</sup>*Id.* § 1437f(o)(6)(C).

<sup>9</sup>The court was proceeding under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), where the United States Supreme Court determined that a court confronted with the validity of an administrative regulation must first ascertain congressional intent on the issue which the regulations address. Regulations deviating from an ascertainable intent must be stricken down. If the court cannot ascertain congressional intent, it must determine whether Congress expressly delegated authority to legislate on the issue. If yes, the regulation must not be arbitrary or capricious, if no, it must merely be reasonable. *Chevron*, 467 U.S. at 842-845.

<sup>10</sup>*Powell*, 760 A.2d. 473, at 481.

## SUPPLEMENTAL LALSHAC MATERIALS

Prior to the LALSHAC conference in November 2000, NHLP posted several documents of interest on our website at [nhlp.org/lalshac/conf.htm](http://nhlp.org/lalshac/conf.htm). These documents include the following, by topic:

1. **Low-Income Housing Tax Credit Program and Fair Housing**  
An Outline of Principles, Authorities and Resources Regarding Housing Discrimination and Segregation
2. **HUD Multi-Family Preservation**  
Background Materials on Opt-Outs, Prepayments and Restructuring and Relevant Recent Statutes
3. **Voucher Program**  
Sample Documents for the Section 8 Homeownership Program
4. **Fair Housing—Litigation Strategies for Multi-Family Conversions**  
Complaint in *Queen King v. City of Blakely Housing Authority* (plaintiffs allege that defendants have violated the federal civil rights laws and U. S. Constitution by establishing, maintaining, and perpetuating a racially segregated public housing and have failed to disestablish that system.)
5. **Using Title VI in Housing Advocacy: Racial Impact Analysis, Environmental Justice and Language Access Issues**  
Dallas Morning News Series of Articles on Toxic Siting
6. **Welfare and Housing Issues**  
Department of Housing and Urban Development and Section 3: Challenges and Opportunities, 32 Clearinghouse Review 50 (May/June 1999)
7. **Public Housing HOPE VI Relocation**  
HUD is circulating a revised *Draft Recommendations on HOPE VI Relocation*, dated November 14, 2000 and a Template on HOPE VI relocation, *Tenant Relocation Plan Guide for HOPE VI Grantees* (MS-Word for Windows document)

The court also rejected HACP's assertion that HUD's regulations were consistent with the statutory scheme, and that the Common Pleas Court substituted its own judgment for that of HUD as to how to best implement the scheme. Because the Common Pleas Court conducted an analysis of HUD's reasoning underlying the regulations and found them lacking, the Commonwealth Court upheld its decision that the HUD regulations were beyond the scope of the statute. Specifically, the HUD regulations permit the termination of benefits for any violent criminal activity, rather than only activity that threatened the health, safety or right to peaceful enjoyment by persons residing in the immediate vicinity of the premises. The court found that the HUD regulation expanded too broadly upon the statutory intent to protect the residents of the premises by permitting termination for violent criminal activity that took place anywhere, rather than somewhere that posed a threat to the tenants.

HACP also presented the somewhat semantic argument that "immediate vicinity" "refers to criminal activity which poses a threat to those living in the immediate vicinity of the criminals' Section 8 unit as opposed to the physical confines of where the crime actually occurred."<sup>11</sup> While agreeing with the actual linguistic interpretation of the statute, the Commonwealth Court again upheld the Common Pleas Court. It held that the intent of Congress was that termination was warranted only when the violent criminal activity took place within the immediate vicinity of the housing unit, because that is when such activity becomes a threat to the "health, safety, or right to peaceful enjoyment of their premises by persons residing in the immediate vicinity of the residences."<sup>12</sup> Thus the court, perhaps unwisely, used the same "immediate vicinity" language to describe both who must be threatened (those in the residence and those in the "immediate vicinity" of the residence) and where the crime must have occurred in order to be considered a threat to those people. Regardless, the court upheld the necessity that the crime take place within the immediate vicinity of the premises, and upheld the lower court's interpretation that immediate vicinity meant "on the premises or next door," rather than eight-tenths of a mile away.<sup>13</sup>

Finally, the court concluded that the issue of whether the carjacking took place in the "immediate vicinity" of the residence was a question of law, rather than fact. Thus, the Common Pleas Court's rejection of the hearing officer's finding that it was in the "immediate vicinity" was proper. ■

<sup>11</sup>*Id.*, at 482.

<sup>12</sup>42 U.S.C.A. § 1437f(d)(1)(B)(iii)(West Supp. 2000).

<sup>13</sup>*Powell*, at 482.

## TENANT RESPONSIBLE TO PHA FOR LATE FEES, ATTORNEY FEES, AND COURT COSTS IN SUMMARY DISPOSSESSION ACTION

A New Jersey appellate court recently held that a public housing tenant can be required to pay not only rent arrears, but also late fees, attorney fees and court costs in order to redeem her tenancy in a meritorious summary dispossession action against her. *Housing Authority & Urban Redevelopment Agency of the City of Atlantic City v. Taylor*, 334 N.J.Super. 573, 760 A.2d 362, 2000 WL 1593466 (N.J.Super.A.D., 2000). The decision affirmed the lower court's ruling ordering the tenant to pay the late fees, attorney fees and court costs to the public housing authority (PHA).

The case arose when the Atlantic City PHA filed a non-payment of rent summary dispossession action, alleging that the tenant owed \$972 in back rent. The tenant did not dispute that she owed the money. New Jersey law permits a tenant to pay all monies owed to the clerk of the court before entry of the final judgment in order to stop all further proceedings and have the complaint dismissed. The lower court, however, ordered that the tenant/defendant pay not only the \$972 in undisputed back rent, but also late fees of \$20, plus attorneys' fees and court costs in the amount of \$144.50 as a condition of dismissing the complaint. The tenant deposited with the court both the \$972 and the \$164.50 in additional fees, but disputed the validity of the PHA's entitlement to the \$164.50.

The tenant's lease included clauses which provided for the additional fees in the event of a nonpayment of rent and a summary dispossession action—clauses neither the validity nor the existence of which the tenant contested. Nor did the tenant contend that such clauses are prohibited by federal law. She did, however, contend that conditioning the dismissal on the payment of the additional fees was a violation of 42 U.S.C. § 1437a(a)(1), which limits the tenant's maximum rent to 30 percent of the family's monthly adjusted income.

The appellate court hinged its decision that conditioning dismissal of the complaint on the payment of the additional fees was not a violation of 42 U.S.C. § 1437a(a)(1) on the definition of "tenant rent." The court noted that "tenant rent" is defined as "[t]he amount payable monthly by the family as rent to the PHA. . . ." 24 C.F.R. §5.603.<sup>1</sup> Without an in-depth discussion of the tenant's assertion that conditioning dismissal of the complaint on the payment of these additional fees for all practical purposes converted those fees into "rent" owed by the tenant, the court concluded that:

<sup>1</sup>The court acknowledged that the definition of "tenant rent" recently has been amended slightly to be "[t]he amount payable monthly by the family as rent to the unit owner. . . ." 65 Fed. Reg. 16,716 (Mar. 29, 2000).

The late fees, attorneys' fees, and court cost at issue here are not defendant's "total monthly rent" governed by the federal law. They are, rather, additional costs incurred by the tenant as a result of failing to pay the rent when due and/or prior to the filing of a summary dispossess action. There is nothing in the federal law that prohibits these additional assessments where they are otherwise authorized by state law and lease provisions. More to the point, there is nothing in the federal law relied upon by defendant that addresses the precise issue here, that is whether such otherwise legally incurred fees and costs can be made a condition of the tenant's payment obligations under state law so as to avoid entry of a judgment of possession.<sup>2</sup>

The court then concluded its opinion by distinguishing two cases; a New Jersey state case and a Florida federal case. In the first case, *Community Realty Management, Inc. v. Harris*, 155 N.J. 212, 714 A.2d 282 (1998), the court concluded that attorneys' fees sought by a Section 8 landlord could not be made a condition of the tenant's payment to avoid judgment for possession. The distinction between that case and *Taylor*, however, was clear to the court: unlike in *Taylor*, the *Harris*' lease did not provide for such fees.

In the second case, *Miles v. Metropolitan Dade County*, 916 F.2d 1528 (11<sup>th</sup> Cir. 1990), *cert. denied*, 502 U.S. 898 (1991), a PHA brought a meritless nonpayment complaint against a public housing tenant. After the case was voluntarily dismissed by the PHA, the tenant was assessed \$41.50 in court costs on her next rent statement. The court concluded that, pursuant to federal law,<sup>3</sup> the tenant was not obligated to pay court costs and attorney's fees for a meritless action. In contrast, the tenant in *Taylor* did not deny the merits of the underlying claim for back rent and, the *Taylor* court concluded, could not take advantage of that provision of federal law.

In conclusion, the court repeated its earlier statement without significant elaboration:

We reject defendant's contention that, because such additional fees are permitted under state law only if provided for by lease and designated as a form of rent obligation, this somehow conflicts with the federal law. The additional costs are not part of the public housing tenant's "monthly total rent" that is governed by that law.<sup>4</sup>

Thus, the court held that the PHA was entitled to the additional fees as a condition of dismissing the complaint for possession. The tenant has appealed the case to the New Jersey Supreme Court. ■

<sup>2</sup>760 A.2d 362, at 365.

<sup>3</sup>See 24 C.F.R. § 966.6(h), which prohibits lease provisions obligating a public housing tenant to pay "attorney's fees or other legal costs whenever the landlord decides to take action against the tenant even though the court determines that the tenant prevails in the action."

<sup>4</sup>760 A.2d 362 at 366.

## RECENT HOUSING-RELATED REGULATIONS AND NOTICES

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD), and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued in December of 2000. 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,<sup>1</sup> (2) bound volumes of the *Federal Register*, (3) HUD Clips,<sup>2</sup> (4) HUD,<sup>3</sup> and (5) USDA's/Rural Development Web page.<sup>4</sup> Citations are included with each document to help you secure copies.

### POSSIBLE POSTPONEMENT OF REGULATIONS' EFFECTIVE DATE

On January 24, 2001, the Bush Administration published in the *Federal Register* a directive to all department heads to refrain from publishing all proposed and final regulations, to withdraw from publication all unpublished regulations that have been sent to the Office of the Federal Register, and to postpone for 60 days the effective dates of all published regulations that have not gone into effect in order for the President's appointees to review the regulations. 65 Fed. Reg. 7,702. While neither HUD nor the Department of Agriculture has published any notices in the *Federal Register* as of January 26, postponing the effective date of any of the final regulations discussed in this issue of the *Bulletin*, readers are urged to review the *Federal Register* to determine whether the effective dates of any of the final regulations have in fact been postponed. Any regulations whose effective date has been postponed may, upon review, be withdrawn by the Bush Administration. Such a withdrawal would, however, have to be carried out consistent with the *Administrative Procedures Act*.

<sup>1</sup>At [access.gpo.gov/su\\_docs](http://access.gpo.gov/su_docs).

<sup>2</sup>At [hudclips.org/cgi/index.cgi](http://hudclips.org/cgi/index.cgi).

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

<sup>4</sup>At [rdinit.usda.gov/regs/](http://rdinit.usda.gov/regs/).

## HUD Regulations

### Treble Damages for Failure To Engage in Loss Mitigation; Advance Notice of Proposed Rulemaking 65 Fed. Reg. 76,519 (Dec. 6, 2000)

**Summary:** HUD intends to issue a proposed rule to amend HUD's Civil Money Penalty regulations to provide for damages of three times the amount of any mortgage insurance benefit claimed by the mortgagee for any mortgage as to which the mortgagee failed to engage in loss mitigation actions. Current regulations provide that HUD may initiate a civil money penalty action against mortgagees and lenders for certain prohibited conduct, including failure to service Federal Housing Administration (FHA) insured mortgages in accordance with FHA regulations. However, in 1998, Congress amended the *National Housing Act* to add a triple penalty to the existing civil money penalty system for a mortgagee's failure to engage in loss mitigation. Specifically, HUD seeks comments regarding the best regulatory procedures and structures for implementing this Congressional mandate. This notice therefore solicits public comment on the subject prior to publication of a proposed rule.

**Comment Due Date:** February 5, 2001.

### Physical Condition Standards and Physical Inspection Requirements for Certain HUD Housing; Administrative Process for Assessment of Insured and Assisted Properties; Final rule 65 Fed. Reg. 77,230 (Dec. 8, 2000)

**Summary:** This rule establishes for multifamily housing certain administrative processes by which HUD will notify owners of HUD's assessment of the physical condition of their multifamily housing. The owners, under certain circumstances, will be provided an opportunity to seek a technical review of HUD's physical condition assessment of the multifamily housing and HUD may take action in certain cases where the housing is found not to be in compliance with the physical condition standards. This rule follows publication of a November 26, 1999 proposed rule and takes into consideration public comment received on the proposed rule.

**Effective Date:** January 8, 2001.

### Solicitation of Public Comments on Systemic Risk; Extension of the period for the submission of public comments 65 Fed. Reg. 79,904 (Dec. 20, 2000)

**Summary:** On October 30, 2000, the Office of Federal Housing Enterprise Oversight (OFHEO) published a notice entitled *Solicitation of Public Comments on Systemic Risk* in the Federal Register (65 FR 64718). OFHEO sought to examine the nature and magnitude of any risks that the Federal National Mortgage Association (FannieMae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) may pose to the financial system in general and to the U.S. housing finance markets in particular; whether and to what extent

Fannie Mae and Freddie Mac contribute to or mitigate systemic risk; and actions that OFHEO and others could take to limit any systemic risk the Enterprises may pose. OFHEO has been requested to extend the comment period. To ensure that the public has ample opportunity to participate in the solicitation, today's notice extends the public comment period from December 29, 2000, through January 29, 2001.

**Dates:** The comment period is extended until January 29, 2001.

### Rule to Deconcentrate Poverty and Promote Integration in Public Housing; Final rule 65 Fed. Reg. 81,214 (Dec. 22, 2000)

**Summary:** This final rule amends HUD's Public Housing Agency (PHA) Plan regulations to fully reflect the importance of deconcentration by income and affirmatively furthering fair housing in a PHA's admission policy, consistent with the directive to achieve "One America," and to provide further direction to PHAs on the implementation of deconcentration and affirmatively furthering fair housing. The amendments made by this final rule concerning the deconcentration component of a PHA's admission policy are applicable to PHAs with fiscal years commencing on and after July 1, 2001.

**Effective Date:** January 22, 2001.

## HUD Federal Register Notices

### Announcement of Funding Awards—Fiscal Year 2000 65 Fed. Reg. 76,273 (Dec. 6, 2000)

**Summary:** This announcement notifies the public of funding decisions made by HUD from funds distributed to the Office of Troubled Agency Recovery during FY 2000. This announcement contains the name and address of all awardees and the amount of each award.

### Deployment of the FHA TOTAL Mortgage Scorecard; Notice

65 Fed. Reg. 76,274 (Dec. 6, 2000)

**Summary:** This notice announces HUD's intention to deploy the FHA TOTAL Scorecard for mortgage industry use. TOTAL refers to "Technology Open To All Lenders." The FHA TOTAL Scorecard, developed by HUD, assesses the credit worthiness of FHA borrowers by evaluating certain mortgage application and borrower credit information that has been statistically proven to accurately predict the likelihood of borrower default. The FHA TOTAL Scorecard is not an automated underwriting system; rather, it is a mathematical equation intended to be used within an automated underwriting system. HUD wishes to deploy the FHA TOTAL Scorecard with industry users who share the Department's vision of increasing homeownership opportunities.

**Development Formula Programs: Assisting Persons With Disabilities—Recipients' Affirmatively Furthering Fair Housing Responsibilities and Involvement of Persons With Disabilities in Planning Actions; Notice**  
65 Fed. Reg. 76,660 (Dec. 7, 2000)

**Summary:** The purpose of this notice is to reemphasize the responsibility of Community Planning and Development formula grant program recipients to: (1) affirmatively further fair housing which includes analyzing compliance with the multifamily design and construction requirements of the *Fair Housing Act*; and (2) include individuals with disabilities in the citizen participation process for the development of Consolidated Plans and Annual Action Plans.

**Availability; Fair Share Allocation of Incremental Voucher Funding, Fiscal Year 2001 Notice of fund availability (NOFA)**

65 Fed. Reg. 78,040 (Dec. 13, 2000)

**Summary:** The purpose of this NOFA is to invite PHAs to apply for vouchers on a fair share allocation basis under the Housing Choice Voucher Program. The vouchers are for issuance to families on a PHA's housing choice voucher waiting list to enable these families to rent decent, safe, and affordable housing of their choice on the private rental market.

**Available Funds:** Approximately \$452,907,000 in one-year budget authority for approximately 79,000 housing choice vouchers. Prior to the funding of any new applications under this NOFA for FY 2001, \$4,191,788 of this budget authority will be used to correct the underfunding of four PHAs under the FY 2000 Fair Share NOFA due to an error on the part of HUD.

**Application Due Date:** January 29, 2001.

**Notice of HUD-Held Multifamily and Healthcare Loan Sale; 2000-1 Sale; Notice of sale of mortgage loans**  
65 Fed. Reg. 78,181 (Dec. 14, 2000)

**Summary:** This notice announces the Department's intention to sell certain unsubsidized multifamily and healthcare mortgage loans, without FHA insurance, in a competitive, sealed-bid sale.

**Dates:** Bid Packages are currently available. It is anticipated that HUD will be accepting bids for the loans in the sale on December 19, 2000.

**Notice of Public and Indian Housing: Access Housing 2000 Initiative; Notice of proposed national initiative—access housing 2000**

65 Fed. Reg. 79,698 (Dec. 19, 2000)

**Summary:** This notice provides information on *Access Housing 2000*, a proposed national initiative that will assist persons with disabilities to transition from nursing homes into the community by providing improved access to affordable housing and necessary personal assistance and supportive services. HUD is partnering with the U.S. Department of Health and Human Services (HHS) and the Institute on Disability (IOD) at the University of New Hamp-

shire to carry out this initiative. Using Section 8 housing vouchers in conjunction with supportive services available under the Medicaid program, the proposed initiative presents an opportunity to design and implement innovative housing and supportive service strategies. If successful, these strategies could expand the availability of accessible, affordable housing in the United States, including homeownership opportunities for persons with disabilities, and assure that such individuals receive the assistance and the ongoing supportive services necessary to make a smooth and successful transition to living in the community.

**Comments Due Date:** February 20, 2000.

**FY 2000 Super Notice of Funding Availability (SuperNOFA) for HUD's Housing, Community Development and Empowerment Programs and Section 8 Housing Voucher Assistance; Notice of Amendment and Clarification to the Continuum of Care Program**  
65 Fed. Reg. 79,903 (Dec. 20, 2000)

**Summary:** On February 24, 2000, HUD published its FY 2000 Super Notice of Funding Availability (SuperNOFA) for Housing, Community Development and Empowerment Programs, and Section 8 Housing Voucher Assistance. This document makes one clarification and two amendments to the Continuum of Care program requirements in the FY 2000 SuperNOFA. First, this document clarifies that funding for Shelter Plus Care renewal projects will be made from the separate *McKinney Act* appropriation established by the Congress for this purpose under the FY 2001 *HUD Appropriations Act*. This document also makes two amendments to the Continuum of Care program to reflect the establishment of this separate appropriation in HUD's implementation of the 30 percent permanent housing funding requirement under the *FY 2000 HUD Appropriations Act*.

**HUD Programs Subject to the Requirements of Title IX of the Education Amendments of 1972; Notice**  
65 Fed. Reg. 80,447 (Dec. 21, 2000)

**Summary:** On August 30, 2000, 20 federal agencies, including HUD, published a final common rule providing for the enforcement of Title IX of the *Education Amendments of 1972* (referred to as "Title IX"). The August 30, 2000 final rule provides that, by November 30, 2000, each agency shall publish a notice in the Federal Register that identifies its respective programs covered by the Title IX regulations. This notice implements this requirement by publishing the list of HUD programs subject to the requirements of the common rule. HUD will periodically update this notice to reflect changes in the covered programs.

**Public Housing Assessment System; Financial Condition Scoring Process; Notice**  
65 Fed. Reg. 80,686 (Dec. 21, 2000)

**Summary:** This notice provides additional information to PHAs and members of the public about HUD's process for issuing scores under the Financial Condition Indicator

of the Public Housing Assessment System (PHAS). This notice includes generally accepted accounting principles (GAAP)-based threshold values and associated scores for each Financial Condition Indicator component and peer group based on all available data as of October 15, 2000. This notice also provides additional clarification to the two audit flag and tier classification charts.

*Dates:* December 21, 2000.

## HUD Notices

### Federal Labor Standards in Public Housing Programs

PIH 2000-48 (Oct. 18, 2000)

*Summary:* HUD has launched department-wide initiatives to enhance the administration, monitoring and enforcement of federal prevailing wage requirements in all HUD programs. In Public Housing, these requirements include compliance with Davis-Bacon wage rates for development/modernization work and compliance with prevailing maintenance wage rates for public housing operations. In addition, HUD is undertaking efforts to expand the use of apprenticeship as a means to provide employment and training opportunities for HUD program beneficiaries, particularly Section 3 residents. As an important part of these efforts, HUD is establishing new procedures concerning program office collaboration with, and support for, the Office of Labor Relations and its mission. This notice deals with activities that will be expected of Public Housing field offices and staff regarding these initiatives.

### Information Update: Implementation of Revised

#### Form HUD-50058, Family Report

PIH 2000-53 (December 15, 2000)

*Summary:* This notice announces the April 2, 2001 implementation date of the revised Form HUD-50058. HUD revised the Form HUD-50058 to reflect statutory and regulatory changes required by the *Public Housing Reform Act of 1998*. HUD also made technical corrections to the Form as part of HUD's ongoing effort to improve the integrity of its financial statement and data systems. The Form HUD-50058 is essential for the oversight, operation, funding, and assessment of the public housing and Section 8 tenant-based assistance programs.

### Prepayment of Direct Loans on Section 202 and 202/8 Projects with Inclusion of FHA Mortgage Insurance

H 00-26 (Dec. 11, 2000)

*Summary:* This notice supersedes Notice H 99-06, and clarifies and standardizes guidance for borrowers and Multifamily Hub/Program Center staff on the prepayment of Section 202 or 202/Section 8 direct loans. It also includes underwriting guidelines where the borrower is proposing to use FHA Mortgage Insurance to refinance the Section 202 direct loan.

## RHS Administrative Notices

### Residential Lead-Based Paint Hazard Reduction

AN No. 3593 (1924-A) (Dec. 1, 2000)

*Summary:* This Administrative Notice (AN) provides guidance to Rural Development staff on implementation of the HUD Final Rule on *Lead-Based Paint (LBP) Hazards in Federally Owned Housing and Housing Receiving Federal Assistance* (hereinafter, the "LBP regulation"). This guidance is intended to simplify and expedite our efforts to comply with the final rule on LBP, which took effect on September 15, 2000. This AN does not prohibit or restrict the financing of homes constructed prior to 1978.

### Multi-Family Housing Workout Plans

AN No. 3597 (1965-B) (Dec. 7, 2000)

*Summary:* The purpose of this Administrative Notice (AN) is to identify priority usage of various workout plan approaches. The intended outcome is to use these priorities in servicing. ■

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