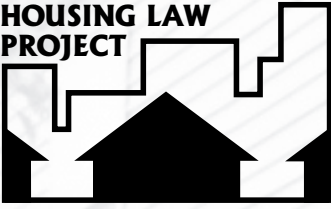


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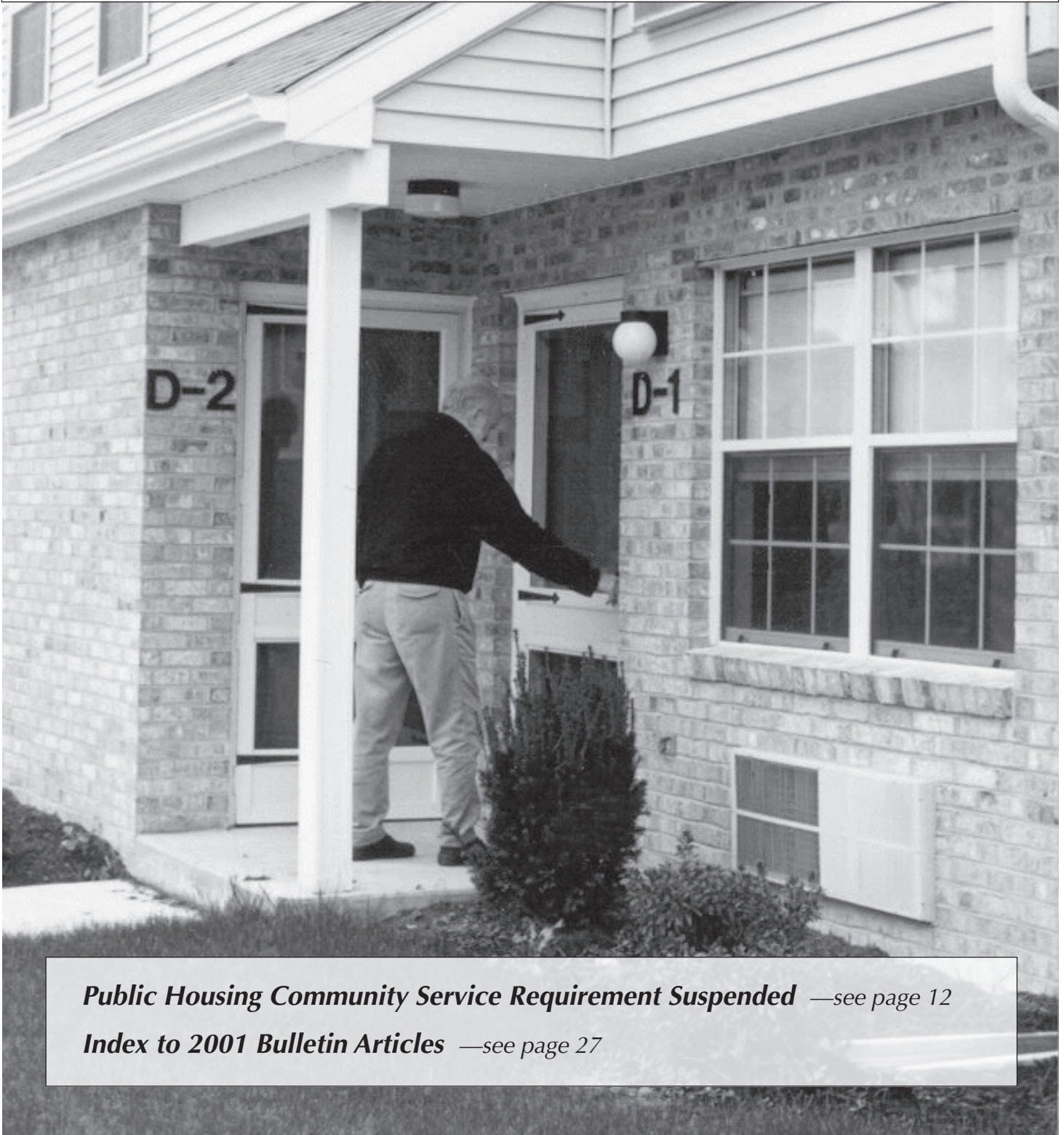


advancing housing justice

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Public Housing Community Service Requirement Suspended —see page 12

Index to 2001 Bulletin Articles —see page 27

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Table of Contents

	Page
“Rights of First Refusal” in Preservation Properties: Worth a Second Look	1
Congress Reauthorizes “Mark to Market” Program for Expiring Section 8 Properties	6
HUD Revises Enhanced Voucher Guidance	8
Congress Resolves HUD Technical Assistance Funding Fiasco	11
Public Housing Community Service Requirement Suspended	12
HUD Memo Attempts to Narrow CDBG and HOME Programs’ One-For-One Unit Replacement Requirement	13
Better Coordination Urged Between Housing and Welfare Programs	15
Supreme Court to Hear RHS Prepayment Cases	19
Recent Housing Cases	19
Recent Housing-Related Regulations and Notices	23
Index to 2001 Articles	27
Announcements	
Recent Additions to NHLP’s Web Site	3
Publication List/Order Form	37



Cover photo: James E. Leonard Apartments, Salisbury, Maryland. A 34-unit seasonal and migrant farm labor housing development owned by Delmarva Rural Ministries. Financed under Rural Housing Service Section 514/516 programs. Photo courtesy of Housing Assistance Council.

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“Rights of First Refusal” in Preservation Properties: Worth a Second Look

Introduction

Throughout the country, many federally assisted use-restricted properties currently providing affordable housing to low-income people are at risk of converting to market-rate use through opt-out or termination of the Section 8 contract or prepayment of a Department of Housing and Urban Development (HUD)-subsidized mortgage, thereby threatening substantial erosion of the existing affordable housing stock. Because federal laws no longer guarantee preservation of these developments,¹ many states and localities have provided further protections for these properties through supplemental laws and policies.² One such policy seeks to grant some form of a “right of first refusal”—an opportunity to purchase the property and preserve it as low-income housing. Such rights resemble, and may find their source in, the existing eminent domain power of the government to appropriate private property for valid public uses upon the payment of just compensation to owners. This article surveys a number of such state and local laws and highlights their important features to illustrate how to make them more effective.

Background on the Current Conversion Threat

After a two-year moratorium on conversions of properties with HUD-subsidized mortgages, Congress enacted a mandatory federal preservation program in 1990 designed to preserve this affordable housing for low and moderate-income households by providing financial incentives to owners and financing purchases by nonprofits and tenant organizations.³ However, starting in 1996 Congress retreated from this commitment, authorizing owners of HUD-subsidized properties to prepay mortgages and convert to market-rate use.⁴ Although the preservation program

¹While Congress has provided no funds recently for the preservation of properties with HUD-subsidized mortgages, the Section 8 laws provide authority to renew Section 8 contracts, sometimes at higher rents, and restructure HUD-insured mortgages to preserve properties. See *Multifamily Assisted Housing Reform and Affordability Act of 1997*, as amended, 42 U.S.C.A. § 1437f note, *Multifamily Housing Assistance* (West Supp. 2001).

²See *Preserving Federally Assisted Housing at the State and Local Level: A Legislative Tool Kit*, 29 HOUS. L. BULL. 183 (Oct. 1999) (a survey of state and local preservation initiatives).

³*Low-Income Housing Preservation and Resident Homeownership Act of 1990* (LIHPRHA), Pub. L. 101-625, Title VI, 104 Stat. 4079, 4249 (Nov. 28, 1990), codified at 12 U.S.C.A. §§ 4101 *et seq.* (West Supp. 2001).

⁴Pub. L. No. 104-120, § 2(b), 110 Stat. 834 (1996); Pub. L. No. 104-134, § 101(e), Title II, paragraph entitled *Annual Contributions for Assisted Housing*, 110 Stat. 1321 (1996); Pub. L. No. 104-204, 110 Stat. 2874 (1996); Pub. L. No. 105-65, 111 Stat. 1343 (1997); Pub. L. No. 105-276, §219, 112 Stat. 2487 (1998) (authority for prepayments of “eligible low-income housing” upon giving HUD, tenants and local government at least 150 days, but no more than 270 days written notice).

has not been repealed, starting in fiscal year (FY) 1998, Congress provided no funding to preserve HUD-subsidized units, limiting its funding to replacement vouchers for tenants.⁵ The laws governing properties with project-based Section 8 contracts permit most owners to withdraw from the program when the fixed-term contract expires.⁶ Therefore, at the end of the contract or the original restricted-use period, most owners of federally subsidized or assisted multifamily properties can now convert properties to market-rate operations, absent other restrictions imposed by federal, state or local laws or agreements.

Existing “Right of First Refusal” Laws in General

The purchase opportunity created by current state or local laws comes in many different forms—from a true “right of first refusal,” which permits a designated purchaser to match another sale offer and thereby acquire title, to a “right to make an offer,” with no obligation on the owner’s part to sell. It can cover any federally assisted, restricted-use property or only, for example, prepayments of HUD-subsidized mortgages. It may be triggered by various events—from a planned sale or other disposition of the property to any action that would affect its current low-income use, such as expiration or termination of use or affordability restrictions or any subsidies. It may provide rights to tenant organizations, to nonprofits and public agencies, or to other preservation purchasers including for-profit entities that commit to specified preservation terms. It can also be accompanied by a variety of procedural requirements and enforcement mechanisms that give tenants, nonprofits or other interested parties important tools to advance the preservation policy.

Types of Housing Covered

State and local preservation laws can create some form of purchase opportunity for various types of affordable housing threatened by conversion. For example, Illinois law covers properties with HUD-subsidized mortgages (although only the sale thereof), or properties with certain state-provided mortgages (although only the prepayment thereof).⁷ Thus, properties with loans insured or held under Section 236, Section 221(d)(3) (if Below Market Interest Rate, Rent Supplement or Section 8), Section 515 and Section 514 are all covered⁸ where such properties are being sold but

the law does not cover many other properties with project-based Section 8 contracts, even where a sale is contemplated. Other jurisdictions have expanded the coverage to protect tenants in buildings whose Section 8 contracts are expiring or otherwise being terminated. State laws in California,⁹ Maryland,¹⁰ Maine,¹¹ and Texas¹² all cover Section 8 contract terminations,¹³ as do some cities.¹⁴ Reaching still further, California and Texas also seek to cover the expiration of affordability and occupancy restrictions on properties that received assistance under the federal Low-Income Housing Tax Credit (LIHTC) program. The broader the reach of the statute or ordinance, the more low-income housing that can be preserved.

State and local preservation laws can create some form of purchase opportunity for various types of affordable housing threatened by conversion.

The “Triggering Event”

Related to the issue of coverage is the specification of the event which “triggers” whatever rights the statute creates. In some jurisdictions, even though coverage is nominally broad to cover many types of housing or multiple conversion threats, the purchase opportunity is not triggered until the owner decides to sell the property. Maryland’s right of first purchase is triggered only by a proposed transfer,¹⁵ although other notice requirements are triggered by other termination actions. The primary Illinois statute covering HUD-subsidized properties is triggered only by an intended sale or disposition of the property,¹⁶ thus leaving uncovered those buildings facing termination of subsidies and restrictions whose owners retain title. San Francisco uses a proposed sale or transfer as the trigger for

⁹CAL. GOVT. CODE § 65863.11(b)(West 2001).

¹⁰MD. ANN. CODE of 1957, Art. 83B, § 9-102(b)(2000).

¹¹ME. REV. STAT. ANN., Title 30-A, §§ 4972 AND 4973 (1999).

¹²TEX. GOVT. CODE ANN. § 2306.185(f)(Vernon 2001).

¹³Rhode Island covers Section 8 terminations, but only if resulting from sale, lease, other disposition, or prepayment. R.I. GEN. LAWS § 34-45-4 (5)(2000).

¹⁴DENVER MUN. CODE § 12-106 (2001); PORTLAND CITY CODE § 30.01.030 (2000). San Francisco covers properties with Section 8 contracts, but only those where owners are seeking to terminate prior to the full original term. SAN FRANCISCO ADMIN. CODE §§ 60.4(a) and (y) (2000).

¹⁵MD. ANN. CODE of 1957, Art. 83B, §§ 9-101(j) and 9-104(a)(2)(2000).

¹⁶310 ILL. COMP. STAT. § 60/4 (2001).

⁵See Pub. L. No. 105-65, 111 Stat. 1343, 1355-56 (Oct. 27, 1997).

⁶See Section 524 of the *Multifamily Assisted Housing Reform and Affordability Act of 1997*, as amended, 42 U.S.C.A. § 1437f note, *Multifamily Housing Assistance* (West Supp. 2001).

⁷Illinois has two separate relevant statutes. The first, 310 ILL. COMP. STAT. § 60/3 (2001), covers sale or disposition of properties with HUD-subsidized mortgages; the other, 20 ILL. COMP. STAT. § 3805/8.1 (2001), covers prepayment of certain state-financed loans.

⁸Apparently seeking to cover federally subsidized Rural Rental Housing properties, the Illinois law erroneously refers to mortgages insured or held by HUD under Section 514 or 515 of the *Housing Act of 1949*, but these loans actually involve the Rural Housing Service (RHS) of the U.S. Department of Agriculture.

purchase rights; a proposed prepayment triggers other procedures and protections, whereas a Section 8 contract expiration or opt-out at the original expiration date triggers no rights.¹⁷ Thus, in jurisdictions using sale to trigger purchase rights, owners retain the ability to convert the property to market-rate first and escape the statutory purchase rights either by holding on to the property or delaying any sale until the property has been converted to market-rate and is no longer covered by the law.

To maximize preservation, the triggering event for the “right of first refusal” should be broadly defined to include events unrelated to the disposition of the property. Ideally, a statute’s triggering events should parallel its coverage. Thus, if a statute creates some preservation rights applicable to properties whose owners have chosen to terminate federal assistance, the rights should be triggered by the termination or opt-out, not merely by the sale or transfer of the property. For example, in Maine the triggering event is the sale, transfer or other action that would result in termination of the financial assistance,¹⁸ effectively creating a preemptive option or public condemnation right. Similarly, in California, where the statute also covers both Section 8 opt-outs and certain HUD mortgage prepayments, the right to make an offer (not a right to purchase) is triggered by the owner’s decision to take any action that would terminate the federal assistance.¹⁹ Maryland’s notice rights and other procedural protections are broadly triggered by a proposed transfer of the property, a threatened prepayment or a termination of assistance, but the right of first purchase is triggered only by a proposed transfer.²⁰ Texas has a similarly broad trigger but creates no direct purchase right.²¹ Denver and Portland both have ordinances triggered by the owner’s decision to opt out of the Section 8 contract.

Nature of the Rights Created

The nature of the right created by state laws also varies, as jurisdictions use different terminology in granting rights to tenants, nonprofits, municipalities, or others. Modeled on a classic “right of first refusal” upon sale, Illinois requires owners to provide a bona fide offer of sale to the tenants, with a first right to purchase.²² Other jurisdictions offer similar rights, often under broader triggers. Maine’s broad “other action” trigger granting the State Housing Authority a “right of first refusal” to purchase the property at its current appraised value²³ effectively operates as a preemptive option or public condemnation right. Rhode Island law provides eligible entities with a “right of first refusal” to buy the property or

¹⁷SAN FRANCISCO ADMIN. CODE § 60.9 (2000)

¹⁸ME. REV. STAT. ANN., Title 30-A, § 4973(1)(1999).

¹⁹CAL. GOVT. CODE §§ 65863.11(b)(c) and (g)(West 2001).

²⁰MD. ANN. CODE OF 1957, Art. 83B, §§ 9-103, 9-101(j) and 9-104 (2000).

²¹TEX. GOVT. CODE ANN. §§ 2306.185(f), 2306.852, 2306.853 (Vernon 2001).

²²310 ILL. COMP. STAT. § 60/5 (2001); 20 ILL. COMP. STAT. § 3805/8.1(c)(2)(2001).

²³ME. REV. STAT. ANN., Title 30-A, § 4973(2)(1999).

Recent Additions to NHLP’s Web Site

The following materials of interest to advocates have been added to NHLP’s Web site in recent months.

Brief of Amici AARP et al. in *Department of Housing and Urban Development v. Rucker*, No. 00-1770 (U.S. Sup. Ct. filed 2000): In their brief in support of the respondent tenants, amici argue that the text of the Department of Housing and Urban Development’s (HUD) “one-strike” statute is silent on the existence of an innocent tenant defense and that HUD’s rule, which precludes the assertion of innocence to reviewing courts, is unreasonable.
www.nhlp.org/html/pubhsg/rdcases.htm

Public Housing Tenant Participation Information Packet: Describes the new requirement that public housing authorities (PHAs) that receive public housing operating subsidies from HUD use \$25 per occupied unit per year for resident participation activities. This packet includes a description of the program, question and answers about the requirement, various HUD forms and other materials.
www.nhlp.org/html/pubhsg/tenant_participation.htm

Challenging Conversions of Federally Assisted Housing in California: This guide provides basic information concerning the threatened conversion of privately owned HUD-subsidized and Section 8-assisted developments in California. It includes specific suggestions for action that housing advocates, including public interest lawyers, can take when addressing the conversion threat in their community or at a particular property. While this guide is directed specifically at California advocates, many of the issues that are discussed in the guide are equally applicable to other states and localities.
www.nhlp.org/html/pres/challenging_conversions_cal.htm

Decisions and Pleadings in 22 Cases Involving Preservation of Federally Assisted Housing: This page contains a brief description of the case. Access to the documents in this section of the Web site are restricted to members of the Housing Justice Network. www.nhlp.org/html/pres/cases.cfm

match third-party offers where an owner intends to sell, prepay or otherwise dispose of the property.²⁴ Maryland law provides a “right of first purchase,” but only upon sale or conveyance, permitting eligible entities the right to buy the property and match any subsequent offers.²⁵ San Francisco law creates similar rights upon an intended prepayment.²⁶ However, in California the law grants only the right to submit an “offer of purchase” that is non-binding on the owner. Texas law simply gives the state time to “attempt to locate a buyer who will conform to the development restrictions” provided by the law.²⁷ Denver and Portland just prevent owners from taking any action during the required notice period that would “preclude the city or its designee from succeeding to the contract or negotiating with the owner for purchase of the property.”²⁸ Obviously, the right created directly determines the community’s ability to affect the future of the property. California’s right to submit a non-binding offer provides tenants and others notice that their housing is at risk and an opportunity to obtain information and make an offer to buy, but imposes no obligation on the owner to sell or to give preference to tenants or nonprofits to acquire the building. By contrast, Rhode Island and Illinois laws grant the tenants or other entities a true “right of first refusal;” by permitting matching of any offer, the tenants are given a legitimate opportunity to purchase the property.

Various jurisdictions have established specific procedures that are triggered by a proposed sale or conversion of federally assisted housing.

Who Gets the Right?

Illinois law, for example, requires a selling owner to make a bona fide offer of sale only to a tenant association.²⁹ Yet tenant associations are not always in the best position to purchase the property for the purpose of maintaining its low-income use. The building may not have a tenant association, or the association may not have the goal, the capacity or the ability to raise sufficient funds to make a legitimate offer.

²⁴R.I. GEN. LAWS § 34-45-8 (2000).

²⁵MD. ANN. CODE OF 1957, ART. 83B, § 9-104 (2000).

²⁶SAN FRANCISCO ADMIN. CODE § 60.8 (2000).

²⁷TEX. GOVT. CODE ANN. § 2306.185(f)(Vernon 2001).

²⁸DENVER MUN. CODE § 12-107(e)(2001); PORTLAND CITY CODE § 30.01.050(E)(2000).

²⁹310 ILL. COMP. STAT. § 60/5 (2001).

Thus many laws grant the purchase rights to a variety of entities. California offers its “right to make a purchase offer” to many different possible purchasers, including the resident tenants’ association, local nonprofits and public agencies, regional or national nonprofits and public agencies, and profit-motivated purchasers, so long as each is capable and committed to maintaining the low-income use for at least 30 years including the renewal of available rent subsidies.³⁰ Combining features of both the Illinois and California statutes, Maryland offers a true right of first purchase to the local housing authority, the local jurisdiction and to any state-registered group representing the tenants, including a nonprofit low-income housing provider or others with low-income housing experience,³¹ so long as they commit to specified extended use terms equal to the original use restriction or at least 20 years.³² Maine provides the “right of first refusal” only to a public agency, the Maine State Housing Authority.³³ Rhode Island provides the purchase right to the tenant’s association, the state housing agency, the local housing authority and the local municipality.³⁴ Any of these other entities may be important candidates to purchase and preserve the property, where tenant intentions or capacity is lacking.

Procedural Protections

Various jurisdictions have established specific procedures that are triggered by a proposed sale or conversion of federally assisted housing. Due to fluctuating requirements or other deficiencies in federal notice laws, many require the owner to give the tenants and others ample notice of the potential loss of assistance or restrictions, as well as additional information about the impact of the proposed conversion and available rights. The laws also often require additional information useful for exercising specified rights, such as information about the development and often prescribe remedies for violations.

Notice

Additional notice provisions are a staple of this type of preservation legislation. Rhode Island requires two years’ notice of any intent to sell, lease or otherwise dispose of subsidized property and, apparently, to prepay the mortgage to each tenant, the tenants’ association, the state housing agency, the local housing authority and the city.³⁵ San Francisco requires 18 months’ notice of prepayments or midterm opt-outs and 12 months’ notice of Section 8 contract expirations.³⁶

³⁰CAL. GOVT. CODE §§ 65863.11 (d) and (e)(West 2001).

³¹MD. ANN. CODE OF 1957, ART. 83B, § 9-104(b)(2000).

³²*Id.*, § 9-104(g).

³³ME. REV. STAT. ANN., TITLE 30-A, § 4973(2)(1999).

³⁴R.I. GEN. LAWS § 34-45-7(2)(2000).

³⁵*Id.* § 34-45-6 (2000)(the term “apparently” is used because the omission of the term “or” in the statute makes coverage unclear with respect to prepayments).

³⁶SAN FRANCISCO ADMIN. CODE § 60.5 (prepayments), § 60.9 (expirations)(2000).

California requires two notices—a one-year notice with specific content to tenants, the state housing department, the PHA and local government of any proposed termination of subsidies or restrictions, and another notice of at least six months, to both tenants and public entities, that includes proposed new rents and other important information about the conversion.³⁷ Texas also requires a one-year notice to the state housing department.³⁸ Illinois requires owners to notify the tenants and the state housing agency at least six months prior to any sale or other proposed disposition of the property.³⁹ Portland and Denver require owners to provide a one-year notice of pending Section 8 contract expirations to the city and the tenants.⁴⁰ Where owners intend to opt out of contracts that were long-term, they must give 210 days notice and 150 days for opting out of one-year contract extensions.⁴¹ Maine requires owners to provide notice of 90 days to tenants, the State Housing Authority and the local PHA prior to entering into any contract of sale, transfer or other termination action.⁴² More time provides potential purchasers a greater chance to develop a viable preservation purchase offer for the property. Many jurisdictions specify the content of these notices, with those in California and Maryland being the most detailed.

Access to Information

Many of the enacted laws also require owners to provide tenants and others with information needed to evaluate the possible purchase. Illinois⁴³ and California⁴⁴ require that the owner provide access upon request to the rent rolls, vacancy rates, operating expenses, capital improvements, project reserves and financial and physical inspection reports. California requires the owner to submit a statement that such information is available upon serving the notice of bona fide opportunity to purchase. In Illinois, the owner must comply with tenant association requests for such information after receiving the notice of intent to purchase the subsidized housing. Rhode Island requires that with the offer of sale, the owner must include a statement that similar information is available to the tenants' association, the state housing agency and other local entities.⁴⁵ San Francisco requires that such information

³⁷CAL. GOVT. CODE §§ 65863.10 (b), (c) and (d)(West 2001). The law requires more specific content for the second notice required for public entities and additional notice of subsequent significant changes in the information.

³⁸TEX. GOVT. CODE ANN. § 2306.185(f)(Vernon 2001).

³⁹310 ILL. COMP. STAT. § 60/4(a)(2001). Illinois law also requires owners of certain state-financed properties to provide nine months notice of intended prepayments and to offer such properties for sale. 20 ILL. COMP. STAT. § 3805/8.1 (2001).

⁴⁰DENVER MUN. CODE § 12-107(a)(2001); PORTLAND CITY CODE § 30.01.050(A)(2000).

⁴¹*Id.* § 12-107(b)(2001); PORTLAND CITY CODE § 30.01.050(B)(2000).

⁴²ME. REV. STAT. ANN., Title 30-A, § 4973(1)(1999).

⁴³310 ILL. COMP. STAT. § 60/6 (2001).

⁴⁴CAL. GOVT. CODE §§ 65863.11 (h)(West 2001).

⁴⁵R.I. GEN. LAWS § 34-45-8(b)(4)(2000).

be made available to any interested parties at least 14 days prior to the required public hearing, which is no later than 45 days after the owner gives notice of his intent to prepay or terminate prematurely.⁴⁶ Giving as much information as possible to potential preservation purchasers as early in the process as possible permits them to better formulate their financing plans and purchase offers.

Many of the enacted laws also require owners to provide tenants and others with information needed to evaluate the possible purchase.

Purchase Price

Once some form of purchase right is triggered, the question of the purchase price of the property must inevitably come into play. In Rhode Island, the owner sets the price, and the tenant association or other qualified entities have the right to meet that price or match any other third-party offers.⁴⁷ Thus, the only limit placed on the price is what the market can bear, as the trigger for purchase rights is another sale offer. In California, the right to make an offer sets no limit on the owner's asking price, as the owner is not obligated to accept any offer submitted unless it seeks to match the terms of one already accepted from a non-qualified purchaser. The statute permits, but does not require, either the owner or the qualified offering entity to request that the fair market value of the property be determined by an independent appraiser, but the appraisal is non-binding on both parties.⁴⁸ In Illinois, where the statute is closer to a "right of first refusal" triggered by sale, after the tenants' association makes its intent to purchase known to the owner, a mechanism for resolution of price disputes is provided. If the parties cannot agree on a price within 60 days of the notice of intent to purchase, the sale price is determined by two independent appraisers; one paid by the owner, the other paid by the tenants association.⁴⁹ If the appraisers do not agree, the parties can take the average or jointly hire a third, binding appraisal.⁵⁰ San Francisco also provides lengthy evaluation

⁴⁶SAN FRANCISCO ADMIN. CODE § 60.6 (prepayments or premature terminations) and § 60.9 (Section 8 contract expirations)(2000).

⁴⁷R.I. GEN. LAWS §§ 34-45-8(b) and (c)(2000).

⁴⁸CAL. GOVT. CODE §§ 65863.11 (k)(West 2001).

⁴⁹310 ILL. COMP. STAT. § 60/7(b)(2001).

⁵⁰*Id.*

procedures to reach a “fair return price” that may not exceed the value calculated by a standard appraisal for the highest and best use of the property.⁵¹ Maryland’s “right of first purchase” statute requires the property to be offered at appraised fair market value—with dispute resolution steps similar to Illinois—unless someone else has made a higher bona fide offer which the qualified entity can match.⁵²

Other Issues

Other possible provisions in this kind of preservation legislation include public hearings on the proposed conversion,⁵³ remedies for owner violations,⁵⁴ exceptions from coverage, definition of what constitutes a “transfer or sale,” time periods in which to make offers, the assignability of rights, any relationship to the eminent domain power, preemption of federal law and the waivability of rights conferred. Jurisdictions have handled these issues in a variety of ways, each having a slightly different impact on the legislation’s goals.

Conclusion

State and local laws granting some form of purchase rights can provide important opportunities to preserve affordable housing threatened with conversion but can vary significantly in their potential effectiveness, depending on the specific elements of the rights. Proponents of preservation policy should be wary of laws that apparently offer protection for at-risk properties but actually yield little because of specific deficiencies in the key components reviewed here. Careful analysis and drafting can resolve many of these shortcomings to produce helpful policies that will prevent further erosion of the affordable housing stock. ■

Congress Reauthorizes “Mark to Market” Program for Expiring Section 8 Properties

Introduction

After much delay and uncertainty concerning the legislative package to which to attach its proposal, Congress has enacted a statutory extension of the authorities for the Section 8 “Mark to Market” program. This program was created in 1997 to permit the Department of Housing and Urban Development (HUD) to reduce subsidies and restructure financing on those HUD-insured properties with expiring contracts carrying “above-market” Section 8 rents. Although, under the terms of the original law, these authorities had been scheduled to expire on September 30, 2001, the program has continued to operate under several Continuing Resolutions that kept the federal government running while numerous appropriations bills for fiscal year (FY) 2002, which started on October 1, 2001, were finalized.

After both houses of Congress failed to pass several earlier bills containing the “Mark to Market” extension and other program modifications,¹ Congress passed the “*Mark to Market*” Extension Act of 2001 (*Extension Act*) as part of H.R. 3061, the FY 2002 Department of Labor and Department of Health and Human Services (HHS) Appropriations bill.² The House and Senate housing staff had previously negotiated the final version of the legislation so that at least with respect to the “Mark to Market” program, the House and Senate versions of this portion of the appropriations bill were identical and were not subject to negotiations in the conference committee. The *Extension Act* retains almost all of the major provisions of the prior program, while making several modest revisions. The following briefly reviews the most significant changes.

Extensions of the “Mark to Market” Program and the Office of Multifamily Housing

Assistance Restructuring (OMHAR)

The law extends the authority for the program for five more years through September 30, 2006. However, the authority for OMHAR is extended for only three years through September 30, 2004, at which time its powers are transferred to the Secretary of HUD. The Secretary’s general powers

⁵¹SAN FRANCISCO ADMIN. CODE §§ 60.8(h) and (i)(2000).

⁵²MD. ANN. CODE of 1957, Art. 83B, §§ 9-104(d) and (f)(2000).

⁵³SAN FRANCISCO ADMIN. CODE § 60.6 (prepayments or premature terminations) and § 60.9 (Section 8 contract expirations)(2000).

⁵⁴California law permits injunctive relief. CAL GOVT. CODE §§ 65863.10(i) and 65863.11 (p)(West 2001). San Francisco prescribes detailed civil remedies for noncompliance, including treble damages, attorney’s fees for a civil suit, and \$5,000 civil penalties. SAN FRANCISCO ADMIN. CODE §§ 60.11 and 60.125(b)(2000).

¹A prior version of the legislation, H.R. 2589, passed the House on September 24, 2001. When it became clear that the Senate would not enact a reauthorization bill before the end of FY 2001, the extension provisions were placed into Title VI of H.R. 3061, the FY 2002 Labor-HHS Appropriations bill, a version of which passed both the House and the Senate later in the fall, prior to being referred to a Conference Committee to fashion the final statute.

²Pub. L. No. 107-116, Title VI, 115 Stat. 2177, 2220 (Jan. 10, 2002). The Conference Report is H.R. Rep. No. 107-342, 107th Cong., 1st Sess. (Dec. 19, 2001)(legislative day Dec. 8, 2001).

under the “Mark to Market” law and the oversight of OMHAR are now vested in the Federal Housing Administration (FHA) Commissioner.³

Technical Assistance Funding

The new law clarifies that HUD must make available funds that are already authorized (up to \$10 million annually) for technical assistance to residents and nonprofit organizations addressing the issues facing properties with expiring Section 8 contracts. The new law also provides that the annually authorized amount is in addition to unobligated amounts previously made available and that this amount can carry over into future fiscal years (if any such funds actually exist).⁴ Deleted from the final bill were provisions contained in prior versions that permitted existing agreements with intermediaries administering certain technical assistance (Intermediary Technical Assistance Grant (ITAG)) funding to be extended or reassigned without the protracted process of a new Notice of Funding Availability if HUD provided assurances that technical assistance funds would continue uninterrupted. After the staff negotiations that produced the extension, the technical assistance program became paralyzed by alleged OMHAR violations of the *Anti-Deficiency Act* in obligating authorized and appropriated funds over the past four years. This problem was addressed separately by remedial appropriations in the FY 2002 Department of Defense Appropriations bill.⁵

Rent Skewing for Certain Nonprofit “Mark Up to Budget” Properties

For partially assisted projects owned by, or that are being proposed for transfer to, nonprofit organizations, the new law requires HUD to include budget-based costs related to the project as a whole, including costs incurred with respect to units not covered by the Section 8 contract.⁶ This revision will increase the financial feasibility of nonprofit acquisition or rehabilitation of these partially assisted properties.

Rent Consistency for Renewals and Enhanced Vouchers

The new law requires HUD to evaluate and establish procedures and guidelines to ensure reasonable consistency between the standards used for establishing rent levels under the enhanced voucher program and “market rents” for

restructuring or Section 8 project-based renewals. This should reduce the incentive that owners have to shop between HUD and local housing authorities for the highest rents when both are supposedly based on market level rents.⁷

Exception Rents

MAHRAA permitted HUD to use “exception rents” that are higher than market levels in a limited number of cases in order to permit properties with high but justifiable operating costs, or that are located in extremely depressed markets, to continue to provide affordable housing. The new law authorizes HUD to provide exception rents for many more properties where the Secretary determines that the housing needs of residents and the community cannot be adequately addressed by the ordinary program “market rent” limits.⁸

Notices of Rejection under “Mark to Market”

Either OMHAR or the Participating Administrative Entities (PAEs) must now notify tenants when proposed restructuring plans are rejected, usually for their failure to meet OMHAR’s program requirements, such as those concerning the scope or cost of necessary rehabilitation.⁹

The new law clarifies that HUD must make available funds that are already authorized (up to \$10 million annually) for technical assistance to residents and nonprofit organizations.

Liberalized Entry into Full “Mark to Market” Restructuring for Already Renewed Projects

The new law permits owners to request restructuring if the property was formerly eligible and remains eligible for restructuring even after the owner renewed the Section 8 contract at lower market rents under other program provisions.¹⁰ This would permit owners who elected renewal at lower rents without debt restructuring (“Mark to Market Lite”) to later seek restructuring if they so desired.

Assumption of Subordinate Debt by Nonprofit Organizations

The law makes a technical change permitting a second mortgage to be assumed by a nonprofit organization purchasing the housing and preserving it as affordable housing.¹¹

³These changes are made by Sections 621 and 624 of the law, amending §§ 578 and 579 of the *Multifamily Assisted Housing Reform and Affordability Act of 1997* (MAHRAA).

⁴Section 612(a), amending § 514(f)(3) of MAHRAA. *The Department of Defense Appropriations Act for FY 2002*, PL 107-117, § 1303, 115 Stat. 2230, 2340-1 (Jan. 10, 2002), specifies that no technical assistance funds from FY 2002 shall carry over into future years; thus carry-over will only be possible with funds from FY 2003 and later, if those appropriations lack a similar restriction.

⁵See *Congress Resolves HUD Technical Assistance Funding Fiasco*, on pg. 11 in this issue of the *Bulletin*.

⁶§ 614, amending § 524(a)(4)(C) of MAHRAA.

⁷§ 613, adding a new § 525 to MAHRAA.

⁸§ 612(b), amending § 514(g)(2)(A) of MAHRAA.

⁹*Id.* at (c), amending § 516 (d) of MAHRAA.

¹⁰*Id.* at (f), amending § 512(2) of MAHRAA.

¹¹*Id.* at (g), amending § 517(a) of MAHRAA.

Expansion of Eligibility to Certain Preservation Projects Being Sold

The new statute permits HUD to consider for “Mark to Market” restructuring certain previously ineligible properties processed under prior preservation programs¹² that are now being sold, including transfers to nonprofit organizations and tenant groups.¹³

Greater Flexibility for Certain Project Improvements

The new law authorizes newly approved restructuring plans to exceed normal rehabilitation standards in order to add important upgraded features like air conditioning, elevators, or community space. Owners must pay at least 25 percent of the extra costs associated with these upgrades.¹⁴

Improving the Availability of FHA Insurance for Restructuring

The new law also amends the FHA Section 223(a)(7) multifamily insurance program to improve its usefulness for refinancing properties undergoing “Mark to Market” restructuring.¹⁵

Codifying Enhanced Voucher Eligibility for Prepayments Since Fiscal Year 1996

From the time mortgage prepayments were first authorized in 1996 until Congress passed unified enhanced voucher authority in 1999, Congress authorized enhanced vouchers for adversely affected tenants through annual appropriations acts. The *Extension Act* amends the unified enhanced voucher authority to restate that all tenants since the beginning of FY 1996 (October 1, 1995) are eligible for enhanced vouchers.¹⁶

Conclusion

The final version of the law does not contain several of HUD’s earlier proposals, including those that would permit PAEs to voucher-out properties in tight markets; delete the preference for public agencies in selecting PAEs; or permit other entities to determine market rent levels. ■

¹²Those preserved under the *Emergency Low-Income Housing Preservation Act of 1987* (ELIHPA) and the *Low Income Housing Preservation and Resident Homeownership Act of 1990* (LIHPRHA).

¹³§ 612(d), amending § 524(e) of MAHRAA.

¹⁴*Id.* at (e), amending § 517(b) of MAHRAA.

¹⁵§ 615, amending § 223(a)(7) of the *National Housing Act*.

¹⁶§ 632, amending Section 8(t)(2) of the *United States Housing Act of 1937* (42 U.S.C. 1437f(t)(2)).

HUD Revises Enhanced Voucher Guidance

Introduction

The Department of Housing and Urban Development (HUD) has issued another notice covering the issuance and administration of “enhanced” replacement vouchers for HUD-assisted multifamily properties that opt out of their Section 8 assistance, prepay their subsidized mortgage, or are subject to other HUD enforcement actions.¹ Although the unified “enhanced voucher” statute was enacted in 1999,² there are still no regulations for enhanced vouchers. This new notice largely reiterates and makes minor changes to policies contained in HUD’s prior guidance.³ Therefore, this article describes only the changes to the enhanced voucher program made by the new notice.

Background on Enhanced Vouchers

Congress first created enhanced vouchers in 1996 as an anti-displacement protection for residents of properties facing prepayment of HUD-subsidized mortgages. They are available only to tenants choosing to remain in their homes after conversion and differ from ordinary vouchers in two respects. First, the payment standard for the enhanced voucher is set at the actual market rent for the unit being converted, which can exceed that established by the local public housing authority (PHA) for the unit size. Second, the owner of the converted development is required to accept them. Congress extended eligibility for enhanced vouchers to tenants facing owner opt-outs from Section 8 contracts when it enacted the unified enhanced voucher authority in 1999⁴ and, since then, both Congress and HUD have made additional policy changes and clarifications as to their use.⁵ Numerous problems remain in ensuring that these vouchers effectively protect all tenants affected by housing conversion actions from involuntary displacement, such as

¹HUD Notice PIH 2001-41 (HA)(Nov. 14, 2001, expires Nov. 30, 2002)(available online at www.hudclips.org).

²Section 8(t) of the *United States Housing Act*, codified at 42 U.S.C. § 1437f(t), enacted by Pub. L. No. 106-74, § 538, 113 Stat. 1122 (Oct. 20, 1999), and amended by Pub. L. Nos. 106-246, § 2801 (July 13, 2000), 106-377, §§ 205 and 228 (Oct. 27, 2000), and 106-569, §§ 902 and 903 (Dec. 27, 2000).

³Notice PIH 2000-09. See *HUD Issues Guidance for FY 2000 Enhanced Vouchers*, 30 HOUS. L. BULL. 64 (May 2000)(reviewing Notice PIH 2000-09). PIH 2000-09 was the first notice to implement the enhanced voucher statute. Note that HUD previously issued two other notices with a more narrow application to replacement vouchers for certain eligible projects, only where owners prepaid the mortgage, pursuant to annual statutory authorities. HUD Notices PIH 99-16 (Mar. 12, 1999) and PIH 98-19 (Apr. 3, 1998).

⁴Section 8(t) of the *United States Housing Act*, codified at 42 U.S.C. § 1437f(t), enacted by Pub. L. No. 106-74, § 538, 113 Stat. 1122 (Oct. 20, 1999).

⁵The enhanced voucher statute was amended by Pub. L. Nos. 106-246, § 2801 (July 13, 2000), 106-377, §§ 205 and 228 (Oct. 27, 2000), and 106-569, §§ 902 and 903 (Dec. 27, 2000). See also Pub. L. No. 106-74, § 531, 113 Stat.

enforcing the owner's duty to accept the vouchers, proper PHA screening of tenants for eligibility, dealing with family and unit-size mismatches, and using vouchers in buildings that are in substandard condition. While HUD's issuance of a new guidance offered yet another opportunity to address these deficiencies, little progress was made on these issues.

The Notice

Covered Conversion Actions

The notice clarifies that enhanced vouchers are available upon the conversion of project-based Section 8 contracts to tenant-based assistance pursuant to statutory authority in the Mark to Market debt-restructuring process.⁶ The notice adds that in such cases, "all families assisted under the expiring contract are income-eligible for enhanced voucher assistance."⁷

HUD Enforcement Actions

Since a PHA cannot approve the use of the vouchers in units which fail Housing Quality Standards (HQS) inspections and because buildings subject to HUD enforcement action "are usually not in decent, safe, and sanitary condition," the notice continues to state that families residing in developments subject to HUD enforcement action will likely be required to move from their homes and receive only regular vouchers for relocation to new housing.⁸ The notice adds new conditions under which PHAs cannot extend enhanced vouchers. Specifically, it states that PHAs cannot provide assistance to owners who are debarred, suspended or subject to limited denial of participation and that PHAs may disapprove owner participation on other grounds such as "fraud, bribery, or any other corrupt or criminal act" or if the owner has a "history or practice of noncompliance with housing standards."⁹

PHA Screening of Tenants

The notice retains HUD's prior position that a PHA can screen tenants from receiving tenant-based assistance based on eligibility criteria established by the PHA. For this reason, some residents will lose their Section 8 assistance in the conversion process, despite their good standing under the project-based Section 8 rental agreement. Advocates need to check their local PHA plans to determine what screening criteria may affect current residents. The revised notice does clarify that any screening used for the enhanced vouchers

must conform to the screening used by the PHA for its regular voucher program.¹⁰ While the new provision protects project-based Section 8 tenants from any increased scrutiny, it directly conflicts with the statutory mandate that enhanced vouchers be provided without screening to all tenants in converting developments and thus is apparently illegal.¹¹

The new notice directly conflicts with the statutory mandate that enhanced vouchers be provided without screening to all tenants in converting developments appears illegal.

Later Loss of Income

When a family is initially eligible for enhanced voucher assistance but does not actually receive an assistance payment because the family's income is sufficiently high to meet the rent payment within 30 percent of its income, the new notice states that the family must be notified that it will be eligible for assistance if its income drops within three years of the eligibility event.¹² For example, a family with total income that is less than 80 percent of area median income (AMI) technically qualifies for voucher assistance. However, if 30 percent of that family's income is \$800 and the new rent for the unit is \$750, no assistance payments will be made on behalf of that family. If the family then experiences a loss of income within three years such that 30 percent of the family's income is less than the rent of \$750, the new notice permits the family to contact the PHA and begin receiving assistance payments. Similarly, if the unit rent increases above \$800, the family will also become eligible for assistance. Since this is a change in HUD policy only, this provision should be applicable to all qualifying residents whose project's eligibility event occurred since the effective date of the applicable statutory authority for their enhanced voucher assistance.¹³

1113 (Oct. 20, 1999)(MAHRAA § 524(d), as amended, requiring enhanced vouchers for all Section 8 contracts that are not renewed). See, e.g., *Congress Clarifies Tenants' Right to Remain in HUD Multifamily Conversions*, 30 HOUS. L. BULL. 138 (Sept. 2000)(reviewing Pub. L. No. 106-246, § 2801); *HUD Issues New Section 8 Renewal Policy Guide*, 31 HOUS. L. BULL. 61 (Mar. 2001)(reviewing Section 8 Renewal Policy Guide issued Jan. 19, 2001).

⁶Section 515(c) of the *Multifamily Assisted Housing Reform and Affordability Act* (MAHRAA) of 1997, Pub. L. No. 105-65, 111 Stat. 1344 (Oct. 27, 1997).

⁷HUD Notice PIH 2001-41 (HA) at 4, 19.

⁸*Id.*

⁹*Id.* at 5.

¹⁰*Id.* at 6.

¹¹Section 524(d) of MAHRAA, as amended by Pub. L. 106-74, § 531 provides: "the Secretary shall make enhanced voucher assistance under section 8(t) of the *United States Housing Act of 1937* (42 U.S.C. 1437f(t)) available on behalf of each low-income family who, upon the date of such [project-based section 8 contract] expiration, is residing in an assisted dwelling unit in the covered project."

¹²HUD Notice PIH 2001-41 (HA) at 25.

¹³If this change were based on a statutory amendment, which it is not, its applicability would be limited to tenants who became eligible for enhanced vouchers since the amendment was enacted.

Advocates should ensure that residents are aware of this change in policy and be vigilant for instances where residents may become eligible for assistance in the future because the notice makes it the family's responsibility to contact the PHA when income or rent changes occur that would trigger the flow of assistance.

Streamlined Processing

The notice eliminates some steps and reduces the paperwork necessary to execute the enhanced voucher Annual Contributions Contract (ACC) between HUD and the PHA. The notice specifies that the "effective date" of the ACC is 60 days prior to the target date, which is the date when an owner who prepays a mortgage or opts out of the Section 8 program can legally increase rents.¹⁴ For prepayments, the ACC effective date is the date of prepayment (since owners cannot increase rents until at least 60 days following prepayment); for opt-outs, it is 60 days prior to the contract expiration or termination date. For buildings facing enforcement action or a HUD disposition sale where the field office finds that units violate HQs and anticipates that families must leave to use their vouchers, the ACC effective date is 120 days prior to the expiration, termination or sale date, as applicable. HUD intends this earlier "effective date" for troubled properties to permit additional search time for tenants who may well have to move although the notice does not require the PHA to actually issue vouchers any earlier. The other changes should also increase resident search time, which is often a barrier for tenant utilization of vouchers.

Right to Remain

The right of a family to remain at the property was clarified by a July 2000 amendment to the statute.¹⁵ The notice cites to the amendment and makes clear that an owner may not terminate the lease "except for a serious or repeated lease violation or other good cause."¹⁶ This is particularly noteworthy because many PHAs are largely unaware that the enhanced voucher program operates differently from the ordinary voucher program in that "good cause" is required to terminate a lease even at the end of the lease term. However, as a practical matter neither PHAs nor HUD regularly enforce the tenants' right to remain. The notice reflects this passive approach, providing that the assisted family may seek judicial remedies for violations under state or local law.

Mismatches Between Family and Unit Size, Including Over-Housed and Overcrowded Families

Despite advocates' efforts to improve protections for families in an "empty nest" situation, the notice changes little.

If a family is living in a unit that voucher rules deem too large for the family size, the new notice continues to require extraordinary steps and additional burdens for tenants seeking to retain their homes.¹⁷ The notice explains that those over-housed must first look to move to an appropriately sized unit within the project. When insufficient units are available, the PHA is given authority to determine how to allocate the available units, such as by lottery or by considering family circumstances such as age or health. For families who cannot be placed in an appropriately sized unit at the property, the notice continues to require that the family engage in a "good faith" search to find such a unit elsewhere. A family that is unable to locate an eligible unit after a good faith effort may remain in its unit for one year with an enhanced voucher at the same rent. Thereafter, it may remain only at a higher rent (under the PHA's ordinary nonenhanced payment standard) and only so long as regular voucher rules allow the family to remain. The notice does not alter an especially harmful provision that requires the over-housed family to pay the "full rent" during any PHA-required voucher search period which extends past the date of the project's eligibility event.¹⁸

Families that are overcrowded in a unit that is too small under the unit size standards for the PHA's voucher program must apparently move in order to receive voucher assistance, although the notice does not explicitly address this facet of the problem at the point of conversion. However, addressing subsequent changes in family size, the notice includes a new section requiring a family to move when an increase in family size renders the unit overcrowded.¹⁹ The PHA must help the family locate a unit of appropriate size and must terminate the HAP contract if the family unreasonably rejects an acceptable unit. If an appropriate unit can be located within the project, the payment standard remains enhanced; otherwise, regular voucher program rules apply. If the family size decreases, the notice requires moving to an appropriate size unit, or if none is available, the enhanced payment standard may continue for up to 12 months.

Conclusion

The notice expires by its terms on November 30, 2002, although HUD typically extends the expiration date if a formal rulemaking process incorporating the changes has not been completed by the original expiration date. Some of the issues discussed here may be clarified or improved if and when HUD engages in formal rulemaking for the enhanced voucher program. ■

¹⁴*Id.* at 17.

¹⁵Pub. L. No. 106-246, § 2801, 114 Stat. 511, 569 (July 13, 2000).

¹⁶HUD Notice PIH 2001-41 (HA) at 25. Note the right to remain is also discussed at Section 11-3 of the Section 8 Renewal Guide, published separately by HUD on their Web site at www.hud.gov/offices/hsg/mfh/exp/guide/s8guide.cfm. See also HUD Notice PIH 01-13 ¶ 12, which narrowly clarified the right to remain for Section 8 Moderate Rehabilitation contract terminations.

¹⁷*Id.* at 28.

¹⁸*Id.* Whether the family is subject to this full rent provision depends on a number of factors including whether (1) the PHA requires a search time longer than 60 days, (2) the PHA issues the enhanced voucher in a timely fashion, no less than 60 days prior to the conversion action, (3) the conversion action is a prepayment subject to a 60 day limit on rent increases and (4) whether the family is able to find a unit of appropriate size.

¹⁹*Id.* at 35-36.

Congress Resolves HUD Technical Assistance Funding Fiasco

Introduction

Nonprofit organizations providing technical assistance to educate tenants and preserve the Department of Housing and Urban Development's (HUD) multifamily portfolio have not been reimbursed by HUD for much of the last half of 2001 for activities undertaken pursuant to their signed contracts. The reason given for HUD's failure to reimburse these activities was that federal laws were allegedly violated by the Office of Multifamily Housing Assistance Restructuring (OMHAR)—primarily the *Anti-Deficiency Act* (ADA)—that regulate the expenditure of federal funds. Technical assistance contracts that were affected include those entered under the Outreach and Technical Assistance Grant (OTAG), the Intermediary Technical Assistance Grant (ITAG), and VISTA programs.

Purportedly, the ADA violations were triggered by HUD's executing multiple-year contracts that were not fully funded by appropriations at the time of execution. Apparently, this is an impermissible practice because it obligates as yet unenacted future years' appropriations and thus, in future years expends current appropriations for past obligations. While an internal HUD investigation into the practices is still ongoing, OMHAR, which had been administering these contracts, has had its authority to administer them stripped. HUD's Budget Office, which assumed responsibility for the contract, then determined that without a special appropriation from Congress addressing the deficiency, invoices under the contracts could not be paid.

Initially, congressional action to remedy the situation was cast in doubt because HUD Secretary Martinez had not—due to the incomplete HUD internal investigation—formally determined the existence or scope of the ADA violations and did not provide written notice to the President and congressional leadership as required by the ADA.¹ Fortunately, however, Congress stepped in to remedy the situation legislatively in the Fiscal Year (FY) 2002 *Defense Appropriations Act* (H.R. 3338, Section 1303). The Act was passed on December 20, 2001 and signed into law on January 10, 2002.² The following is a summary of the corrective legislation.

The Corrective Legislation

Up to \$11.3 million is made available to remedy any past ADA violations and for new FY 2002 obligations, of which no more than \$10 million is available for the new obligations. Whether this amount is sufficient to continue

technical assistance activities at current levels depends on HUD's conclusion regarding the scope of any ADA violations. That conclusion will determine which prior obligations were improper and the amount required to remedy them. This, in turn, will determine the balance that is available for new commitments. OMHAR is actively defending its past expenditures, which may help minimize the scope of the violation.

Up to \$1.3 million is available for invoices submitted by nonprofit technical assistance providers as of October 15, 2001. This cut-off date may have little impact on grantees, since the conference committee report accompanying the appropriations bill makes clear that an undetermined portion of the remaining \$10 million can be used prior to the completion of Inspector General's investigations, described below. Funding to cure past deficiencies comes from the \$15 billion Housing Certificate Fund for Section 8 renewals. For new obligations, there are three sources: the Housing Certificate Fund, \$1 million from funds appropriated for OMHAR salaries and \$500,000 from the salaries of the Office of General Counsel (OGC) which is also the office charged with determining the scope of the ADA violation.

Although wholly unrelated to the alleged ADA violations, the law also requires an audit by the HUD Inspector General (IG) of "each provision of technical assistance" under Section 514, which authorizes the technical assistance contracts. Moreover, to the extent that the IG determines any funding was used improperly, the legislation requires HUD to recapture such funds and deny future funding to any violator. With respect to HUD's OTAG grantees, the focus of this investigation will likely include the scope of eligible activities and perhaps Section 514's prohibition against using any technical assistance funds for lobbying Congress.³ The conference committee report requires the HUD Secretary to submit bimonthly reports to the appropriations committees detailing the status of probable ADA violations, a spending plan for the \$11.3 million made available by the act, and the status and findings of IG audits. The first such report is due no later than January 15, 2002.

The Act makes clear that there will be no carry over of funds from any previous year, which is consistent with HUD's current interpretation of Section 514. However, the *MAHRAA Extension Act*⁴ amended Section 514 to allow funds to carry over to later years which could become effective starting in FY 2003, depending upon future appropriations and HUD's interpretation of the conflicting provision in this law.

³MAHRAA, Pub. L. No. 105-65, § 514(f)(3)(C), 111 Stat. 1344, 1395 (Oct. 27, 1997), states that "None of the funds ... may be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation."

⁴Contained in § 612 of H.R. 3061, the FY 2002 *Labor/Health and Human Services Appropriations Act*, passed by the Congress on December 20, 2001, Pub. L. No. 107-116 (115 Stat. 2177, 2220 (Jan. 10, 2002)). See *Congress Reauthorizes "Mark to Market" Program for Expiring Section 8 Properties* on pg. 6 of this issue of the *Bulletin*.

¹See OMB Circular No. A-34 (2000), ¶ 40.6.

²P.L. 107-117, 115 Stat. 2230, 2340.

Conclusion

HUD must implement this technical assistance appropriation in a manner which does not accelerate outlays, which means that HUD cannot actually spend funds more quickly than some baseline amount. Since the applicable outlay baseline is unknown to all but budget insiders, it is unclear whether this will further hinder the flow of funds to groups with executed contracts under the OTAG and ITAG components. ■

Public Housing Community Service Requirement Suspended

Introduction

The Fiscal Year (FY) 2002 *HUD Appropriations Act* provides that no funds made available from the Act may be spent to implement the community service requirement for public housing residents, although the obligation remains in place for projects “funded with” HOPE VI grants.¹ The pertinent provision, proposed by Rep. Charles Rangel (D-NY), provides the following:

SEC. 432. None of the funds made available by this Act may be used to implement or enforce the requirement under section 12(c) of the United States Housing Act of 1937, as amended (42 U.S.C. 1437j(c)) relating to community service, except with respect to any resident of a public housing project funded with any amounts provided under section 24 of the United States Housing Act of 1937, as amended, or any predecessor program for the revitalization of severely distressed public housing (HOPE VI).

Instructions

The Department of Housing and Urban Development (HUD) has posted on its Web site instructions implementing the new provision.² These instructions clarify that the provision becomes effective for each public housing authority (PHA) as of the commencement of the PHA’s 2002 fiscal year.

¹*Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act*, Pub. L. No. 107-73, Section 432, 115 Stat. 651, 699 (Nov. 26, 2001). The Act is available online through the Library of Congress’s THOMAS Web site at www.thomas.loc.gov. The full report of the Conference Committee, H. Rep. No. 107-272 (Nov. 6, 2001), which includes both the final text of the bill as amended and the Joint Explanatory Statement of the Conference Committee, is also available through THOMAS under that report number.

²*Community Service Requirement Change in FY 2002 HUD Appropriation Act* at www.hud.gov/offices/pih/pha/policy/community_service.cfm. (Content updated Dec. 10, 2001).

PHAs’ fiscal years begin January 1, April 1, July 1 or October 1.³ HUD does not provide any instructions on how PHAs should implement the suspension. However, since most PHAs have adopted a community service requirement as part of their PHA Plan,⁴ they will have to change their Annual Plans.

Significantly, HUD allows a PHA to choose to immediately suspend enforcement of the community service requirement for all public housing non-HOPE VI-funded programs. The PHA need not wait until the beginning of the PHA’s 2002 fiscal year to implement the suspension.⁵ HUD again does not provide any instructions as to what steps, if any, a PHA must take to immediately suspend the community service requirement. However, it would seem that suspension of the community service requirement would necessitate action by the PHA governing board.⁶ Advocates should urge PHA boards to adopt resolutions that amend the PHA Plan to remove the community service requirement or suspend the community service requirement until further board action. Moreover, reinstatement of the community service requirement should be dependent upon a commitment to provide broad public notice and an opportunity for resident input and comment. This commitment ideally should exceed the requirement for notice and comment to adopt or amend a PHA plan.

The community service requirement was included as Section 512 of the *Quality Housing and Work Responsibility Act of 1998* (QHWRA).⁷ It provides that all adult residents of federally funded public housing—unless exempt—must perform community service activities and participate in economic self-sufficiency activities or work. Nonexempt residents must fulfill eight hours per month or a total of 96 hours per year of public housing community service.⁸

As a result of the *Appropriations Act* language, HUD has further instructed PHAs to provide a written notice of the changes in the law to all affected residents as soon as feasible, generally 30 days before the beginning of a PHA’s 2002 fiscal year. The notice must include language stating that the PHA will not implement or enforce the community service requirement provision of the lease during the applicable fiscal year, except for HOPE VI-funded projects. HUD explains that a HOPE VI-funded project is one “that is or was funded

³To determine a PHA’s fiscal year, visit *PHA profiles* on the HUD Web page at www.hud.gov/offices/pih/systems/pic/haprofiles/ or review the PHA’s Annual Plan.

⁴Section 12 of the PHA Plan Template, HUD form 50075 at www.hud.gov/offices/pih/pha/templates/index.cfm.

⁵All PHAs whose fiscal year began after October 2000 were required to implement the community service policy and to include a description of that policy in their Annual Plans. 24 C.F.R. § 960.600 (2000); see also *Admissions and Occupancy Frequently Asked Questions*, IV Q1, Feb. 5, 2001, available at www.hud.gov/pih/legis/ao_faq.pdf.

⁶24 C.F.R. § 903.21 (2000).

⁷42 U.S.C.A. § 1437j(c)(West Supp. 2000). For a more extensive discussion of the public housing community service requirement see *Public Housing Community Service Policies: Requirements and Advocacy Tips*, 31 HOUS. L. BULL. 135 (June 2001).

⁸42 U.S.C.A. § 1437j(c)(West Supp. 2000).

with any amount of HOPE VI funding.” Unfortunately this simple statement leaves many questions unanswered. It would seem that the community service requirement would not apply to a development for which a PHA received a HOPE VI planning grant but for which no further activity was funded. Such a development would not be funded with HOPE VI funding. Developments that have received HOPE VI funds but for which revitalization is not complete and reoccupancy has not begun also should not be subject to the community service requirement. In this case the funding is for the revitalized development, not the development that is in a transition phase. Moreover, imposing community service requirements on residents in a development that is in transition because it may be demolished and from which residents will be relocated (either into other public housing or through the use of vouchers, neither of which have any community service requirements) would be harsh and confusing for the resident and impracticable for the PHA to implement.

Conclusion

The HUD Web site notes that further instructions will be forthcoming and that interim questions regarding the community service requirement should be directed to Patricia Arnaudo or Meloson Bell, Customer Services and Amenities Division, HUD Headquarters, via e-mail at Meloson_Bell@HUD.GOV or the Public and Indian Housing Information and Resource Center at (800) 955-2232. ■

HUD Memo Attempts to Narrow CDBG and HOME Programs’ One-For-One Unit Replacement Requirement

Introduction

In late fall of last year, the Office of General Counsel (OGC) of the Department of Housing and Urban Development (HUD) issued a memorandum¹ on Section 104(d) of the *Housing and Community Development Act of 1974* (HCDA).² The purpose of this memorandum was to argue for a much narrower applicability of the provisions of Section 104(d) requiring Community Development Block Grant (CDBG) and HOME Program participants to adopt antidisplacement

¹Memorandum from Robert S. Kenison, Office of Assisted Housing and Community Development to Miniard Culpepper, Assistant General Counsel for New England Region (Oct. 29, 2001) (*HUD OGC Memo*) available at www.nhlp.org/lowell.pdf.

²Pub. L. No. 93-383 (Aug. 22, 1974), as amended by Pub. L. No. 100-242, § 509 (Feb. 5, 1988), codified at 42 U.S.C.A. § 5304(d)(WestLaw, current through Pub. L. No. 107-56 (Oct. 26, 2001)).

and relocation assistance plans, which include one-for-one unit replacement requirements. The memo is related to litigation filed in Massachusetts last year, *Mendonsa v. Lowell Housing Authority*,³ which seeks, among other things, to enforce the Section 104(d) one-for-one replacement requirement in the demolition of a state public housing development. This demolition is part of a public housing “reinvention” supported with \$170,000 in CDBG funds over a five-year period.⁴

The Section 104(d) One-For-One Replacement Requirement

Under Section 104(d), CDBG and HOME recipients are required to certify that they will follow a “residential antidisplacement and relocation assistance plan.”⁵ As originally enacted, the 1974 HCDA did not include such a plan requirement. This requirement was added by Section 509 of the *Housing and Community Development Act of 1987*,⁶ sometimes referred to as the “Barney Frank Amendment” after its legislative sponsor.⁷

Section 104(d) replacement plans require recipients to provide relocation benefits to families displaced as a result of CDBG and HOME “development projects.”⁸ They also include a one-for-one unit replacement provision, requiring grantees to:

provide within the same community comparable replacement dwellings for the same number of occupants as could have been housed in the occupied and vacant occupiable low and moderate income dwelling units demolished or converted to a use other than for housing for low and moderate income persons.⁹

HUD regulations implementing Section 104(d) require grantees to replace all “lower-income dwelling units” demolished or converted “in connection with an assisted activity” with adequately sized units that will meet the definition of a lower-income dwelling unit for at least 10 years.¹⁰

³No. 01-2034-C (Mass. Supp.Ct., filed May 2001)(Suffolk County).

⁴See City of Lowell’s Opposition to Motion for Preliminary Injunction, *Mendonsa v. Lowell Housing Authority*, No. 01-2034-C (Mass. Supp. Ct., filed May 2001)(Suffolk County).

⁵42 U.S.C.A. §§ 5304(d)(CDBG), 12705(b)(16)(HOME)(WestLaw, current through Pub. L. No. 107-56 (Oct. 26, 2001)).

⁶Pub. L. No. 100-242 (Feb. 5, 1988).

⁷The Section 104(d) one-for-one replacement requirement is entirely separate from the public housing one-for-one replacement requirement that was formerly included in Section 18 of *U.S. Housing Act of 1937*, codified at 42 U.S.C.A. § 1437p (West Supp. 2001). The Section 18 one-for-one replacement requirement, suspended in 1995, was permanently repealed by the *Quality Housing and Work Responsibility Act* (QHWRA), Pub. L. No. 105-276, § 531 (Oct. 21, 1998), which amended Section 18 in its entirety.

⁸42 U.S.C.A. §§ 5304(d)(2)(A)(WestLaw, current through Pub. L. No. 107-56 (Oct. 26, 2001)).

⁹*Id.*

¹⁰24 C.F.R. § 42.375(a)(b)(2001).

A “lower-income dwelling unit” is defined as one with a market rent, including utilities, that does not exceed the applicable Fair Market Rent (FMR)¹¹ for the area.¹²

October 2001 HUD OGC Memo: Strained Readings of Section 104(d) Legislative History and *Berrios v. City of Lancaster*

The HUD OGC memo argues that the demolition of the Julian D. Steele state-funded public housing development, the subject of the *Mendonsa* litigation, is not subject to the displacement plan requirements of Section 104(d), including one-for-one replacement, because the CDBG funds supporting the demolition were used only to plan for the demolition, not to carry it out.¹³ Essentially, HUD’s position is that Section 104(d) is triggered only when CDBG or HOME funds pay for an actual wrecking ball. To make this argument, HUD relies heavily on a distinction between “direct” and “indirect” displacement in the legislative history of Section 104(d) and a federal district court opinion in *Berrios v. City of Lancaster*.¹⁴

The HUD OGC memo cites a House floor debate, set out in the Congressional Record, about extending anti-displacement plan protections to families not “directly” displaced by a CDBG or HOME development project.¹⁵ HUD argues that since protections for “indirect displacees” were dropped from the version of the statute passed by Congress, indirect displacement with CDBG or HOME funds does not trigger Section 104(d).¹⁶ This is correct, but HUD misconstrues the definition of indirect displacement. The question of direct versus indirect displacement debated in the legislative history did not concern whether CDBG and HOME funds were used for planning or implementation. Rather, the debate centered around displacement as a result of direct action by a grantee versus displacement as a result of increased rents or other indirect economic effects that might attend a development project supported with CDBG or HOME funds.

Rep. Barney Frank (D-MA) has made this distinction clear in a letter to plaintiffs’ counsel in *Mendonsa*. According to Congressman Frank, the debate on “direct” and “indirect” displacement:

related entirely to whether or not the amendment should be interpreted to include economic impacts leading to an increase in rent levels or property values which would drive out poor people. [T]he distinction between “indirect” and “direct” which is the subject of the senate comments quoted in the

HUD memo relates to an entirely different point than the one the memo focuses on.¹⁷

The HUD OGC memo similarly misconstrues the *Berrios* decision. In that case, the plaintiffs who were displaced as a result of CDBG-funded code enforcement activity, brought an unsuccessful challenge to the City of Lancaster’s failure to provide them with Section 104(d) benefits. HUD appears to argue that this was because CDBG funds were used only to pay the “salaries of ... housing inspectors” and therefore did not involve any direct displacement.¹⁸

In fact, the issue in *Berrios* was not the specific activities that the CDBG funds were applied toward. Rather, the plaintiffs’ claims were unsuccessful because the court determined that a code enforcement program was not a “development project” within the meaning of the statute.¹⁹

Conclusion: Inconsistency with HUD Regulations and Relocation Handbook

Not only does the HUD OGC memo rely on a mischaracterization of the legislative history of Section 104(d) and a case readily distinguishable from the “reinvention” that will result in the demolition of the Julian Steele development, but HUD’s arguments are directly contrary to its regulations and Relocation Handbook. The regulations and handbook give the one-for-one replacement requirement a broad applicability, stating that the one-for-one replacement requirement is triggered when lower-income dwelling units are demolished or converted “in connection with” an assisted activity.²⁰ The handbook explains: “A displacement is considered to have occurred ‘in connection with’ a CDBG-assisted activity if such action and the CDBG-assisted activity are part of a single undertaking (i.e., a single project).”²¹ Clearly, the demolition of the Julian Steele development will occur in connection with the CDBG-assisted planning of this demolition. A hearing on plaintiffs’ federal claims in *Mendonsa* was scheduled for January 24, 2002. ■

¹¹See *Id.* § 888 (2001).

¹²*Id.* at § 42.305.

¹³HUD OGC Memo at 3.

¹⁴798 F. Supp. 1153 (E.D.Pa. 1992).

¹⁵See HUD OGC Memo at 5-9 (citing 133 Cong. Rec. S37649-65 (Dec. 21, 1987)).

¹⁶*Id.*

¹⁷Letter from Rep. Barney Frank to Judith Liben, Massachusetts Law Reform Institute (Dec. 20, 2001).

¹⁸See *id.* at 12-14. The memo actually includes little argument about *Berrios*, and cites long passages of the opinion.

¹⁹See 790 F. Supp. at 1160 (“We conclude the statute does not require the payment of benefits when the displacement occurs solely as a result of code enforcement activities.”).

²⁰24 C.F.R. § 42.375(a); HUD Handbook 1378, ¶7-10.

²¹*Id.* (emphasis in original).

Better Coordination Urged Between Housing and Welfare Programs

Introduction

In an effort to prepare for the upcoming reauthorization of federal welfare legislation, the Administration for Children and Families, the agency within the Department of Health and Human Services (HHS) that oversees the Temporary Assistance for Needy Families (TANF) program, recently invited government officials, legislators, welfare department staff and TANF recipients to a series of town hall “listening sessions” designed to “gather insights from those on the front lines of welfare reform.”¹ The purpose of the meetings was to inform HHS about the local experiences in implementing the new welfare programs and to discuss how the TANF program could be strengthened. The sessions were held in Atlanta, Chicago, Dallas, New York and San Francisco.

At the San Francisco session, the National Housing Law Project (NHLP) urged HHS to pay greater attention to the intersection between “Welfare-to-Work” programs and the federally subsidized housing programs administered by the Department of Housing and Urban Development (HUD). Since HHS and HUD often work with the same program beneficiaries and seek to address similar if not the same issues, expanded and improved coordination between the TANF and HUD housing programs would advance both agencies’ goals and improve services to recipients. This is particularly true with respect to the “Welfare-to-Work” initiatives and opportunities that voucher participants can use to move to areas of higher employment.

In addition, NHLP urged HHS to capitalize on the job training and employment opportunities that must be made available by HUD-funded agencies, including local public housing authorities (PHAs) and community development agencies to lower-income persons in the community. Finally, NHLP stressed that HHS should become aware of and give support to the HUD program benefits that present and recent TANF recipients living in subsidized housing receive as their income increases through employment. By understanding and leveraging HUD programs, HHS will increase the benefits from the welfare program changes to HUD-subsidized families and make both the welfare and housing programs more effective. This article reviews and discusses NHLP’s recommendations in greater detail.

Mobility Opportunities and “Welfare-to-Work” Initiatives

Section 8 Voucher Mobility

Section 8 voucher-holders can move anywhere in the country where a PHA administers a Section 8 program.² This mobility can help voucher-holders move to areas with better access to jobs. Obviously, this can be a particularly powerful tool for TANF recipients who are also voucher-holders. According to HUD data, in the latter part of 2000 approximately 350,000 families participating in the Section 8 voucher program—about one-third of the families with minor children—received some income from AFDC/TANF.³ As public housing and project-based Section 8 units are increasingly converted to tenant-based assistance, this number will likely increase. Unfortunately, for a number of reasons the mobility aspects of the voucher program have not been fully exploited.

Although PHAs are obligated to advise voucher-holders’ families of their mobility opportunities when they first receive Section 8 assistance, there is no requirement that existing voucher-holders be reminded periodically of the program’s mobility opportunities and it does not appear that many, if any, PHAs make it a regular practice to so advise program participants. In fact, federal funding rules and PHA jurisdictional boundaries often create disincentives for PHAs to promote mobility outside their jurisdictions.⁴ HHS should, therefore, make special efforts to encourage welfare departments to inform and educate TANF participants about the opportunities that the voucher program presents for moving to areas with better employment possibilities.

Obviously, mobility opportunities are more likely to be realized where PHAs work with other agencies—such as welfare departments—to conduct outreach, provide counseling and other assistance to families. Recent data suggests that special services to facilitate mobility generally cost between \$1,500-\$3,500 per family.⁵ Accordingly, PHAs should be encouraged to work with welfare departments to improve mobility services and help mitigate these costs. Moreover, HHS should encourage HUD to influence PHAs administering vouchers to use their administrative fees to provide or improve mobility services in tandem with local welfare offices.

Local welfare agencies should also advise TANF recipients about the value of mobility services and counseling and how to secure these benefits. Information about mobility rights

¹The TANF program, which provides federal block grant funds to states to provide cash assistance and other programs, is currently authorized through fiscal year (FY) 2002. The listening sessions were billed as “an initial step by the Bush administration” to develop new TANF legislation when Congress considers reauthorization later this year. For more information, see HHS press release at www.acf.dhhs.gov/news/press/2001/listen.html.

²See 24 C.F.R. § 982.353(b)(2001).

³B. Sard, Center on Budget and Policy Priorities, *Outline of How Federal Housing Programs Can Help Provide Employment and Training Opportunities and Supportive Services to Current and Former Welfare Recipients*, (Aug. 16, 2001), available at www.cbpp.org/1-6-00hous.htm.

⁴Indeed, PHAs may decide to require new non-resident voucher holders to rent units within the PHA’s jurisdiction for the first year of the Section 8 lease. 24 C.F.R. § 982.353(c)(2)(2001).

⁵See n.3, *supra*.

and opportunities, as well as counseling and education services, should be provided to all TANF recipients through consultations with case workers, the posting of notices on welfare office bulletin boards, the distribution of fliers to persons visiting welfare offices, and by enclosing printed materials with the monthly TANF checks mailed to recipients.

The Family Self-Sufficiency Program

Similarly, HUD's Family Self Sufficiency Program (FSS) is designed to promote employment and increase savings among voucher-holders and families living in public housing.⁶ Created in 1990, the objective of the FSS program is to reduce low-income families' dependency on welfare and housing assistance. One aspect of the program is case management services. The case manager works with the family to develop an FSS contract and helps the family access supportive services in the community, such as child care, transportation, credit and money counseling and education programs. The FSS program is also used to establish individual escrow accounts for participants.⁷

As the FSS participant family's rent charges increase because of new work-related earnings, the PHA deposits the incremental rent increase charges into the family's escrow account. The FSS participant may withdraw funds from the account, with the PHA's permission, while still in the FSS program for certain work-related expenses. After successful completion of the FSS program, the FSS participant may withdraw all of the escrow funds for any purpose.

The FSS program can provide the TANF recipient with multiple opportunities to achieve self-sufficiency. As with mobility and counseling opportunities, welfare departments should also advise TANF recipients who are public housing residents or voucher program participants about the opportunities presented by the FSS programs. Moreover, HHS and HUD should promote collaboration between PHAs, local welfare agencies, homeless programs and state and local government—especially those receiving HUD Community Development Block Grant (CDBG) funds—to enhance the employment prospects of low-income Section 8 voucher-holders and public housing residents.

Local welfare providers can also play an integral role in PHAs' FSS program. Under the program, each participating PHA must establish Program Coordinating Committees (PCCs)⁸ that will assist the PHA in securing the commitments of public and private resources for the operation of the local FSS program. HHS should encourage local welfare providers to become PCC members. Even if they do not become PCC members, the directors and counselors of local welfare departments should continually encourage PHAs to adopt and/or increase the size of their FSS programs for the benefit of all public housing residents and Section 8 voucher participants.

⁶See 24 C.F.R. Part 984 (2001).

⁷*Id.* at § 984.305.

⁸*Id.* at § 984.202.

Welfare to Work Housing Vouchers

Recognizing that stable and affordable housing is a critical but often missing factor in a family's transition from welfare to economic independence, HUD issued 50,000 new Welfare-to-Work vouchers in 1999 for the sole use of families receiving (or having recently received) TANF assistance and services. As families with Welfare-to-Work vouchers leave the program, the vouchers must be reissued to other families that are current or recent TANF recipients.

The Welfare-to-Work vouchers were distributed through a national competition to 133 PHAs and tribal entities in 35 states.⁹ Over the two years of its operation, the program has had varying degrees of success. While the voucher turnover rate has been relatively low, 8 percent on average, as of October 31, 2001, the lease-up rate for the Welfare-to-Work vouchers for 21 of the 133 PHAs was less than 75 percent.¹⁰ Lack of coordination with local welfare agencies was cited as a major obstacle to leasing-up the vouchers by several PHAs.¹¹

Because stable and permanent housing is critical to maintaining employment and achieving self-sufficiency, HHS and its local welfare agencies should have an interest in ensuring that all Welfare-to-Work vouchers are used.

Because stable and permanent housing is critical to maintaining employment and achieving self-sufficiency, HHS and its local welfare agencies should have an interest in ensuring that all Welfare-to-Work vouchers are used. HHS should therefore encourage local welfare offices to work pro-actively with PHAs receiving Welfare-to-Work vouchers to ensure that every voucher is issued to, and a home is leased by, a current or recent TANF recipient. To that end, welfare agencies should at the very least advise TANF recipients of the availability of Welfare-to-Work vouchers in jurisdictions that have them. They should also consider providing additional

⁹Although no new funding has been provided, existing unused Welfare-to-Work funds have been reallocated for the past two years. For information about Welfare-to-Work vouchers, see *PHAs Challenged by Implementation of Section 8 Welfare-to-Work Vouchers*, 31 HOUS. L. BULL. 38 (Feb. 2001). See also www.hud.gov/pih/programs/ph/wtw/.

¹⁰See *Monthly Lease-Up Reports: November 2001* at www.hud.gov/offices/pih/programs/hcv/wtw/lease_up/1101.pdf.

¹¹Quadel Consulting Corporation, *Welfare-to-Work Monthly Narrative Reports*, (Sept. 11, 2000 and Nov. 13, 2000); Quadel Consulting Corporation, *Welfare-to-Work Leasing Progress Report: PHA Leasing Status-Part Two (Individual Agency Status and Leasing Delays, August 2000* (Nov. 8, 2000).

assistance, such as locating available rental units, undertaking rental application training, and providing credit counseling to ensure full utilization of the voucher program.

Furthermore, PHAs should be encouraged to seek excess local TANF funds to assist welfare recipients who hold Section 8 or Welfare-to-Work vouchers locate housing or relocate to areas with better access to jobs or job-related services. Excess TANF funds could also be used to assist TANF recipients with job-related services who live in conventional public housing.

Moving to Work and Job Plus Demonstration Sites

The purpose of the Moving to Work (MTW) demonstration is to test locally designed methods for delivering housing assistance in cost-effective ways to families making the transition from welfare to work.¹² Applications for demonstration sites were approved for 24 PHAs in 18 states. Some of the participating PHAs used the funds to provide training and supportive services through enhanced and expanded FSS programs (or similar case management approaches), including services for pre-employment skills development, job search, and supportive services such as child care or transportation.

Part of the MTW program is the Jobs Plus demonstration, whose goal is to boost the employment rate in each public housing development to between 50 and 70 percent of resident families. Public housing developments in Baltimore, Chattanooga, Dayton, Los Angeles, St. Paul, and Seattle are participating in the program. At each of these sites, there should be a partnership with the local welfare office and the *Job Training Partnership Act* agency. If one does not exist, HHS should promote participation by local welfare departments in each Moving to Work and Job Plus demonstration site.

Local welfare departments should support other HUD-funded and PHA-sponsored programs designed to provide mobility counseling, work-promotion and other related supportive services. These include the Regional Opportunity Counseling (ROC) program, the Resident Opportunities and Self-Sufficiency (ROSS) program, drug elimination and prevention programs and HOPE VI Supportive Service programs. Funding applications for these programs are announced each year through one or more HUD Notice of Funding Availability (NOFA) published in the Federal Register and accessible on HUD's Web site, www.hud.gov. Welfare agencies should collaborate with and support PHA applications for these funds.

Section 3 Requirements

As of May 2001, approximately 190,000 families living in conventional public housing were also recipients of TANF benefits. As with all public housing residents, these families may be entitled to receive job and training opportunities under HUD's Section 3 program. That program obligates

¹²Pub. L. No. 104-134, § 204 (1996). For more information about the MTW demonstration and specific programs of current MTW participants, see www.hud.gov/offices/pih/programs/ph/mtw/.

agencies receiving federal housing or community development funding to hire Section 3 eligible persons¹³ for 30 percent of newly filled positions funded by the HUD programs.¹⁴ If the funds are for public housing, preference must be given to public housing residents.¹⁵ In addition HUD regulations specify that a certain proportion of housing and community development contracting opportunities should go to businesses controlled by, or that provide significant employment opportunities to, Section 3 residents or other low-income individuals.

The Section 3 program requirements are seldom adhered to or enforced. It is estimated that more than 16,000 public housing residents should receive training or employment under the program.

Unfortunately, the Section 3 program requirements are seldom adhered to or enforced. Based upon current funding for HUD public housing construction and rehabilitation programs (including HOPE VI) alone, it is estimated that more than 16,000 public housing residents should receive training or employment under the Section 3 program. Many more welfare recipients and low-income persons are eligible to participate in Section 3 opportunities because housing and community development agencies that receive HUD funds, such as CDBG and HOME grants, which are usually distributed by local government entities or, in smaller jurisdictions, by state governments, must also comply with the mandates of Section 3.

Too often, TANF recipients living in public housing enter dead-end jobs that do not pay a living wage. With full implementation of Section 3 obligations, these families could access new jobs and training opportunities for positions such as bookkeepers, secretaries, landscapers, security officers and construction workers. Unlike others entering the workforce, public housing residents have the advantage of already living in secure, affordable housing. This should assist them in making the difficult transition from welfare to work.

¹³"Section 3 residents" are public housing residents, participants in Youthbuild, and other low and very low-income persons in the community. The Youthbuild program provides disadvantaged youth with opportunities for employment, education, leadership development and training in the construction or rehabilitation of housing for homeless individuals and lower-income families. 24 C.F.R. § 135.5 (2001).

¹⁴12 U.S.C. § 1701u, as amended by Pub. L. No. 102-550, § 915, 106 Stat. 3672, 3878 (Oct. 28, 1992); 24 C.F.R. Part 135 (2001); see also www.hud.gov/progdesc/emp-lowr.html.

¹⁵*Id.* § 135.5 (2001).

HHS should demand full compliance with Section 3 requirements and capitalize on these employment-related services to promote better and higher-paying jobs for TANF recipients. By encouraging local welfare agencies to work with agencies that receive HUD funds, HHS could ensure that current and recent TANF recipients in and outside public housing get the employment and training opportunities intended by Congress when it enacted the Section 3.

Earned Income Disregard

The Earned Income Disregard (EID) program also affects TANF recipients. Under the program, PHAs are required to disregard, for purposes of calculating a household's rent, a portion of the family's income for a limited period when a household's income increases as a result of an increase in earned income.¹⁶ The EID requirement is applicable to both public housing tenants and Section 8 voucher participants with disabilities. It is available to family members who were previously unemployed and who receive, or received within the past six months, TANF or other Welfare-to-Work benefits. The advantages of the EID are obvious: it allows the family to retain a greater percentage of its earnings by not adjusting the family's rent upwards immediately following an increase in income from training or employment. Thus, it enables the household to adjust more gradually to the increased expenses usually associated with employment, such as transportation and clothing. Unfortunately however, the EID program is not being implemented nationally in a uniform manner. Some PHAs have resisted the program while others provide the benefit sporadically or only when requested.

In 1998, NHLP surveyed PHAs to determine how many were aware of and implementing the EID rule.¹⁷ Sixty percent of the responding PHAs indicated that they had not implemented the EID and many were unaware of the rule's existence. While PHA awareness of the program appears to have improved since 1998 as many PHAs are now including the program in their regulations, advocates and tenant groups throughout the country continue to report significant implementation issues. It appears that many PHAs do not inform their tenants of their right to the EID, nor have they developed an appropriate screening mechanism to ensure that eligible tenants receive this mandated benefit. Instead, most PHAs are leaving it up to the tenants to request the benefit, a process that is ineffective when most tenants are ill-informed or not informed at all of their right to the EID.

Local welfare agencies should be informed about the EID and how it affects TANF recipients in federally subsidized housing. In addition to ensuring that recipients receive the appropriate benefit, HHS should encourage its local offices to provide information and education about the EID (via fliers available both at the welfare department and enclosed with monthly TANF checks, handouts, bulletin board notices, etc.)

to all TANF participants residing in public housing or disabled participants receiving Section 8 vouchers. If necessary, local welfare workers should be urged to contact the PHA directly to determine why the benefit is not being offered to its residents. HHS should also encourage HUD to develop uniform EID rules. Finally, HHS should create a simple form or questionnaire for workers to use in determining EID eligibility for the benefit of PHAs, public housing residents and disabled Section 8 voucher-holders.

The EID program is not being implemented nationally in a uniform manner. Some PHAs have resisted the program while others provide the benefit sporadically or only when requested.

The PHA Plan

Each PHA is required to develop Five-Year and Annual Plans for the administration of its various housing programs that must be approved by HUD.¹⁸ Residents of public housing and voucher recipients must be involved in the process of developing these plans and PHAs are urged to secure broad public participation in the plan process and are required to report if they have consulted local or state governments in the plan process. Moreover, PHAs are required to make best efforts to enter into cooperation agreements with local welfare agencies for the purpose of sharing information regarding rents, income and services, among other matters, so that the agencies can better carry out their respective functions. These cooperation agreements may also include the provision of economic self-sufficiency services to public housing residents and voucher recipients.¹⁹

HHS should educate local TANF agencies about the PHA Plan process, explain how they may learn about and become involved in that process and enter into cooperation agreements. Enhanced coordination between TANF agencies and PHAs will ultimately benefit TANF recipients living in subsidized housing in their efforts to obtain self-sufficiency. ■

¹⁶42 U.S.C.A. § 1437a(d)(West Supp. 2001); 24 C.F.R. § 960.255 (2001).

¹⁷See *PHAs, Rents and the Working Poor*, 28 HOUS. L. BULL. 89 (June 1998).

¹⁸42 U.S.C.A. § 1437c-1 (West Supp. 2001).

¹⁹*Id.* at § 1437j(d)(7).

Supreme Court to Hear RHS Prepayment Cases

On January 4, 2002, the Supreme Court accepted the plaintiffs' Petition for Certiorari in *Franconia Associates v. United States* and a companion case, *Grass Valley Terrace v. United States*, two Rural Housing Service (RHS) prepayment cases from the Federal Circuit.¹ The cases were initiated, respectively, in 1997 and 1998 in the Court of Federal Claims by two groups of RHS Section 515 Rural Rental Housing owners who sought damages from RHS based on their claim that the *Emergency Low-Income Housing Preservation Act of 1987* (ELIHPA),² which restricted their right to prepay their loans, was an anticipatory repudiation of their contract with RHS and constituted an uncompensated taking in violation of the Fifth Amendment's due process clause. The Claims Court dismissed some of the owners' claims on the ground that ELIHPA terminated their prepayment rights and that their claims were thus barred by the six-year federal statute of limitations, which began to run upon the passage of ELIHPA in 1988.³ The owners, contending that the statute of limitations does not begin to run until such future time as they actually sought to prepay their loans and RHS refused to accept the prepayment, appealed the decision to the Federal Circuit Court of Appeals, which affirmed the Claims Court decisions.⁴ The owners then petitioned the Supreme Court for Certiorari, and their petition was accepted.

The issue to be decided by the Court is whether a breach of contract and a Fifth Amendment takings claim accrue, for purposes of the federal six-year statute of limitations, when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenant upon prepayment of government mortgage loans. Although the cases will be briefed this term, oral argument in the cases is not expected until the Supreme Court's next term, which begins in October. The Supreme Court's is likely to issue its opinion in the cases before the end of 2002. Other significant developments in the *Franconia* and *Grass Valley* cases that recently occurred in the Court of Federal Claims will be reported on in the next issue of the *Bulletin*. ■

¹ ___ U.S. ___, 70 U.S.L.W. 3193, 2002 WL 10,619 (U.S. 2002).

²Pub. L. No. 100-242, 101 Stat. 1877 (1988).

³*Franconia Assoc. v. United States*, 43 Fed. Cl. 702, 709 (1999). *Grass Valley Associates v. United States*, 46 Fed. Cl. 629, 636 (2000). Several of the plaintiffs in these cases had loans that were entered into after Dec., 21, 1979, when Congress first placed 20-year prepayment restrictions on RHS loans. The restrictions enacted by ELIHPA were not extended to these loans until 1992 by the *Housing and Community Development Act of 1992* (HCDA), Pub.L. No. 102-550, § 712, 106 Stat. at 3841 (1992). Since the litigation was commenced within six years of the passage of HCDA, their claims were not dismissed as barred by the statute of limitations.

⁴*Franconia Assoc. v. United States*, 240 F.3d 1358 (2000); *Grass Valley Associates v. United States*, 7 Fed. Appx. 928, 2001 WL 534,141 (Fed. Cir., May 17, 2001)(Unpublished).

Recent Housing Cases

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

Fennelly v. Kimball Court Apartment Limited Partnership, 2001 WL 1,524,452 (Mass. Super., Sept. 25, 2001). The court held that the federal Section 8 good cause eviction lease provision trumped other provisions of a housing choice voucher-tenant's lease. The lease between the landlord and the tenant provided that in the event of fire, the tenancy would be terminated. However, the addendum to the lease that spells out additional requirements for Section 8 voucher-tenants provides that the tenancy could only be terminated for good cause and through court action. When a fire, apparently started by the tenant's children when she was not present, destroyed the unit, the landlord informed the local housing authority that the Housing Assistance Payment (HAP) contract was terminated and told the tenant that her tenancy had ended without instituting formal court proceedings. Except for a statement from an office employee of the local housing authority, who told her that the tenancy was terminated by the fire and that she should look for other housing, the tenant did not receive a formal notice from the authority that her tenancy had been terminated. When the tenant could not find other housing with her Section 8 voucher, she sued her former landlord alleging breach of the lease and violation of the federal law governing Section 8. Ruling on the parties' cross-motions for summary judgment, the court found that the Department of Housing and Urban Development (HUD)-required lease addendum provides that the tenancy can only be terminated for good cause and through court action and that the provision takes precedence over any conflicting lease provisions. The court held that the lease did, in fact, conflict with the addendum and granted the tenant's summary judgment on her breach of the lease claim. The court also granted the tenants' claim that the landlord violated her Due Process rights in terminating her tenancy. It found that the landlord's relationship to the government under the voucher program was "symbiotic in character and interdependent enough" that the landlord's conduct constituted state action and that the termination violated her procedural due process rights. Lastly, the court granted the tenant's summary judgment motions on a claim

¹www.westlaw.com

²www.lexis.com

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

of breach of the covenant of quiet enjoyment and denied all counts of the landlord's cross motion for summary judgment.

Christopher Village v. United States, 50 Fed. Cl. 635 (Oct. 26, 2001). The United States Court of Federal Claims denied class certification to 200 owners of "troubled" Section 221(d)(3) properties who sought to recover damages from HUD on the ground that their defaults on their HUD-insured loans were caused by HUD's failure to approve adequate rent increases. Under the regulatory agreement with HUD, the 221(d)(3) owners were required to maintain their properties in good condition. HUD deemed one of plaintiff owners' apartment buildings to be in poor condition, placed the project on the "troubled" properties list and assigned a Special Workout Assistance Team (SWAT) to the property. When HUD asked the property owners to refurbish it, the owners requested a rent increase which HUD ignored. Instead, it demanded that the owners place \$2 million in escrow to pay for the repairs. When the owners did not comply, HUD foreclosed on the property.

When the owners' effort to set aside the foreclosure through a federal district court action failed, HUD sold the property to the local municipality for \$10. On appeal from the district court decision, the United States Court of Appeals for the Fifth Circuit concluded that all the owners' claims were moot except for their declaratory relief claim that HUD had violated its regulations when it ignored their request for a rent increase and demanded that \$2 million be put in escrow for the repairs. On that claim the Fifth Circuit held that HUD had acted arbitrarily and capriciously and in violation of the *Administrative Procedure Act*. The owners then filed a class action suit in the Court of Federal Claims on behalf of themselves and other similarly situated owners to collect damages for HUD's conduct.

The Court of Federal Claims rejected the class certification request after reviewing eight factors that are to be considered in deciding to certify a class. The court found that the individual questions of fact predominated over the common questions of law because each class member would have to prove her individual damages. It also found that plaintiffs were not typical of the class because each class member had a different relationship with HUD. Moreover, it was not convinced that the claim of each putative class member would be too small to pursue individually. Lastly, it did not find a significant risk of inconsistent adjudications if each putative class member were to sue on her own behalf. Since the putative class failed in four of the eight factors, the court denied class certification.

Vargas v. 1387 Grand Concourse Realty Corporation, 732 N.Y.S. 2d 6 (Nov. 1, 2001). A state appellate court in New York City upheld summary judgment against plaintiff-tenants who had filed a § 1983 claim against the New York City Housing Authority alleging municipal indifference to "shoddy" lead paint inspections of Section 8 units. The court concluded that the plaintiffs had not submitted any evidence showing that the housing authority condoned poor inspections or that it failed to adequately train inspectors. It found

that nine complaints filed over an 11-year period for the 75,000 units administered by the housing authority insufficient to indicate a pattern of indifference.

Housing Authority for Prince George's County v. Williams, 784 A. 2d 621 (Nov. 2, 2001). The Maryland Court of Special Appeals reversed a lower court's denial of the housing authority's motion for judgment for possession against a tenant whose minor children engaged in criminal drug activity. The public housing tenant's minor son was arrested for distribution of cocaine, leading the housing authority to move to terminate the tenancy. The authority and tenant entered into a settlement agreement incorporating language mirroring the lease provision that the tenant, "member's [sic] of tenant's household, and any guests under tenant's control, will not engage in criminal activity, including but not limited to 'drug-related activity,' on or near tenant's premises. . . ." Less than a year later, the tenant's other minor son was arrested for possession of marijuana and the housing authority instituted eviction proceedings. The lower court concluded that since a minor is dealt with through the juvenile system—by definition not criminal—there was no violation of the agreement, and denied the authority's motion for judgment.

The appellate court reversed, finding that although a juvenile proceeding is not criminal, the underlying behavior may still be criminal, thus possibly constituting a violation of the agreement and the lease. However, it stopped short of granting the eviction. Instead, after acknowledging that the tenant could not simply order her minor children from the house, that allowing them to remain will have an impact on other tenants who wish to live in a crime-free environment and that innocent tenants do not wish to be evicted for the actions of others, the court remanded the case for an evidentiary hearing at which all relevant circumstances be considered, including the knowledge of the tenant and the efforts she took to control her sons' behavior. The court suggested that if the tenant had done everything possible to curtail her sons' illegal activities and if she was wholly without knowledge of their crimes, the application to evict the tenant should be denied.

Housing Authority of Joliet v. Keys, 2001 WL 1,636,500 (Ill. App., Dec. 14, 2001). In a split decision, the court upheld a lower court's ruling that an innocent grandmother could not be evicted from public housing for her adult grandson's criminal behavior. While the named tenant, a frail, elderly woman was hospitalized, her adult grandson, a listed household member, robbed and shot someone at the residence. The housing authority instituted eviction proceedings against the tenant based on a lease provision stating that the "tenant, any member of the tenant household, a guest, or another person under the tenant's control shall not engage in or permit . . . criminal activity on or off the premises. . . ." The trial court entered judgment in the tenant's favor because she had no knowledge of the crime and no control of the actions of her grandson. Focusing on the definition of "control," the appellate court concluded that the word means more than merely granting access to property, that the grandmother did

not have “control” over her grandson’s actions, and that she could not be evicted for those actions. Additionally, the court noted that construing the language, as the housing authority suggested, to permit her eviction would lead to absurd results such as tenants being evicted for the behavior of invited insurance salesmen. Addressing the ambiguity in the language regarding whether “control” modifies only “another person” or all the people listed including household members, the court reasoned that ambiguous lease terms must be construed against the drafter, in this case the housing authority. Moreover, upon reviewing the legislative history on which the lease language was based, the court found that Congress did not intend for the eviction of innocent tenants. And, while it noted potential constitutional due process concerns, it did not rule upon them. The dissent in the case argued that the lease was not ambiguous and that it imposed strict liability on the tenants for the acts of others.

Vasquez v. Housing Authority of the City of El Paso, 271 F.3d 198 (5th Cir., 2001). In a split decision, the Court of Appeals for the Fifth Circuit reversed a lower court’s grant of summary judgment for the Housing Authority of the City of El Paso (HACEP) preventing the distribution of political fliers on public housing grounds by nonresidents. A candidate for political office and a public housing resident filed a complaint in district court against the housing authority challenging, on First Amendment grounds, its enforcement of trespass regulations against candidates engaged in door-to-door campaigning. The regulations limited access to housing authority property to residents, members of their households, their guests and visitors and such other persons who have legitimate business on the premises, prohibited the distribution of notices and flyers without the housing manager’s prior approval, set time limits for entering the property and forbade leaving flyers on the doors of residents who do not answer.

The Fifth Circuit reversed the grant of summary judgment in favor of HACEP, concluding that the regulations constituted an unreasonable restriction on the tenant’s right to receive political information. While concluding that public housing grounds were nonpublic fora for purposes of First Amendment analysis and that the regulations were viewpoint-neutral, the court, nonetheless, reasoned that door-to-door campaigning is fundamental to the political process and sometimes the only method possible for distributing information to low-income people. It found that HACEP’s crime prevention goal did not outweigh this important information dissemination method. The court concluded that HACEP’s safety concerns could be met by simply requiring distributors of political notices to first get permission from the management and that restricting all political leafleting was an “unreasonable restriction on the freedoms guaranteed by the First Amendment.”

The dissent in the case argued that, in a nonpublic forum, the government’s restriction need only be reasonable, rather than the best possible method of advancing its goals. In light of safety concerns for the elderly population of the building, the dissenter found the regulations to be reasonable.

East Hartford Housing Authority v. Morales, 2001 WL 1,474,833 (Conn. App., Nov. 27, 2001). The appellate court affirmed the lower court’s ruling that a tenant in a Section 8 housing project needs to pay to the court registry only the tenant share of the rent, or \$72 per month, rather than full market rent of \$518. The East Hartford Housing Authority (EHHA) instituted eviction proceedings against the tenant for failure to pay rent. The trial court judge granted EHHA judgment for possession but stayed execution of the judgment for an additional month and ordered the tenant to pay \$72, the tenant share of the rent, to the court registry. EHHA appealed both the stay and the amount of the payment.

The appellate court concluded that the appeal of the stay was procedurally waived. As to the rent amount, the court found that EHHA had not followed the federal notice requirements necessary to adjust the tenant’s rent to the full market rent. Thus, the court held that even though the tenant had not properly recertified her rent with EHHA, EHHA was not entitled to claim the full market rent until it complied with the procedural and notice requirements of the Section 8 regulations. The court thus upheld the lower court’s ruling.

Barnes v. Chicago Housing Authority, 2001 WL 1,568,385 (Ill. App., Dec. 3, 2001). The appellate court upheld the grant of summary judgment in favor of the defendant, the Chicago Housing Authority (CHA) and LeClaire Courts Resident Management Corporation (LCRMC), which held that under Illinois law, CHA and LCRMC were immune from suit brought by a public housing tenant based on their failure to provide adequate security in the housing development. The plaintiff, a tenant in a CHA development that was managed by LCRMC, was shot and paralyzed from the waist down when he intervened in an attack by gang members on his daughter. He brought a damage action against both entities alleging willful and wanton misconduct in not providing adequate security. The injury occurred during a six-to-eight week period when no security was provided at the development because LCRMC’s contract with a security company, which was subject to CHA’s approval, expired before CHA approved a new contract. The trial court granted CHA’s motion to dismiss and LCRMC’s motion for summary judgment, holding that both entities were immune from suit pursuant to Illinois’s *Tort Immunity Act*.

The appellate court upheld the rulings, concluding that CHA was a “local public entity” and immune under the statute. The court’s conclusion was predicated on its finding that LCRMC participated in the business of government, was entirely government funded and that it was subject to strict CHA and federal regulations. Because it was essentially government run, the appellate court concluded that it qualified for the same immunities as CHA. The appellate court also rejected the tenant’s argument that the *Tort Immunity Act* was unconstitutional. Thus, the tenant was left with no recourse.

Alexander Investment v. United States, 51 Fed. Cl. 102 (Dec. 5, 2001). The United States Court of Federal Claims held that federal legislation that prevented Section 221(d)(3) and Section 236

building owners from prepaying their private but federally insured mortgages did not amount to an unconstitutional taking. Plaintiff-owners had entered into agreements with HUD and lenders in the 1970s to receive below market rate, or subsidized, mortgages. In exchange, the owners agreed to maintain the units in the buildings as low-income housing for the duration of the promissory note. A right of prepayment was set out in the notes with the lenders, permitting owners to prepay their mortgages without HUD approval after 20 years, thus terminating the obligation to maintain the low-income use of the property. The prepayment language did not appear in the owners' Regulatory Agreements with HUD. However, before the 20-year period had expired, Congress enacted the *Emergency Low Income Housing Preservation Act of 1987* (ELIHPA), followed by the *Low Income Housing Preservation and Resident Homeownership Act of 1990* (LIHPRHA), the combined effect of which was to place severe limitations on the owners' right to prepay their notes and to require HUD approval for any prepayment. When the plaintiffs applied to HUD to prepay their notes, HUD denied the request. The plaintiffs sued the United States for breach of contract and for a Fifth Amendment taking of their right to prepay. The Claims Court concluded that in order to establish a takings claim, the plaintiffs must establish that they were the owners of property and that property was taken by the government for public use. Because the prepayment provisions were in the note and not in the regulatory agreements with the United States, the court found that there was no privity of contract between the United States and the owners and that therefore they had no property right which could have been taken. Further, it found that the notes were expressly subject to any future amendment to HUD regulations that did not harm the lenders. The court rejected the owners' argument that a regulatory taking took place because: the government action was not aimed at harming the owners; the economic impact on the owners was, at worst, a diminution of value, rather than a complete loss of property; and the owners entered into a highly regulated realm of government assisted housing, benefitted from the program, and were fully aware of the risk that the law could change. Since the prepayment rights were subject to changes in the law, no property right to prepay ever vested for the owners, and no Fifth Amendment taking could take place. The court thus granted the United States' motion for summary judgment.

Chancellor Manor v. United States, 2001 WL 1,529,617 (Fed. Cl., Nov. 30, 2001). The United States Court of Federal Claims held that the federal legislation that prevented Section 221(d)(3) and Section 236 building owners from prepaying their private but federally insured mortgages did not amount to an unconstitutional taking. Plaintiff-owners had entered into agreements with HUD and lenders in the 1970s to receive below market rate, or subsidized, mortgages. In exchange, the owners agreed to maintain the units in the buildings as low-income housing for the duration of the promissory note. A right of prepayment was set out in the notes with the lenders, permitting owners to prepay their

mortgages without HUD approval after 20 years, thus terminating the obligation to maintain the low-income use of the property. The prepayment language did not appear in the owners' Regulatory Agreements with HUD. However, before the 20-year period had expired, Congress enacted the *Emergency Low Income Housing Preservation Act of 1987* (ELIHPA), followed by the *Low Income Housing Preservation and Resident Homeownership Act of 1990* (LIHPRHA), the combined effect of which was to place severe limitations on the owners' right to prepay their notes and to require HUD approval for any prepayment. These restrictions were however lifted by the *Housing Opportunity Program Extension Act of 1996* (HOPE).

One of the plaintiff-owners 20-year restrictive period expired while LIHPRHA was still in effect, but before the *HOPE Act* was passed. Given the choice under ELIHPA and LIHPRHA of simply continuing the mortgage payments, selling the property to a nonprofit or receiving financial incentives to maintain the property as low-income housing for the useful life of the property, the owner accepted the incentives and thus committed to maintain the affordable nature of the property for the next 50 years or more. ELIHPA and LIHPRHA delayed two other owners' ability to prepay their loans, but they had not signed incentive agreements before the passage of the HOPE Act. Thus, they were able to prepay their mortgages when that statute lifted the restrictions. All the owners brought a damage action against the United States, alleging breach of contract and Fifth Amendment takings.

The Court of Federal Claims granted the United States' motion for summary judgment against all of the owners. After rejecting a number of creative argument by the plaintiffs, including a third-party beneficiary argument and a judicial estoppel argument, the court found no privity of contract with the United States because the Regulatory Agreements between the owners and the United States did not contain the prepayment provisions. As in *Alexander* (above), the court found that the promissory notes were subject to possible changes in the law and that the owners were aware of such risk. The only caveat was that regulatory amendments could not have an adverse effect on the lenders. As HUD was thus not a party to the notes, the United States did not breach the contracts. As to the takings claims, the court concluded that, because the notes were subject to possible changes in the law and regulations, the owners never had a vested interest in their right to prepay their loans. Since ELIHPA and LIHPRHA superceded the owners' contracts with the lenders, they eliminated the owners right to prepay. However, since the right to prepay never vested, the court concluded that there could be no Fifth Amendment taking.

City of Salem v. Salem Heights Apartment Co., 2001 WL 1,562,418 (Mass. Housing Ct., Nov. 30, 2001). Relying exclusively on state contract law, a Massachusetts housing judge granted the City of Salem's motion for summary judgment, effectively preventing a landlord from prepaying a Section 236 mortgage note. In 1973, Salem approved the owner's application to build a low-income housing development and

executed a regulatory agreement pursuant to Massachusetts law. The owners also executed a mortgage note and a HUD Regulatory Agreement under Section 236 of the *National Housing Act*. These agreements permitted the owners to receive interest rate subsidies in exchange for providing low-income housing in the development. The owner's note provided that the owner could prepay its loan without HUD permission after 20 years, but that prepayment right was severely curtailed by ELIHPA and LIHPRHA, but then reinstated under the *HOPE Act*. In April 2000, the owners notified the tenants that they intended to prepay the mortgage and replace their subsidies with vouchers. Salem objected, claiming that the vouchers were inadequate replacement subsidies for a number of reasons, including the requirement that tenants be rescreened for voucher eligibility, the potential termination of the vouchers if the housing were to become too expensive or too run down and the diminution of available low-income housing stock in the city. Salem filed suit and obtained a preliminary injunction preventing the prepayment.

On the city's motion for partial summary judgment, the court found that even though the Section 236 contract did not obligate the owners to maintain the affordable nature of the housing for the term of the mortgage, a separate contract between the owners and the city, required by Massachusetts state law, obligated the owners to maintain the low-income use of the property for 40 years and to operate the development on a limited-profit basis without a right to prepay. Thus, the court granted the city's motion for summary judgment on the breach of contract claim but allowed for possibility that the owner could find another way to comply with the contract without maintaining the Section 236 mortgage and accompanying subsidies in place. In so doing, the court rejected the owner's contention that federal provisions allowing for a prepayment after 20 years preempted the 40-year state contract provision. ■

**Life's unfairness is not irrevocable;
we can help balance the scales for
others, if not always for ourselves.**

—Hubert Humphrey

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD) and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued through December 31, 2001. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

Copies of the cited documents may be secured from various sources, including (1) the Government Printing Office's Web site on the World Wide Web,¹ (2) bound volumes of the *Federal Register*, (3) HUD Clips,² (4) HUD,³ and (5) USDA's/Rural Development Web page.⁴ Citations are included with each document to help you secure copies.

HUD Regulations

66 Fed. Reg. 63,436 (December 6, 2001)

Amendments to HUD's Civil Money Penalty Regulations

Summary: This rule implements sections 561 and 562 of the *Multifamily Assisted Housing Reform and Affordability Act of 1997* (MAHRAA). These sections concern HUD's ability to impose civil money penalties. Section 561 expands the list of parties and violations subject to civil money penalties related to multifamily properties. Section 562 authorizes HUD to impose civil money penalties for violations of Section 8 project-based housing assistance payments contracts.

Effective Date: January 7, 2002.

HUD Federal Register Proposed Rules

66 Fed. Reg. 60,132 (November 30, 2001)

Uniform Financial Reporting Standards for HUD Housing Programs, Additional Entity Filing Requirements

Summary: This rule proposes to amend HUD's regulation on Uniform Financial Reporting Standards by adding HUD Approved Title I and Title II non-supervised lenders, non-supervised mortgagees, and loan correspondents to the covered entities required to electronically submit annual financial information to HUD prepared in accordance with generally accepted accounting principles. Under long-standing regulatory and contractual requirements, these entities already submit financial information to HUD on an annual basis.

Comment Due Date: January 29, 2002.

¹At www.access.gpo.gov/su_docs.

²At www.hudclips.org/cgi/index.cgi.

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

⁴At www.rdinit.usda.gov/regs.

66 Fed. Reg. 60,128 (November 30, 2001)
Appraiser Qualifications for Placement on FHA Single Family Appraiser Roster

Summary: This proposed rule would make several regulatory changes designed to strengthen the licensing and certification requirements for placement on the FHA Appraiser Roster. First, the proposed rule would require that appraisers on the Appraiser Roster must have professional credentials that are based on the minimum licensing/certification standards issued by the Appraiser Qualifications Board of the Appraisal Foundation. The proposed rule also clarifies that an appraiser may be removed from the Appraiser Roster if the appraiser loses his or her license or certification in any state due to disciplinary action, even if the appraiser continues to be licensed or certified in another state. Finally, the proposed rule provides that an appraiser who is licensed or certified in a single state and whose license or certification has expired or has been revoked, suspended or surrendered as a result of a state disciplinary action, will be automatically suspended from the Appraiser Roster until HUD receives evidence demonstrating renewal or that the state imposed sanction has been lifted.

Comment Due Date: January 29, 2002.

66 Fed. Reg. Page 61,636 (December 3, 2001)
Semi-Annual Regulatory Agenda

Summary: In accordance with section 4(b) of Executive Order 12866, *Regulatory Planning and Review*, HUD is publishing its agenda of (1) regulations already issued or that are expected to be issued over the next several months, and (2) currently effective rules that are under review. The purpose of publication of the agenda is to encourage more effective public participation in the regulatory process by providing the public with early information about pending regulatory activities.

66 Fed. Reg. 65,162 (December 18, 2001)
Uniform Financial Reporting Standards For HUD Housing Programs, Additional Entity Filing Requirements

Summary: On November 30, 2001, HUD published a proposed rule entitled *Uniform Financial Reporting Standards for HUD Housing Programs, Additional Entity Filing Requirements*. The preamble to the rule (although not the rule text) misstates the date by which the financial statements of entities covered by the rule must submit their financial statements electronically. This notice corrects the preamble.

HUD Federal Register Notices

66 Fed. Reg. 59,052 (November 26, 2001)
Section 8 Housing Assistance Payments Program—Contract Rent Annual Adjustment Factors, Fiscal Year 2002

Summary: This notice announces revised Annual Adjustment Factors (AAFs) for the adjustment of Section 8 contract rents on housing assistance payment contract anniversaries from October 1, 2001. The AAFs are based on a formula using data on residential rent and utility cost changes from the

most current Bureau of Labor Statistics Consumer Price Index (CPI) survey and from HUD's Random Digit Dialing (RDD) rent change surveys.

Effective Date: October 1, 2001.

66 Fed. Reg. 59,080 (November 26, 2001)
Public Housing Assessment System (PHAS) Information About PHAS Interim Scoring, Methodology for Public Housing Agencies (PHAs) With Fiscal Years Ending On or After September 30, 2001

Summary: HUD assesses America's PHAs under the Public Housing Assessment System (PHAS). Under the PHAS, HUD evaluates PHAs based on four key indicators: (1) The physical condition of the PHA's properties; (2) the PHA's financial condition; (3) the PHA's management operations; and (4) the residents' assessment (through a resident survey) of the PHA's performance. This notice, together with two other notices published concurrently, provides additional information on an interim PHAS scoring process for two of the four PHAS indicators and other relevant information about PHAS scoring.

66 Fed. Reg. 59,084 (November 26, 2001)
Public Housing Assessment System Physical Condition Scoring Process Interim Scoring, Corrections and Republication

Summary: This notice provides additional information to PHAs about the interim scoring methodology for scoring PHAs under the Physical Condition Indicator of the PHAS. This interim scoring is effective for PHAs with FYs ending September 30, 2001, December 31, 2001, March 31, 2002, June 30, 2002, and September 30, 2002. After the interim period, the Department will determine a PHA's PHAS Physical Condition Indicator score in accordance with the scoring process of this notice, excluding the modification in the calculation of the area weights for the five inspectible areas.

Comment Due Date: December 26, 2001.

66 Fed. Reg. 59,126 (November 26, 2001)
Public Housing Assessment System (PHAS): Financial Condition Scoring Process Interim Assessments

Summary: This notice is an update of the Financial Condition Indicator scoring notice that was published on December 21, 2000 and takes into consideration public comment received from PHAs, public housing industry and resident groups and other interested Federal and Congressionally chartered agencies. This notice describes an interim scoring process for PHAs on the Financial Condition Indicator of PHAS. This interim process is effective for PHAs with fiscal year ends (FYE) of September 30, 2001, December 31, 2001, March 31, 2002, June 30, 2002, and September 30, 2002. After the interim period, the Department will use the scoring process described in the Financial Condition Scoring notice published December 21, 2000 to determine a PHA's PHAS Financial Condition Indicator score.

Comment Due Date: December 26, 2001.

66 Fed. Reg. 63,247 (December 5, 2001)
Public Housing Assessment System (PHAS) Financial Condition and Physical Condition Interim Scoring Notices Correction; Location for Submission of Public Comments

Summary: On November 26, 2001, HUD published two notices that advised of interim scoring processes under HUD's PHAS for the PHAS Physical Condition Indicator and for the PHAS Financial Condition Indicator. The notices also solicited public comment but omitted the location where public comments could be submitted. This notice provides that information.

66 Fed. Reg. 63,547 (December 7, 2001)
Announcement of Funding Awards; Indian Housing Drug Elimination Program; Fiscal Year 2001

Summary: On October 19, 2001 (66 FR 53242), the Department published a notice that announced the funding awards for FY 2001 funding for its Indian Housing Drug Elimination Program. This document makes a correction to the list of funded applicants.

66 Fed. Reg. 63,717 (December 10, 2001)
Mortgagee Review Board; Administrative Actions

Summary: In compliance with section 202(c) of the *National Housing Act*, notice is hereby given of the cause and description of administrative actions taken by HUD's Mortgagee Review Board against HUD-approved mortgagees.

HUD Notices

Notice PIH 2001- 40 (HA) (November 14, 2001)
Operation Enduring Freedom

Summary: This notice provides general guidance to PHAs administering Public Housing and/or Section 8 Housing Choice Voucher and Moderate Rehabilitation programs and owners participating in the Section 8 Housing Choice Voucher program, on providing support for families and dependents of military personnel (including reservists and guardsmen) called to active duty during Operation Enduring Freedom.

Expires: November 30, 2002.

Notice PIH 2001-41 (HA)(November 14, 2001)
Section 8 Tenant-Based Assistance (Enhanced and Regular Housing Choice Vouchers) For Housing Conversion Actions—Policy and Processing Guidance

Summary: This notice revises the funding process and several administrative policies concerning regular and enhanced vouchers provided as the result of housing conversion actions.

Expires: November 30, 2002.

Notice PIH 2001-42 (TDHEs)(November 30, 2001)
Total Development Costs (TDC) for Affordable Housing under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA)

Summary: This notice supersedes Notice PIH 2000-30 (TDHEs), *Dwelling Construction and Equipment (DC&E) Costs*,

dated August 14, 2000. This notice transmits the schedule for the maximum amount of funds that may be used per unit for TDC costs of affordable housing under NAHASDA.

Expires: November 30, 2002.

Notice PIH 2001-43 (HA)(December 5, 2001)
December 2001 Semi-Annual Assessment Process for the Public and Indian Housing Information Center (PIC) Form 50058 Reporting

Summary: The Office of Public and Indian Housing (PIH) will not conduct the December 2001 semiannual assessment process for both Section 8 and public housing, as established under Notice PIH 2000-13, in order to provide sufficient time for the full implementation of the new PIC Form 50058 module.

Expires: December 31, 2002.

Notice H 2001-08 (August 1, 2001)
Fiscal Year 2001 Annual Operating Cost Standards—Section 202 Supportive Housing for the Elderly and Section 811 Supportive Housing for Persons with Disabilities Programs

Summary: Attached to this notice are the Operating Cost Standards (OCS) which HUD Office staff should use for calculating the annual per person/per unit amount of a Project Rental Assistance Contract (PRAC) when making FY 2001 subsidy fund reservations for Capital Advance applications under the subject programs. These Standards have been updated using the National Consumer Price Index (CPI) of housing changes for 2000. Each HUD Office should adjust these Standards downward to accommodate any lower-cost area within its jurisdiction when locally developed cost data so indicate.

Expires: August 31, 2002.

Notice H 2001-12 (HUD)(November 20, 2001)
Reinstatement and Extension of Notice H 95-55, Procedures for Implementing Section 214 of the Housing and Community Development Act of 1980, as amended—Restrictions on Assistance to Noncitizens

Summary: Notice H 95-55 and related Notices (H 95-68, H 96-52, H 96-88, and H 99-34) are being reinstated and extended to November 30, 2002.

Expires: November 30, 2002.

Notice H 2001-14 (HUD)(December 7, 2001)
Increase in FHA Multifamily Statutory Per Unit Limits and Revised High Cost Percentages

Summary: The President has signed the *HUD Appropriations Act* implementing an increase of 25 percent in the statutory per unit mortgage limits in the *National Housing Act* for the FHA multifamily mortgage insurance programs. The new limits are effective for all project mortgages that have not been initially endorsed. Multifamily Hubs can consider requests for reprocessing from mortgagees with outstanding Firm Commitments that have not been initially endorsed.

Expires: December 31, 2002.

Notice H 2001-15 (December 12, 2001)
**Extension of “Revitalization Area Evaluation Criteria—
Single Family Property Disposition”**

Summary: Notice H 00-16, issued on August 18, 2000 and titled *Revitalization Area Evaluation Criteria for Single Family Property Disposition*, is extended to August 31, 2002.

Expires: December 31, 2002.

RHS Notices

RD AN No. 3688 (2018-F)(December 5, 2001)
**New Policy Memorandum on the Freedom of Information
Act from the New Attorney General**

Summary: On October 12, 2001, Attorney General John Ashcroft issued a new policy memorandum on the Freedom of Information Act (FOIA), 5 U.S.C. 552. This FOIA policy statement supersedes the former Attorney General, Janet Reno, FOIA policy statement that was issued by the Department of Justice in October 1993. This Administrative Notice (AN) addresses a new standard with respect to withholding records in response to FOIA requests.

RHS Unnumbered Letters

**Clarification and Guidance on the Documents Required in
Determining an Applicant Eligible for 502 Direct/504 Loan/
Grant Assistance (December 13, 2001)**

Summary: The purpose of this unnumbered letter is to provide clarification and guidance in determining an applicant's eligibility for Section 502 Direct/Section 504 loan/grant assistance. The Management Control Review (MCR) for the Section 504 loan/grant program, which was conducted in FY 2000, indicated that some field offices were requiring applicants to provide copies of their driver's license or divorce decree in order to determine eligibility. ■

INDEX

HOUSING LAW BULLETIN

January - December 2001

	Issue	Page
ARTICLES OF GENERAL INTEREST		
<i>(see also FAIR HOUSING/DESEGREGATION; LEGISLATION; WELFARE AND HOUSING)</i>		
Rapidly Increasing Energy Costs Raise Utility Allowance Issues	June 01	125
Support Builds for New Production Bills.	Sept 01	210
Recent Articles and Publications of Interest	Oct 01	225
National Low Income Housing Coalition Releases 2001 <i>Out of Reach</i> Report:		
Disparity Between Rents and Minimum Wage Keeps Growing	Oct 01	241
Protections for Military Renter Households Under the Soldiers' and Sailors' Civil Relief Act . .	Nov/Dec 01	262
Domestic Abuse Victim Settles Discriminatory Eviction Claim Favorably	Nov/Dec 01	265
CERTIFICATE PROGRAM <i>(see SECTION 8 PROGRAMS—Voucher Program)</i>		
CONSTITUTIONAL ISSUES		
<i>(see also CRIMINAL ACTIVITY AND DRUGS; DISCRIMINATION; FAIR HOUSING/DESEGREGATION; PUBLIC HOUSING; TENANT PARTICIPATION)</i>		
<i>En Banc</i> 9 th Circuit Reverses Panel's Earlier Decision in <i>Rucker v. Davis</i>	Jan 01	3
Florida PHA Found in Contempt of Order Enjoining It from Using Lease Provisions on Jury Waiver and Loitering	Feb 01	50
Federal Court in Florida Issues Preliminary Injunction Ordering PHA to Cease Warrantless Searches	Feb 01	51
Virginia Court Reverses Conviction for Trespass on Privatized Streets Surrounding Public Housing	Jul/Aug 01	182
Supreme Court to Review <i>Rucker</i> Decision	Sept 01	197
California Tenants Have No Constitutional Right to Distribute Newsletter	Oct 01	244
CRIMINAL ACTIVITY AND DRUGS		
<i>(see also CONSTITUTIONAL ISSUES; FAIR HOUSING/DESEGREGATION)</i>		
<i>En Banc</i> 9 th Circuit Reverses Panel's Earlier Decision in <i>Rucker v. Davis</i>	Jan 01	3
Criminal Activity Must Be Within "Immediate Vicinity" in Order to Merit Section 8 Termination	Jan 01	16
<i>En Banc</i> 9 th Circuit Rules that "One-Strike" Law Does Not Permit Eviction of "Innocent Tenants"	Feb 01	29
Federal Court in Florida Issues Preliminary Injunction Ordering PHA to Cease Warrantless Searches	Feb 01	51
Pennsylvania Appellate Court Again Rejects Strict "One-Strike" Eviction Policy	Apr 01	96
Screening and Eviction for Drug Use and Other Criminal Activity in HUD-Assisted Housing	June 01	140
<i>Writ of Certiorari</i> Sought in <i>Rucker</i>	June 01	143
Supreme Court to Review <i>Rucker</i> Decision	Sept 01	197
California Section 8 Tenants are Entitled to a 90-Day Notice of Lease Termination	May 01	117
Screening and Eviction for Drug Use and Other Criminal Activity in HUD-Assisted Housing	June 01	140

	Issue	Page
DECONCENTRATION (see PUBLIC HOUSING—Deconcentration)		
DISCRIMINATION (see also FAIR HOUSING/DESEGREGATION; SECTION 8 PROGRAMS)		
The Case for Applying California’s Source of Income Anti-Discrimination Statute to Section 8 Tenants	June 01	147
Racial Concentration in the Housing Choice Voucher Program	Oct 01	223
Domestic Abuse Victim Settles Discriminatory Eviction Claim Favorably	Nov/Dec 01	265
DRUGS (see CRIMINAL ACTIVITY AND DRUGS)		
EMPLOYMENT (see WELFARE AND HOUSING)		
EVICCTIONS		
<i>En Banc</i> 9 th Circuit Reverses Panel’s Earlier Decision in <i>Rucker v. Davis</i>	Jan 01	3
Criminal Activity Must Be Within “Immediate Vicinity” in Order to Merit Section 8 Termination	Jan 01	16
Tenant Responsible to PHA for Late Fees, Attorney Fees and Court Costs in Summary Dispossession Action	Jan 01	18
Pennsylvania Appellate Court Again Rejects Strict “One-Strike” Eviction Policy	Apr 01	96
<i>Writ of Certiorari</i> Sought in <i>Rucker</i>	June 01	143
Protections for Military Renter Households Under the Soldiers’ and Sailors’ Civil Relief Act	Nov/Dec 01	262
Domestic Abuse Victim Settles Discriminatory Eviction Claim Favorably	Nov/Dec 01	265
FAIR HOUSING/DESEGREGATION		
(see also HUD; LEGISLATION; DISCRIMINATION; CONSTITUTIONAL ISSUES; PUBLIC HOUSING)		
Deconcentration Final Regulations Are Published	Jan 01	10
HUD Issues Additional Guidance for Second Year PHA Plans	Feb 01	34
Fair Housing Litigation to Prevent the Loss of Federally Assisted Housing: The Duties of Public Housing Authorities and Project Owners (Part One of Two Articles)	Apr 01	73
Fair Housing Litigation to Prevent the Loss of Federally Assisted Housing: The Duties of Public Housing Authorities and Project Owners (Part Two of Two Articles)	Jul/Aug 01	157
Racial Concentration in the Housing Choice Voucher Program	Oct 01	223
Public Housing Deconcentration Policy Delayed and Weakened Again	Nov/Dec 01	255
FARMERS HOME ADMINISTRATION (FmHA) (see RURAL HOUSING SERVICE)		
HOMEOWNERSHIP (see HUD; LEGISLATION; SECTION 8 PROGRAM—Homeownership)		
HOPE VI PROGRAM (see also PUBLIC HOUSING)		
Survey of the Proportion of Family Public Housing Rental Units Included in HOPE VI Revitalization Sites: FY 1998, 1999, 2000 Awards	Feb 01	45
Steps That HUD and PHAs Should Take to Facilitate Self-Sufficiency in the Public Housing Program: A Brief Overview	Oct 01	237

	Issue	Page
HOUSING AND URBAN DEVELOPMENT, DEPARTMENT OF (HUD)		
<i>(see also ARTICLES OF GENERAL INTEREST; FAIR HOUSING/DESEGREGATION; LEGISLATION; PUBLIC HOUSING; PRESERVATION; SECTION 8 PROGRAMS—Voucher Program)</i>		
HUD Issues Additional Guidance for Second Year PHA Plans	Feb 01	34
HUD Issues New Section 8 Renewal Policy Guide	Mar 01	61
Admission and Occupancy FAQs Answered by HUD	Mar 01	64
Second HUD Report on “Vouchered-Out” Assisted Properties	Mar 01	68
HUD Data on Section 8 Projects	May 01	116
HUD Issues Partial Final Rule on the Voluntary Conversion of Public Housing Developments to Vouchers	Jul/ Aug 01	171
HUD Publishes Proposed Rule and Interim Rule Affecting Existing Section 8 Homeownership Program	Jul/ Aug 01	173
HUD Proposes Another Initiative to Improve the Income Verification and Rent Determination Process	Sept 01	202
HUD FY 2002 Appropriations Enacted	Nov/Dec 01	251
HUD “Clarifies” PHAs’ Ability to Convert Public Housing to Vouchers Without Regulations	Nov/Dec 01	253
HUD Issues Comprehensive Guide for the PHA Planning Process	Nov/Dec 01	257
Budget		
HUD FY 2002 Budget May Be Worse Than It Looks	Mar 01	59
HUD Budget Cuts Public Housing, Modestly Increases Vouchers and Leaves Most Other Programs at Current Funding Levels	Apr 01	92
HUD FY 2002 Appropriations Enacted	Nov/Dec 01	251
HOUSING JUSTICE NETWORK (LALSHAC)		
Supplemental LALSHAC Materials	Jan 01	17
HOUSING PRODUCTION/INCREASING THE SUPPLY OF HOUSING		
Support Builds for New Production Bills	Sept 01	210
Stamford Adopts a One-for-One Replacement Ordinance	Nov/Dec 01	260
JOBS <i>(see WELFARE AND HOUSING)</i>		
LALSHAC <i>(see HOUSING JUSTICE NETWORK)</i>		
LEGISLATION <i>(see also HUD—Budget; RURAL HOUSING SERVICES)</i>		
Congress Increases Caps on Low-Income Housing Tax Credits and Private Activity Bonds . . .	Feb 01	49
Support Builds for New Production Bills	Sept 01	210
Preservation Bills Resurrected	Sept 01	214
HUD FY 2002 Appropriations Enacted	Nov/Dec 01	251
LOW INCOME HOUSING TAX CREDIT (LIHTC)		
Congress Increases Caps on Low-Income Housing Tax Credits and Private Activity Bonds . . .	Feb 01	49
MOBILITY <i>(see DISCRIMINATION; FAIR HOUSING/DESEGREGATION; PUBLIC HOUSING—Deconcentration)</i>		

PRESERVATION OF LOW-INCOME HOUSING STOCK

(see also LEGISLATION; HUD; SECTION 8 PROGRAMS—Voucher Program; TENANT PARTICIPATION)

California Adopts Improved Notice Requirements for Federal Housing Conversions	Jan 01	14
HUD Issues New Section 8 Renewal Policy Guide	Mar 01	61
Second HUD Report on “Vouchered-Out” Assisted Properties	Mar 01	68
Nationwide Settlement Affecting Tenants’ Rights at RTC Properties	Mar 01	69
Fair Housing Litigation to Prevent the Loss of Federally Assisted Housing: The Duties of Public Housing Authorities and Project Owners (Part One of Two Articles)	Apr 01	73
HUD Data on Section 8 Projects	May 01	116
Fair Housing Litigation to Prevent the Loss of Federally Assisted Housing: The Duties of Public Housing Authorities and Project Owners (Part Two of Two Articles)	Jul/Aug 01	157
Opt-Out and Prepayment of Four Section 8 Projects Preliminarily Enjoined	Jul/Aug 01	180
Preservation Bills Resurrected	Sept 01	214
Ninth Circuit Authorizes Circumvention of RHS Section 515 Preservation Statute Through a Quiet Title Action	Sept 01	216
Texas Adopts Affordable Housing Preservation Law	Oct 01	242
Stamford Adopts a One-for-One Replacement Ordinance	Nov/Dec 01	260

PUBLIC HOUSING (see also CONSTITUTIONAL ISSUES; FAIR HOUSING/DESEGREGATION; HOPE VI; HUD; SECTION 8 PROGRAMS; TENANT PARTICIPATION)

Criminal Activity Must Be Within “Immediate Vicinity” in Order to Merit Section 8 Termination	Jan 01	16
Tenant Responsible to PHA for Late Fees, Attorney Fees and Court Costs in Summary Dispossession Action	Jan 01	18
<i>En Banc</i> 9 th Circuit Rules that “One-Strike” Law Does Not Permit Eviction of “Innocent Tenants”	Feb 01	29
PHAs Challenged by Implementation of Section 8 Welfare-to-Work Vouchers	Feb 01	38
Survey of the Proportion of Family Public Housing Rental Units Included in HOPE VI Revitalization Sites: FY 1998, 1999, 2000 Awards	Feb 01	45
Florida PHA Found in Contempt of Order Enjoining It from Using Lease Provisions on Jury Waiver and Loitering	Feb 01	50
Federal Court in Florida Issues Preliminary Injunction Ordering PHA to Cease Warrantless Searches	Feb 01	51
Admission and Occupancy FAQs Answered by HUD.	Mar 01	64
Fair Housing Litigation to Prevent the Loss of Federally Assisted Housing: The Duties of Public Housing Authorities and Project Owners (Part One of Two Articles)	Apr 01	73
\$27 Million Available for Tenant Participation Activities.	Apr 01	87
HUD Budget Cuts Public Housing, Modestly Increases Vouchers and Leaves Most Other Programs at Current Funding Levels.	Apr 01	92
Pennsylvania Appellate Court Again Rejects Strict “One-Strike” Eviction Policy	Apr 01	96
Rapidly Increasing Energy Costs Raise Utility Allowance Issues.	June 01	125
Public Housing Community Service Policies: Requirements and Advocacy Tips	June 01	135
Screening and Eviction for Drug Use and Other Criminal Activity in HUD-Assisted Housing.	June 01	140
<i>Writ of Certiorari</i> Sought in <i>Rucker</i>	June 01	143
Fair Housing Litigation to Prevent the Loss of Federally Assisted Housing: The Duties of Public Housing Authorities and Project Owners (Part Two of Two Articles)	Jul/Aug 01	157
Virginia Court Reverses Conviction for Trespass on Privatized Streets Surrounding Public Housing.	Jul/Aug 01	182
Promoting Implementation of the Family Self-Sufficiency Program.	Sept 01	193
HUD Proposes Another Initiative to Improve the Income Verification and Rent Determination Process.	Sept 01	202
Steps That HUD and PHAs Should Take to Facilitate Self-Sufficiency in the Public Housing Program: A Brief Overview.	Oct 01	237
Stamford Adopts a One-for-One Replacement Ordinance.	Nov/Dec 01	260

	Issue	Page
Conversion		
HUD Issues Partial Final Rule on the Voluntary Conversion of Public Housing Developments to Vouchers.	Jul/ Aug 01	171
HUD "Clarifies" PHAs' Ability to Convert Public Housing to Vouchers Without Regulations.	Nov/Dec 01	253
Deconcentration		
Deconcentration Final Regulations Are Published.	Jan 01	10
HUD Issues Additional Guidance for Second Year PHA Plans.	Feb 01	34
Public Housing Deconcentration Policy Delayed and Weakened Again	Nov/Dec 01	255
PHA Plan Process		
Updated Residents' Guide to PHA Plans.	Jan 01	9
HUD Issues Additional Guidance for Second Year PHA Plans.	Feb 01	34
HUD Issues Comprehensive Guide for the PHA Planning Process.	Nov/Dec 01	257
RECENT HOUSING CASES*		
Admissions		
<i>Faison v. New York City Housing Authority</i>	June 01	150
Bankruptcy		
<i>Stolz v. Brattleboro Housing Authority</i>	Apr 01	98
<i>Smith v. St. Louis Housing Authority</i>	Apr 01	98
<i>Beckett v. Coatesville Housing Associates</i>	July/ Aug	184
Banning		
<i>Thompson v. Mayor, City of Knoxville</i>	June 01	150
Constitutional Issues		
<i>Noble v. Tooley</i>	Feb 01	51
Criminal Activity/Drugs		
<i>Memphis Housing Authority v. Tara Thompson</i>	Mar 01	70
<i>Faison v. New York City Housing Authority</i>	June 01	150
<i>Lucas Metropolitan Housing Authority v. Carmony</i>	July/ Aug 01	185
<i>Wessington House Apartments v. Clinard</i>	July/ Aug 01	185
<i>Stark Metro Housing Authority v. Dorsey</i>	Oct 01	246
<i>Burton v. Tampa Housing Authority</i>	Nov/Dec 01	267
Environmental Review		
<i>Broward Garden Tenants Association v. United States Environmental Protection Agency</i>	Oct 01	246
Evictions		
<i>Memphis Housing Authority v. Tara Thompson</i>	Mar 01	70
<i>Collins v. Cleme Manor Apartments</i>	Apr 01	97
<i>Stolz v. Brattleboro Housing Authority</i>	Apr 01	98
<i>Smith v. St. Louis Housing Authority</i>	Apr 01	98
<i>Lovejoy v. Intervest Corporation</i>	May 01	120
<i>Turner v. Housing Authority of Baltimore City</i>	May 01	120
<i>Chancellor Manor v. Thibodeau</i>	June 01	150
<i>Chancellor Manor v. Edwards</i>	July/ Aug 01	184

*This is a very abbreviated index of the cases listed in the Recent Housing Cases in each issue of the Bulletin. Not included are cases reported in separate articles.

	Issue	Page
<i>Beckett v. Coatesville Housing Associates</i>	July/Aug 01	184
<i>Youngstown Metropolitan Housing Authority v. Scott</i>	July/Aug 01	184
<i>Lucas Metropolitan Housing Authority v. Carmony</i>	July/Aug 01	185
<i>Fair v. Finkel</i>	July/Aug 01	185
<i>Wessington House Apartments v. Clinard</i>	July/Aug 01	185
<i>Stark Metro Housing Authority v. Dorsey</i>	Oct 01	246
<i>Chambers v. The Habitat Company</i>	Oct 01	248
<i>Burton v. Tampa Housing Authority</i>	Nov/Dec 01	267
 Fair Housing/Discrimination		
<i>Arnold Murray Const., L.L.C. v. Hicks</i>	Mar 01	70
<i>Newell v. Rolling Hills Apartments</i>	Apr 01	97
<i>Robinson, II, v. Gorman and Housing Authority of City of Torrington</i>	May 01	120
<i>Paraquad, Inc. v. St. Louis Housing Authority</i>	Sept 01	219
<i>City of Pittsburgh Commission on Human Relations v. DeFelice</i>	Sept 01	219
<i>Broward Garden Tenants Association v. United States Environmental Protection Agency</i>	Oct 01	246
<i>Walker v. City of Lakewood</i>	Oct 01	247
 Federal Tort Claims Act		
<i>Shade v. Housing Authority of City of New Haven</i>	May 01	120
 Grievance Hearing		
<i>Turner v. Housing Authority of Baltimore City</i>	May 01	120
 Guest Policy		
<i>Young v. Halle Housing Associates</i>	June 01	150
 HOPE VI		
<i>Paraquad, Inc. v. St. Louis Housing Authority</i>	Sept 01	219
 Housing Quality Standards		
<i>Banks v. Dallas Housing Authority</i>	Nov/Dec 01	268
 Lead Based Paint		
<i>Shade v. Housing Authority of City of New Haven</i>	May 01	120
 Preservation/Prepayment		
<i>Cienega Gardens v. United States</i>	Oct 01	248
<i>City Line Joint Venture v. United States</i>	Nov/Dec 01	268
<i>Community Stabilization Project v. Cuomo</i>	Nov/Dec 01	268
 Procedural Issues		
Abstention		
<i>Newell v. Rolling Hills Apartments</i>	Apr 01	97
Class Certification		
<i>James v. City of Dallas, Texas</i>	July/Aug 01	184
Exhaustion		
<i>Alexandria Resident Council v. Alexandria Redevelopment & Housing Authority</i>	July/Aug 01	185
Jurisdiction		
<i>Newell v. Rolling Hills Apartments</i>	Apr 01	97
<i>Rivera v. Phipps Houses Services, Inc.</i>	July/Aug 01	184
<i>Chambers v. The Habitat Company</i>	Oct 01	248

	Issue	Page
Jury Trial		
<i>Collins v. Cleme Manor Apartments</i>	Apr 01	97
Mootness		
<i>Benavides v. Housing Authority of the City of San Antonio, Texas</i>	Nov/Dec 01	268
Rent Payments Pending Eviction		
<i>Lovejoy v. Intervest Corporation</i>	May 01	120
Ripeness		
<i>Paraquad, Inc. v. St. Louis Housing Authority</i>	Sept 01	219
<i>In the Matter of the Application for a Rental Increase at Zion Towers Apartments</i>	Nov/Dec 01	268
Preemption		
<i>City of Country Club Hills v. HUD</i>	Oct 01	247
Private Right of Action		
<i>Banks v. Dallas Housing Authority</i>	Nov/Dec	268
Standing		
<i>Noble v. Tooley</i>	Feb 01	51
<i>Thompson v. Mayor, City of Knoxville</i>	June 01	150
<i>Young v. Halle Housing Associates</i>	June 01	150
<i>James v. City of Dallas, Texas</i>	July/Aug 01	184
<i>Walker v. City of Lakewood</i>	Oct 01	247
<i>Peoria Area Landlord Association v. City of Peoria</i>	Oct 01	248
<i>Community Stabilization Project v. Cuomo</i>	Nov/Dec 01	268
Public Housing (Other Issues)		
<i>HUD v. K. Capolino Construction Corp.</i>	June 01	150
<i>Lorain Metropolitan Housing Authority v. Mayor of the City of Lorain</i>	July/Aug 01	185
<i>Benavides v. Housing Authority of the City of San Antonio</i>	Nov/Dec 01	268
Rent Increases (Project-Wide)		
<i>In the Matter of the Application for a Rental Increase at Zion Towers Apartments</i>	Nov/Dec 01	268
<i>SCHS Associates v. Cuomo</i>	Nov/Dec 01	269
Rent Recertification		
<i>Chancellor Manor v. Thibodeau</i>	June 01	150
<i>Chancellor Manor v. Edwards</i>	July/Aug 01	184
Voucher Termination		
<i>Rodgers v. Garland Housing Agency</i>	Oct 01	247
RECENT REGULATIONS AND NOTICES	Jan 01	19
.	Feb 01	51
.	Mar 01	70
.	Apr 01	98
.	May 01	121
.	June 01	151
.	July/Aug 01	186
.	Sept 01	219
.	Oct 01	249
.	Nov/Dec 01	270

	Issue	Page
RURAL HOUSING		
RHS Housing Programs to Stagnate Under Administration's FY 2002 Budget.	Apr 01	95
Ninth Circuit Authorizes Circumvention of RHS Section 515 Preservation Statute Through a Quiet Title Action.	Sept 01	216
Domestic Abuse Victim Settles Discriminatory Eviction Claim Favorably.	Nov/Dec 01	265
SECTION 8 PROGRAMS (<i>see also</i> DISCRIMINATION; HUD; LEGISLATION; PRESERVATION)		
Criminal Activity Must Be Within "Immediate Vicinity" in Order to Merit Section 8 Termination.	Jan 01	16
HUD Issues Additional Guidance for Second Year PHA Plans.	Feb 01	34
PHAs Challenged by Implementation of Section 8 Welfare-to-Work Vouchers	Feb 01	38
Admission and Occupancy FAQs Answered by HUD.	Mar 01	64
90-Day Notice of Lease Termination.	May 01	117
Rapidly Increasing Energy Costs Raise Utility Allowance Issues.	June 01	125
Screening and Eviction for Drug Use and Other Criminal Activity in HUD-Assisted Housing.	June 01	140
The Case for Applying California's Source of Income Anti-Discrimination Statute to Section 8 Tenants.	June 01	147
HUD Issues Partial Final Rule on the Voluntary Conversion of Public Housing Developments to Vouchers.	Jul/Aug 01	171
Promoting Implementation of the Family Self-Sufficiency Program.	Sept 01	193
HUD Proposes Another Initiative to Improve the Income Verification and Rent Determination Process.	Sept 01	202
Tools for Improving Low Section 8 Voucher Utilization Rates.	Oct 01	231
Homeownership		
The Section 8 Homeownership Demonstration Program: A Selective Review of Its Success.	Jan 01	1
Community Participation and Program Flexibility Are Key to Creating a Successful Section 8 Homeownership Program.	May 01	101
Homeownership Becomes a Reality for Section 8 Voucher Holder.	May 01	116
Section 8 Homeownership Audio Teleconference Tapes Available.	June 01	127
HUD Publishes Proposed Rule and Interim Rule Affecting Existing Section 8 Homeownership Program.	Jul/Aug 01	173
Determining Housing Affordability Is a Crucial Responsibility for PHAs Administering Section 8 Homeownership Vouchers.	Nov/Dec 01	263
Project-Based Section 8		
California Adopts Improved Notice Requirements for Federal Housing Conversions	Jan 01	14
HUD Issues New Section 8 Renewal Policy Guide	Mar 01	61
HUD Data on Section 8 Projects	May 01	116
California Section 8 Tenants are Entitled to a Opt-Out and Prepayment of Four Section 8 Projects Preliminarily Enjoined	Jul/Aug 01	180
Voucher Program		
PHAs Challenged by Implementation of Section 8 Welfare-to-Work Vouchers	Feb 01	38
Second HUD Report on "Vouchered-Out" Assisted Properties	Mar 01	68
HUD Budget Cuts Public Housing, Modestly Increases Vouchers and Leaves Most Other Programs at Current Funding Levels	Apr 01	92
Rapidly Increasing Energy Costs Raise Utility Allowance Issues.	June 01	125
HUD Issues Partial Final Rule on the Voluntary Conversion of Public Housing Developments to Vouchers	Jul/Aug 01	171
HUD Publishes Proposed Rule and Interim Rule Affecting Existing Section 8 Homeownership Program	Jul/Aug 01	173

	Issue	Page
HUD Proposes Another Initiative to Improve the Income Verification and Rent Determination Process	Sept 01	202
Racial Concentration in the Housing Choice Voucher Program	Oct 01	223
Tools for Improving Low Section 8 Voucher Utilization Rates	Oct 01	231
HUD "Clarifies" PHAs' Ability to Convert Public Housing to Vouchers Without Regulations	Nov/Dec 01	253
 TENANT PARTICIPATION (<i>see also</i> PRESERVATION; PUBLIC HOUSING)		
Updated Residents' Guide to PHA Plans	Jan 01	9
HUD Issues Additional Guidance for Second Year PHA Plans	Feb 01	34
Nationwide Settlement Affecting Tenants' Rights at RTC Properties	Mar 01	69
\$27 Million Available for Tenant Participation Activities	Apr 01	87
California Tenants Have No Constitutional Right to Distribute Newsletter	Oct 01	244
HUD Issues Comprehensive Guide for the PHA Planning Process	Nov/Dec 01	257
 VOUCHER PROGRAM (<i>see</i> SECTION 8 PROGRAMS—Voucher Program)		
 WELFARE AND HOUSING (<i>see also</i> GENERAL INTEREST)		
PHAs Challenged by Implementation of Section 8 Welfare-to-Work Vouchers	Feb 01	38
Promoting Implementation of the Family Self-Sufficiency Program	Sept 01	193
Steps That HUD and PHAs Should Take to Facilitate Self-Sufficiency in the Public Housing Program: A Brief Overview	Oct 01	237
National Low Income Housing Coalition Releases 2001 <i>Out of Reach</i> Report: Disparity Between Rents and Minimum Wage Keeps Growing	Oct 01	241

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