NATIONAL HOUSING LAW PROJECT
advancing housing justice

Housing Law Bulletin

Volume 31 • July/August 2001
Published by the National Housing Law Project

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

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

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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: Obtaining Data, Formulating Claims and Anticipating Objections

> The poor are not the cause [of distressed neighborhoods]. The real cause is the poverty, the unemployment, and also the lack of concern by [people responsible for] their condition. So [the poor] are the victims.
>
> So I would like to say that I totally disagree with the suggestion to relocate the poor out of the cities. Doing that is to attack unwholesome problems by looking at only one side of it and it will merely bring trouble from one place to another. Where can the poor move to and how and why? This solution will only perpetuate the same discordance, frustration, and so forth, which now exists in the cities.
>
> Are we going to spend the same expenses to build new houses for the poor as we plan to do for the high income in the city? Are we going to build new, good hospitals, new, good facilities, new, good public institutions in those areas for the poor?[1]

Introduction: HUD's Role

Part One[2] of this two-part series of articles was an overview of federal fair housing law relating to discriminatory effect liability and the affirmative fair housing duties of public housing authorities (PHAs) and the owners of federally assisted, multifamily housing developments. Part Two will outline the sources of demographic statistical data and other related information available on the Internet to support claims, describe

*This series of articles is an extension of an article written by David Bryson on the fair housing duties of HUD regarding the loss of federally assisted housing. *See HUD's Fair Housing Duties and the Loss of Public and Assisted Units*, 29 HOUS. L. BULL. 1 (Jan. 1999)(available online at www.nhlp.org/hlb/199/199fairhsg.htm). NHLP extends its special thanks to Henry Korman, formerly of Cambridge and Somerville Legal Services and Professor Duncan Kennedy of Harvard Law School for their generous assistance in the preparation of this article.

[1]Nho Trong Nguyen, Vietnamese-Buddhist Association of America, *Testimony before the Committee on Banking, Currency and Housing, House of Representatives*, 94th Cong., 2d. Sess., 234 (Sept. 20-24, 1976)(cited in John Calmore, *Fair Housing v. Fair Housing*, 14 CLEARINGHOUSE REV. 7, 18 (1980)).

[2]*See Fair Housing Litigation to Prevent the Loss of Federally Assisted Housing: The Duties of Public Housing Authorities and Project Owners*, 31 HOUS. L. BULL. 73 (Apr. 2001)(*Part One*).

how to approach the formulation discriminatory effect theories[3] in situations involving the loss of public housing and federally assisted multifamily housing,[4] and discuss the anticipated objections to the imposition of discriminatory effect liability against PHAs and project owners.

The duties the Department of Housing and Urban Development (HUD) will not be addressed in detail, largely because they have been addressed at length elsewhere.[5] However, any claim brought against a PHA or project owner to challenge the loss of housing they administer should often also involve HUD as a defendant. HUD has fair housing duties under Title VIII of the *Civil Rights Act of 1968*, the *Fair Housing Act*,[6] as extensive as those of PHAs and project owners, including the affirmative duty to further fair housing.[7] Despite this, HUD has long been inattentive to its fair housing duties, making little or no effort to assess the civil rights effects of its decisions in the administration of the federal housing programs.[8] In addition, HUD will nearly always be involved in the demolition or conversion process—for example, approving and funding public housing demolitions and proposing (or failing to propose) new subsidy levels for affordable developments subject to project-based Section 8 subsidy contracts—which usually means that HUD's inclusion in a suit will be necessary to obtain full relief and to preserve the housing that is the subject of the suit.

Obtaining Demographic Data about Developments, Neighborhoods, and Regional Housing Needs

The first step in assessing the fair housing effects of the threatened loss of a federally assisted housing development is to assemble a demographic profile of the development and of the wider community. Fortunately, a large amount of detailed information is now publicly available on the Internet. With this information, it is possible to determine the demographic characteristics of particular housing developments and the census tracts in which these developments are located and how housing needs may vary according to racial and ethnic groups in cities, counties, and metropolitan areas. With a little more effort, it is also possible to determine how Section 8 voucher utilization patterns may vary according to race, national origin, and other categories, in particular, geographic areas.[9]

The Picture of Subsidized Households

In 1996, 1997, and 1998, the HUD Office of Policy Development and Research published a two-part data set, the *Picture of Subsidized Households* (*Picture*).[10] Organized by state, the *Picture* data sets report demographic information on households participating in federally assisted housing programs for individual public housing and multifamily assisted housing developments and census tracts.[11] The information provided is extensive and includes: the number of units in each development or the number of tenant-based Section 8 households per census tract, the percentage of households of color, the percentage of households with children present, and the percentages of households including persons with disabilities, average household income, and average length of tenure, in addition to other information.[12]

The data in the *Picture* is several years old[13] and not always complete,[14] but provides, nonetheless, a very readily accessible and detailed demographic snapshot of a federally assisted development or patterns of tenant-based Section 8 utilization in a geographic area.[15] The ready availability of the *Picture* online and the ease with which the detailed data it contains may be analyzed electronically makes it a very powerful resource, especially when paired with some of the other sources of information described below.

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[3]As with *Part One*, this discussion will focus on federal housing law as it related to race and national origin. Title VIII provides protection on the basis of a number of other classifications as well. *See Part One*, 31 HOUS. L. BULL. 76, n. 24.

[4]For the purposes of this discussion, these will be referred to collectively as "federally assisted housing."

[5]*See HUD's Fair Housing Duties and the Loss of Public and Assisted Units*, 29 HOUS. L. BULL. 1 (Jan. 1999)(*HUD's Fair Housing Duties*).

[6]42 U.S.C. §§ 3601, *et seq.*

[7]*See Part One*, 31 HOUS. L. BULL. 84.

[8]*See HUD's Fair Housing Duties*, 29 HOUS. L. BULL. 7 (citing *Morton v. Mancari*, 417 U.S. 535, 549 (1974) and the *Report on Minority Group Considerations* requirement imposed on HUD as a result of criticism over the its urban renewal programs).

[9]The following discussion is intended to guide an initial assessment of the viability of discriminatory effect claims. Even though the uses of data described below are fairly simple and straightforward, actual presentation of a demographic analysis at trial is probably best done through an expert witness. *See generally* ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* ("SCHWEMM") at § 32.3(6) (1996).

[10]Available online at www.huduser.org/datasets/assthsg/statedata98/index.html (1998); www.huduser.org/datasets/assthsg/statedata97/index.html (1997); and www.huduser.org/datasets/assthsg/statedata96/index.htm (1996). HUD's sources for the *Picture* are 1990 census data and HUD-50058 and HUD-50059 forms submitted by PHAs and project owners. In addition to the *Picture,* a more limited report of 1994 PIH data is available at: www.huduser.org/publications/pubasst/famdat.html.

[11]Aggregate information for a PHA's public housing, tenant-based Section 8, and Section 8 Moderate Rehabilitation developments are also included in the *Picture.*

[12]There are approximately three dozen data fields of family demographic data, in addition to development-specific information such as address, numbers of bedrooms per unit, and latitude and longitude. Some of household demographic data is presented in more than one data field—*e.g.*, presence of children in a household, which is presented as percentage of households with children with one spouse present and percentage of households with children with both spouses present.

[13]In addition to data specific to assisted families, the *Picture* also includes 1990 tract-level census data on the percentage of households of color, poverty levels, and percentages of homeownership for the tracts in which developments are located.

[14]The census tract data set contains far more gaps than the development and PHA data set. HUD appears to have censored information for those census tracts containing fewer than 14 tenant-based Section 8 households.

[15]Recognizing that the data are not complete, *see id.*, the census tract *Picture* data set can be imported into a spreadsheet application fairly easily. The data can then be analyzed to determine trends at least for those census tracts in a geographic area that have the highest concentrations of households renting housing with tenant-based Section 8 assistance.

The American Factfinder

Data from the 2000 census is gradually[16] becoming available on the Census Bureau Web site. Currently, some race, age, and national origin data are accessible on-line through the new and user-friendly American Factfinder data system.[17] As more data is added to the Factfinder data system, it will become an increasingly valuable resource. In the meantime, a large amount of 1990 data, including income and housing data, is available through the 1990 Census Lookup data system.[18] Until more 2000 data is released, 1990 data will often be the most recent data available.

Public Housing Agency Plans

In addition to being an early warning system for possible public housing demolition, disposition, or revitalization activities by PHAs,[19] PHA Annual Plans and Five-Year plans[20] often provide demographic data about the families in PHAs' jurisdictions.[21] In particular, annual plans often include demographic data about the composition of public housing and Section 8 voucher waiting lists by categories such as race, national origin, and disability. Five-year plans are supposed to include a statement of "Housing Needs of Families in the [PHA's] Jurisdiction by Family Type" that compares the housing needs[22] of families of various demographic and income groups.

The Housing Needs Table

Approximately six years ago, HUD commissioned a special tabulation of 1990 Census data for use by Community Development Block Grant (CDBG) recipients in the Consolidated Planning (ConPlan) process. This tabulation has been published in an online Housing Needs Table data system.[23] The data system allows a user to compare, fairly easily, the needs for affordable housing of renter and other households by race and national origin[24] in specific states, counties, or census places throughout the country. The data system produces reports showing the percentage of households of different types that have "housing problems," meaning for these purposes that households pay more than 30 percent of

[16]*See* U.S. Census Bureau, *Census 2000 Release Schedule* (Jun. 7, 2001)(available online at factfinder.census.gov/home/en/releaseschedule.html).

[17]*See* factfinder.census.gov/servlet/BasicFactsServlet. Data is available by state, county, metropolitan area and census place. Some data is also available by census tract.

[18]*See* venus.census.gov/cdrom/lookup.

[19]*See, e.g.,* 24 C.F.R. 903.7(h)(2000) (requiring PHAs to authorize demolition and disposition activities in their public housing agency annual plans).

[20]These will be referred to generally as "PHA plans."

[21]Approved PHA plans without supporting documents are available online in pdf format at: www.hud.gov/pih/pha/plans/phaps-approvedplans.html.

[22]Seven categories of needs: "Overall," "Affordability," "Supply," "Quality," "Accessibility," "Size," and "Location" are ranked on a five-point scale for each family type.

[23]*See* webprod.aspensys.com/housing/chas/state.asp.

[24]The data system is limited in this regard, offering four choices for generating reports: "All Households," "White, Non-Hispanic Households," "Black, Non-Hispanic Households," and "Hispanic Households."

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income for housing costs. While the underlying census data is dated, the Housing Needs Table data system provides the most recent information currently available. It is very useful in assessing the potential qualitative disparities[25] of impact by race or national origin of a loss of low-income housing opportunities in a particular geographic area. For example, with the Housing Needs Table data system, it is possible to determine what percentage of African American renter households of 0 to 80 percent of area median income (AMI) have housing affordability problems in a specific census area.

The American Housing Survey

HUD and the Census Bureau collect housing and demographic data on 46 metropolitan areas throughout the country as part of the American Housing Survey (AHS). AHS data is collected on each of the areas on a rotating basis approximately every four years.[26] Of all the data sources described here, AHS reports are by far the most detailed and include household demographic and income information, tenure, and housing amenities, configurations, and defects.

The Multifamily Tenant Characteristics System

HUD maintains an online data system of demographic data for households participating in its housing programs, the Multifamily Tenant Characteristics System (MTCS). Unlike the other data sources described above, MTCS is currently available to the public on a restricted basis only.[27] Via public access, MTCS provides demographic and income information about households participating in HUD housing programs, but only at the state, national, or PHA-level. Information about individual projects or census tracts is not accessible to the public.

HUD personnel and PHAs have much wider access to MTCS and have the ability to generate more detailed and specially tailored reports, including project-specific reports and analyses of Section 8 voucher geographic concentrations.[28] Even though many MTCS reports are not publicly accessible on HUD's Web site, it should be possible to obtain these reports from HUD through the *Freedom of Information Act*[29] or from PHAs through state *sunshine laws*. HUD is in the process of implementing a second-generation data system, MTCS 2000.[30]

Other Sources of Information

The sources described above are probably the most readily available, but the list is not exhaustive. In situations involving the loss of public housing, PHAs' demolition, disposition, and revitalization applications[31] are essential documents that are usually not available online. A jurisdiction's ConPlan and Analysis of Impediments to Fair Housing, requirements of the CDBG program, can also provide useful information. However, these documents are typically not available online in complete form.[32] In addition to ConPlans, local and state governmental agencies sometimes produce reports on affordable housing and housing needs,[33] as do housing rights organizations.[34] Finally, HUD has produced a software package, Community 2020, which can generate maps depicting housing data, including data on HUD housing programs, and demographic data.[35]

Fortunately, a large amount of detailed information is now publicly available on the Internet.

Evaluating the Applicability of Discriminatory Effect Theories in Situations Involving the Loss of Federally Assisted Housing

Different data, from the sources described above or from other sources, will be relevant depending on the form of discriminatory effect being examined,[36] the means by which the housing is threatened, and the type of housing involved. Public housing and multifamily assisted housing will be addressed separately.

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[25]*See Part One*, 31 HOUS. L. BULL. 79, n.74.

[26]*See* www.census.gov/hhes/www/housing/ahs/ahsdescr.html (*Description—American Housing Survey*). AHS reports from 1993 to 1999 are available in pdf format from the Census Bureau Web site *at* www.census.gov/mp/www/pub/con/mscho22a.html.

[27]Public access to MTCS is available through the MTCS Guest Login page *at* www.hud.gov/mtcs/public/guest.cfm.

[28]For a complete description of the reports that can be generated through MTCS, *see MTCS Web Reports Guide* (Sept. 1999)(available online at www.hud.gov:80/pih/systems/mtcs/webusr/webusr.html).

[29]5 U.S.C.A. § 552 (West 2000). HUD has recently promulgated new *Freedom of Information Act* regulations clarifying procedures for obtaining electronic documents. Under the new regulations, electronic reports should be available even if they have not been previously generated. *See* 66 Fed. Reg. 6,964 (*Revision of Freedom of Information Act Regulations; Final Rule*).

[30]*See* www.hud.gov:80/pih/systems/pic/mtcs2000/index.html.

[31]These applications typically include numerous attachments (project budgets, affordability targets, relocation projections, etc.) that often are even more informative than the text of the application itself.

[32]Executive summaries of ConPlans are available online *at* www.hud.gov/library/bookshelf18/archivedsum.cfm. Complete ConPlans should be available from HUD through the Freedom of Information process or from local agencies through state sunshine statutes.

[33]*See, e.g.,* Florida Affordable Housing Study Commission, *The Affordable Housing Study Commission Final Report 1999* (available online at www.dca.state.fl.us/fdcp/DCP/Resources/publications/AH2000ver1revised.pdf).

[34]*See, e.g.,* Housing Comes First, *Still Vouchered Up and Nowhere to Go II* (Nov. 1999)(study of subsidized housing programs in Missouri); Minnesota Housing Partnership, *Vouchers to Nowhere: The Ever Shrinking Market for Section 8 Vouchers in Suburban Hennepin County, Minnesota* (Oct. 2000) (available online at www.mhponline.org/aff%20hsg%20info/sect8/sect8/homeline00/report.htm).

[35]*See generally* www.hud.gov/cio/c2020.

[36]*i.e.,* disparate impact or non-intentional perpetuation of segregation, *see Part One*, 31 HOUS. L. BULL. 77, n. 43, 78.

The Loss of Public Housing

Public housing units are lost when they are no longer operated as public housing. As described in Part One, units may be lost through the HOPE VI revitalization and demolition process or through the "demolition-disposition" (demo/dispo) process authorized by Section 18 of the *U.S. Housing Act*.[37] In addition, under new QHWRA provisions, in the near to intermediate future, units may be lost again by being "vouchered out" or "converted;" a process by which a PHA's public housing funding for a particular development is converted into tenant-based voucher funding on either a mandatory or voluntary basis.[38] HUD has not yet issued a complete set of final conversion regulations.[39]

Disparate Impact and the Loss of Public Housing

The best way to approach a disparate impact analysis of the threatened loss of a public housing development is first to identify the groups that will be adversely affected and to identify the different actions and practices of the PHA related to the loss of the development that affect these groups.[40] The loss of a public housing development will always involve a series of actions, rather than any single act.[41] Different groups will be affected by different actions. For example, in addition to the removal of physical structures, the demolition of a public housing development will usually involve the displacement of current residents. This displacement clearly affects these residents, but generally does not affect families on the admission waiting list for the development.

Data from the sources above or other sources can be examined to determine the ways in which members of protected classes in the affected groups are disparately affected by a PHA's actions in removing a public housing development. For disparate impact purposes, three main groups will be directly affected by the loss of a public housing development: current residents, families on the admission waiting list for the development, and other eligible families in the jurisdiction. This list is not exhaustive. Other groups also may be affected depending on the factual circumstances of particular cases. For example, fair housing organizations also may be affected by the loss of a public housing development to the extent that organizations must divert resources to address the fair housing effects of the loss of the development.[42]

The loss of a public housing development will always involve a series of actions, rather than any single act. Different groups will be affected by different actions.

Effect on Current Residents

When a public housing development stands to be demolished, disposed of, or "revitalized," current residents may be adversely affected in at least two ways. First, residents will usually be displaced from their homes. If no replacement housing is planned, the injury is fairly straightforward.[43] If replacement housing is planned, this should be examined. Courts are likely to examine replacement components at some stage in assessing the overall discriminatory effect of the PHA's actions.[44] However, replacement does not by any means automatically foreclose a disparate impact claim. A PHA may plan to replace fewer units than the number of occupied units it plans to demolish. In addition, residents may end up being largely excluded from the new housing that the PHA plans to construct.[45] The best source for information on replacement housing, assuming (as usually will be the case) that the redevelopment planned is a part of a HOPE VI grant, is the PHA's HOPE VI application. HUD's HOPE VI application forms specifically require PHAs to report the estimated number of original households to return to the HOPE VI site, as well as the number of these residents who will be housed in newly constructed units.[46]

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[37] *See id.* at 76-7.

[38] *See* 42 U.S.C.A. § 1437t (West Supp. 2000)(voluntary conversion); *id.* § 1437z-5 (mandatory conversion).

[39] *See* 64 Fed. Reg. 40,232 (Jul. 23, 1999)(*Required Conversion of Developments From Public Housing Stock; Proposed Rule*); 64 Fed. Reg. 40,240 (Jul. 23, 1999)(*Voluntary Conversion of Developments From Public Housing Stock; Proposed Rule*); 66 Fed. Reg. 33,616 (Jun. 22, 2001)(*Voluntary Conversion of Developments From Public Housing Stock; Required Initial Assessments).*

[40] Not only does this approach make it easier to conceptualize and assess the disparate impact of a defendant's actions, specificity of this kind is probably a required element of the disparate impact plaintiff's case. *See Watson v. Fort Worth Bank & Trust ("Watson")*, 487 U.S. 977, 994 (1988) ("[W]e note that the [Title VII] plaintiff's burden in establishing a prima facie case [of disparate impact in employment] goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged.").

[41] The Fifth Circuit has distinguished a "single act or decision" from a "a policy, procedure, or practice," finding that a single act or decision is not a sufficient basis for a disparate impact complaint. *See Simms v. First Gibraltar Bank ("Simms"), 83 F.3d 1546, 1555 (5th Cir. 1996)*. This decision is in tension with the disparate impact zoning decisions cases, such as *Huntington Branch, NAACP v. Town of Huntington ("Huntington")*, 844 F.2d 926, 934 (2nd Cir. 1988) and *Metropolitan Housing. Dev. Corp. v. Village of Arlington Heights ("Arlington II")*, 558 F.2d 1283, 1289–90 (7th Cir. 1977). *See* SCHWEMM at § 10.4(2)(b).

[42] *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); SCHWEMM at § 12.2(4).

[43] *See, e.g., McNeil v. New York City Hous. Auth.*, 719 F. Supp. 233, 254 (S.D.N.Y. 1989); *Lancor v. Lebanon Hous. Auth.*, 760 F.2d 361, 363 (1st Cir. 1985); *Johnson v. United States Dept. of Agric.*, 734 F.2d 774, 789 (11th Cir. 1984); *Edwards v. Habib*, 366 F.2d 628, 630 (D.C. Cir. 1965).

[44] *See, e.g., Project B.A.S.I.C. v. Kemp*, 721 F.Supp. 1501, 1517 (D.R.I. 1989) (While minorities constituted 66 percent of the PHA's tenants, challenge to demolition was without merit because replacement was planned).

[45] For example, PHAs may target replacement housing to be affordable to income levels significantly higher than those of current residents. PHAs may also institute special admissions criteria for the replacement housing that will exclude current residents.

[46] *See Application Data Form: Relocation, Income, and Non-Dwelling Structures* (Att. 22 of FY 2001 HOPE VI application form, available online at www.hud.gov/pih/programs/ph/hope6/Forms20-26.xls). These data forms include extensive demographic information about the public housing site pre and post-redevelopment. Race and national origin data, however, is not included.

Second, residents may be forced to relocate to more distant, more poorly served, or more impacted areas.[47] When a PHA displaces public housing residents, it must first have a relocation plan in place.[48] As a practical matter, these relocation plans are often cursory.[49] To the extent that plans identify where residents will be relocated, census tract data can be obtained from online sources to determine the characteristics, including poverty levels, of the areas into which displaced residents will move. If a PHA plans to relocate residents with Section 8 vouchers, the jurisdiction's voucher utilization patterns can be analyzed. The *Picture* reports the location of each PHA's voucher households by census tract. In addition, PHAs will often circulate lists of properties participating in the voucher program. Data about the census tracts in which these properties are located from the Census data systems can also be examined.

Families on a PHA's public housing waiting list will be harmed by the loss of public housing units insofar as their opportunities for guaranteed affordable housing will be reduced and they will be forced to endure a longer wait for public housing units.

Possible racial disparities in these effects can be measured in several ways.[50] The basic idea in every approach is to determine whether people of color will become worse off, on a disproportionate basis, because of a PHA's plans. One, taking data from the *Picture,* the population of households of color can be compared to the overall population of the development. Where households of color comprise a majority of the households adversely affected, this may constitute a racially disparate impact.[51] Two, taking data from the *Picture* and the MTCS data system, the racial composition of the development can be compared to the racial composition of the PHA's total public housing stock or its combined public housing stock and Section 8 voucher program. A third possibility is to compare the racial composition of the development to the general population, probably the income-eligible renter household[52] population. This data is available from the *Picture,* the Census data systems, and the Housing Needs Table data system. In the second and third approaches, there would be a disparate impact if the population of affected resident households includes a significantly greater percentage of families of color than does the population against which the affected population is compared.

Effect on Families on the Public Housing Admission Waiting List

Families on a PHA's public housing waiting list will be harmed by the loss of public housing units insofar as their opportunities for guaranteed affordable housing will be reduced and they will be forced to endure a longer wait for public housing units.[53] The possible racial disparities of these harms can be measured in the following ways. These are suggestions and are not intended to be exhaustive. One, the number of families of color on the PHA's waiting list, which should be reported in the PHA's Annual Plan, can be compared to the overall racial composition of the list. Where

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[47]*See, e.g., Jones v. Mayer Co.,* 392 U.S. 409, 442–43 (1968). Related issues regarding the perpetuation of segregation are discussed below.

[48]Relocation pursuant to a HOPE VI plan is subject to the *Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs Act* ("URA"), 42 U.S.C. §§ 4601, *et seq*. The URA requires a relocation plan that minimizes the adverse impacts on displaced persons. *See id*. § 4625(a). After amendments of QHWRA, Pub. L. No. 105-276 (Oct. 21 1998), relocation of residents due to the demolition or disposition of a public housing development pursuant to Section 18 of the *U.S. Housing Act of 1937*, 42 U.S.C.A. § 1437p (West 2000), is not subject to the URA and instead is subject to requirements included in Section 18 itself. *See Congress' New Public Housing and Voucher Programs*, 28 HOUS. L. BULL. 1 (Oct. 1998)(comprehensive discussion of QHWRA amendments; available online at: www.nhlp.org/html/hlb/1098/1098congress.htm). HUD's notice regarding implementation of the amended Section 18 requires PHAs to have a relocation plan in place. *See* PIH 99-19, ¶6.F. (expiration date extended by PIH 2000-16).

[49]*See, e.g.,* HUD Special Application Center Relocation Plan template (applies to Section 18 demolition and disposition; available online at: www.hud.gov/pih/sac/ddreloc.pdf).

[50]While *Wards Cove Packing Co. v. Atonio ("Wards Cove")*, 490 U.S. 642 (1989) imposed addition requirements, the Supreme Court has never provided comprehensive guidance on how disparity of impact should be measured even in the employment context. *See Part One*, 31 HOUS. L. BULL. 79. *See also* Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 420 (1998).

[51]*See Betsey v. Turtle Creek Assocs. ("Betsey")*, 736 F.2d 983, 988 (4th Cir. 1984); *In re Malone ("Malone")*, 592 F.Supp. 1135 (E.D.Mo. 1984). Using the total population of a development as the population against which to contrast is probably most appropriate where residents of a development stand to be affected in different ways. For example, a portion of the development might stand to be demolished—the racial composition of that portion could be compared to the entire development. Or, if the development of replacement housing is planned, the population of the former resident households who are estimated to return could be compared to the population of excluded households. As discussed in n. 46, *supra,* race and national origin data is not reported in HOPE VI data forms, but other demographic information, such as numbers of children and numbers of persons living with disabilities, is reported. Numbers of bedrooms per unit of replacement housing is also reported in HOPE VI data forms. A reduction in the number of multi-bedroom units can be expected disparately to affect families with children. *See Part One*, 31 HOUS. L. BULL. 76, n. 24.

[52]*See id.* at 79.

[53]*See U.S. v. Charlottesville Redevelopment and Housing Authority ("Charlottesville")*, 718 F.Supp. 461, 463 (W.D.Va. 1989) ("[F]or the purposes of assessing whether there has been a violation of 42 U.S.C. § 3604(a)-(c) [Title VIII], being made to wait longer because of race than is justified for public housing is functionally equivalent to being denied public housing."). On average, families must wait almost a year for a public housing unit; in larger metropolitan areas, public housing waits range from almost *three* to *eight* years. *See* HUD, *Waiting in Vain: Update on America's Rental Housing Crisis* (Mar. 1999). From 1998 to 1999, the number of families on waiting lists that were not closed due to their overwhelming size increased between 10 and 25 percent. *See id.* Already lengthy waits may further be compounded if a PHA decreases admissions from its list in order to hold open vacancies into which to relocate families displaced by a demolition or redevelopment.

families of color comprise a majority of the list, there may be a disparate impact.[54] Two, the percentage of families of color on the waiting list can be compared to the racial composition of the area's general population.[55] There may be a disparate impact if the percentage of families of color on the waiting list is significantly greater than the percentage of the area's general population that are families of color. Three, if the development that is the subject of the PHA's plans has a site-based waiting list, the racial composition of this site-based list can be compared to the racial composition of other waiting lists maintained by the PHA.[56]

Effect on Families Eligible for Public Housing in the Region

Renter households eligible for public housing by reason of their income in a region will have their affordable housing opportunities reduced by the loss of public housing units. The effect on eligible families is especially significant in those jurisdictions where PHAs have closed their lists since waiting lists will almost never reflect the full demand for public housing in these jurisdictions. Racial disparities, if they exist, may be shown by comparing the racial composition of the area's general population to that of the population of public housing-eligible households. If households of color are disproportionately eligible for public housing, the loss of such housing may disparately impact them.[57] In addition, the comparative need for affordable housing among households eligible for public housing in a region should also be examined. With figures from the Housing Needs Table data system, it is possible to calculate the percentage of African American and Latino households eligible for public housing who have housing affordability problems.[58] This percentage can then be compared to the overall percentage of housing affordability problems for eligible households in the relevant county or census place. If eligible African American or Latino households have a higher percentage of housing affordability problems than the overall eligible population, the loss of guaranteed affordable housing may threaten disproportionate harm to them that could constitute the basis of a disparate impact claim.[59]

Perpetuation of Segregation and the Loss of Public Housing

Actions that reduce opportunities for "interracial association" and the "important benefits" enjoyed by people living in ethnically and racially diverse areas may also be the basis of a Title VIII discriminatory effect claim.[60] Both residents of federally assisted developments and other members of the surrounding community, of potentially any racial or ethnic affiliation,[61] may have perpetuation-of-segregation claims relating to the loss of a development, depending on the factual circumstances. As with actions that cause disproportionate harm to persons of color, discriminatory purpose is not required for a PHA to be liable for actions that frustrate opportunities for interracial association through the "perpetuation of segregation" in housing.

Renter households eligible for public housing by reason of their income in a region will have their affordable housing opportunities reduced by the loss of public housing units.

A perpetuation of segregation claim will not be available in every situation involving the loss of public housing units, just as a disparate impact claim will not necessarily be available in every situation. Whether such a claim is available depends on whether a PHA's plans will reduce opportunities for interracial association among the people affected by these plans. At least two groups of people can be expected to be affected: residents of the threatened development and other residents of the area in which the development is located.[62]

Effect on Residents of a Threatened Development

Residents of a development will have their right to an integrated living environment affected to the extent that they stand to be displaced to less racially and ethnically diverse

[54]*See* n. 51, *supra. See also Resident Advisory Board v. Rizzo ("Rizzo")*, 564 F.2d 126, 143 (3rd Cir. 1977).

[55]As described in the discussion of the effect on current residents above, this general population should probably be limited to the income-eligible renter household population of some area such as the PHA's jurisdiction.

[56]The loss of a development with a site-based waiting list may cause special harm to families on the site-based list. These families may have their opportunity to secure a public housing unit by virtue of their place on the list extinguished altogether.

[57]*See Arlington II*, 558 F.2d at 1288 (finding disparate impact on the basis of race in the denial of low-income housing opportunities since people of color were more likely to satisfy income eligibility requirements); *Huntington*, 844 F.2d at 938 (2nd Cir. 1988).

[58]"Housing Needs of Families in the Jurisdiction by Family Type" are also included in PHA Annual Plans. This information is less detailed as to housing affordability problems than is the Housing Needs Table data system, but it also reports information, albeit quite minimal, about supply, quality, size, and other needs not included in the Housing Needs Table data system.

[59]*See U.S. v. City of Black Jack ("Black Jack")*, 508 F.2d 1179, 1184–85 (8th Cir. 1974); *Part One*, 31 HOUS. L. BULL. 79, n.74. A similar type of disparate impact analysis—*i.e.*, one that contrasts harms qualitatively in light of varying needs rather than contrasting the number or percentages of persons of different racial or ethnic affiliations affected—could be performed for families on a public housing waiting list. The main difficulty is that descriptions of the housing affordability problems of waiting-list families are not included in PHA Annual Plans.

[60]*See id*. at 79-80.

[61]*See Trafficante v. Metro. Life Ins. Co. ("Trafficante")*, 409 U.S. 205, 209-10 (1972)(White residents living in a "white ghetto" because of a landlord's discriminatory leasing practices had standing to seek relief under Title VIII.).

[62]Other groups may also be affected, depending on the specific factual circumstances, as may fair housing organizations that have diverted resources to address civil rights consequences of the loss of units. *See* n. 42 and accompanying text, *supra.*

neighborhoods.[63] The type of analysis required to determine whether this will occur will depend on the means by which a PHA plans to relocate residents of the threatened development. If residents will be relocated to another public housing development,[64] the racial composition of that development's census tract can be compared to the composition of the threatened development's census tract, using data from the *Picture* or the Census data systems.

If the PHA plans to relocate residents with Section 8 vouchers, the racial composition of the census tracts in which residents will use their vouchers can be compared to the composition of the tract in which the threatened development is located. Information about the tracts to which families are expected to relocate with vouchers may be provided in the PHA's relocation plan.[65] If it is not, the *Picture* lists the specific tracts in which vouchers administered by the PHA are used and 1990 census data about the composition of these tracts.[66] It would be reasonable to assume that displaced residents will feed into the PHA's existing geographic voucher utilization patterns. If those show a pattern of racially segregated voucher utilization, a perpetuation-of-segregation claim may exist. More recent Census data is available through the FactFinder. In addition, the PHA may make lists of properties accepting Section 8 vouchers to voucher recipients. The composition of the tracts in which these properties are located may be compared to the tract in which the threatened development is located, using information from the Census data systems.

Effect on Other Area Residents

Other residents of an area threatened with the loss of a public housing development will have their fair housing rights affected if the loss of the development will reduce the racial and ethnic diversity of their community. This is likely to occur if the displacement of public housing residents will reduce the overall racial and ethnic diversity of an area.[67] The demographic composition of the development, using data obtained from the *Picture*, can be compared to the demographic composition of a larger geographic area,[68] such as one or more census tracts,[69] or census block groups or a municipality as a whole, using information from the Census data systems, to determine the extent to which the development contributes to the overall diversity of the area.

Other residents of an area threatened with the loss of a public housing development will have their fair housing rights affected if the loss of the development will reduce the racial and ethnic diversity of their community.

If the demolition is part of a redevelopment plan that involves the construction of replacement housing on-site or at a nearby site, the effect of this replacement housing on the diversity of the neighborhood must also be considered. Depending on the amount of replacement housing and the population expected to reside in it, the replacement housing may either lessen or exacerbate the effects of a demolition and displacement of residents.[70] Assuming that more detailed information is not provided in a redevelopment plan, one way to assess the fair housing effects of replacement housing is to correlate the income eligibility and affordability targets of the replacement housing with the segments of the local population that would meet these criteria, using CHAS data on income and tenure or information from the AHS or Census data systems.[71]

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[63]This discussion assumes that all residents of a development will be treated in the same manner and will be provided the same relocation options. This may not always be the case. For example, leaving aside the *Uniform Relocation Act* and other issues for the moment, a PHA may plan to relocate most residents of a Development X it plans to demolish to Development Y, except for large households in X, which cannot be accommodated in Y because it contains only 2 and 3 bedroom units. These large households will be relocated to Development Z, which contains more multibedroom units. The fair housing rights of large households may be differently affected than other households of Development X depending on how the diversity (and other features) of neighborhoods Y and Z each compare to X. This different effect could also support a disparate impact claim on the basis of familial status in addition to race and other classifications.

[64]The development into which a PHA plans to relocate residents may or may not be named in the PHA's relocation plan or other documents. Even if a development is not identified by name, it may still be possible to identify it because of the level of vacancy the PHA would have to maintain in it to accommodate the residents it intends to relocate.

[65]*See* n. 48, *supra*.

[66]Because the *Picture* usually provides demographic information about voucher households in those tracts containing 14 or more voucher households, it is also possible to determine which tracts households of color most commonly use their vouchers.

[67]One example that would involve fair housing effects would be the loss of a development that is home to a substantial number of families of color in an area that is predominantly non-minority.

[68]The term "area" is intentionally open-ended. Affected areas for perpetuation of segregation purposes can be as small as individual housing developments, *see, e.g., Trafficante*, 409 U.S. 205 (1972), or entire towns, *see, e.g., Black Jack*, 508 F.2d 1179 (8th Cir. 1974).

[69]A census tract is comprised of approximately 1,500 households. Depending on the particular circumstances, for large developments, it may make sense to compare the composition of a development not only to the composition of the census tract in which the development is located, but also to adjacent census tracts. Adjacent census tracts may be determined by generating census tract maps through the FactFinder data system.

[70]The type of analysis required here is very similar to the (unsuccessful) arguments about "bottom line" effects that disparate impact defendants sometimes raise. *See Part One*, 31 HOUS. L. BULL. 81-82.

[71]For example, assume that a PHA is planning to demolish 250 units of family rental public housing and to replace them with 100 units of rental housing targeted to be affordable to households at 80 percent of AMI. Also assume that 70 percent of the renter households at 80 percent of AMI are non-minority. If no information to the contrary is available, it would be reasonable therefore to estimate that 70 percent of the households to occupy the replacement housing would be non-minority. *See, e.g., Huntington*, 844 F.2d at 938 (2nd Cir. 1988); *Arthur v. City of Toledo ("Arthur")*, 782 F.2d 565, 576 (6th Cir.1986); *Arlington II*, 558 F.2d at 1286, 1291 (7th Cir. 1977).

"The Deconcentration of Poverty"—The PHA's Rebuttal or Justification for the Removal of Public Housing Units

Even if a PHA's plan to remove a public housing development from the federal inventory will have a discriminatory effect, the PHA may escape liability if it is able to put forth a sufficient rebuttal or justification for its plan. The federal circuits apply different rules of decision in Title VIII discriminatory effect cases.[72] Under each set of rules, the discriminatory effect shown by the plaintiff is measured to some degree against the interest of the defendant in pursuing the course of action that is the basis for the plaintiff's complaint. This is sometimes referred to as the defendant's "legitimate interest" under the pure effects framework or the defendant's "interest in taking the action complained of" under the three and four-factor tests.[73]

Historically, the demolition or disposition of public housing has often involved questionable motives. Some local governments have demolished projects over concerns about "image" and property values or have sold developments to receive one-time infusions of cash from the sale of public housing assets.[74] Analyses of the viability of projects and local needs for affordable housing have sometimes been based on outdated data or exaggerated estimates.[75] If for no other reason than history, the interests put forth by PHAs should be closely scrutinized.[76]

Whatever a PHA's actual motives, chances are the "deconcentration" or "de-densification" of poverty or assisted households will be invoked as a justification in its rebuttal or in the presentation of its interest in pursuing plans to remove public housing units. "Deconcentration" has been for some years a federal priority.[77] It has been identified as a means to reduce crime, to increase educational opportunities, and to promote family self-sufficiency through work. On the whole, it may in fact produce these positive effects. However, it may not necessarily have these benefits in every situation or in every community. PHAs should not be permitted to rely only on the unsupported assertion that a plan to "deconcentrate poverty" is legitimate because of the positive effects that are expected to accrue from it. Such hypothetical benefits are insufficient to overcome adverse fair housing impacts.

When plaintiffs, such as families residing in a development or families in need of affordable housing, establish a showing of significant discriminatory effect, a PHA should be required to show how forcing residents from their homes and reducing needed housing opportunities will serve the public good. PHAs are subject to special affirmative fair housing duties under *Executive Order 11063* (1962), QHWRA, and perhaps Title VIII as well.[78] At a minimum, these duties require PHAs to gather and analyze information about the racial and socioeconomic effects of their decisions in administering the federal housing programs before they make their decisions. Platitudes about deconcentration are insufficient. A PHA must act in accordance with a reasoned analysis supported by actual data.[79] If it fails to do so, it has not articulated a legitimate interest.

Further, assuming that a PHA demonstrates that deconcentration would have positive effects, it must still show that its demolition or redevelopment plan will actually result in deconcentration in the first instance. If a PHA plans to relocate residents to other public housing developments with characteristics similar to the development it plans to remove, it is difficult to see how any meaningful deconcentration has been accomplished.

Similar problems may exist if the PHA plans to relocate residents with tenant-based voucher assistance. The private market is heavily segregated with respect to race and income.[80] There is no reason to think that displaced families will be treated any differently than others in the private market. Displaced families, for example, may be expected to face discrimination on the basis of race, level of income, and their status as voucher holders and former public housing residents.[81] A possible, perhaps likely, result is not the deconcentration of poverty but the reconcentration of low-income families in other areas through the voucher program.[82]

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[72]*See Part One*, 31 HOUS. L. BULL. 80-84.

[73]*Id.*

[74]*See* NHLP, *Public Housing in Peril: A Report on the Demolition and Sale of Public Housing Projects* ("Public Housing in Peril"), 43–68. (1990).

[75]*See id.*

[76]In other words, PHAs' justifications might be attacked as less than "bona fide" under the pure effects test.

[77]*See, e.g.,* 42 U.S.C.A. § 1437v(a)(3)(West Supp 2001).

[78]*See Part One*, 31 HOUS. L. BULL. 85-86. Receipt of CDBG funding, which may be involved in a PHA's redevelopment plans, also imposes affirmative fair housing duties. *See* 42 U.S.C.A. § 5304(b)(2)(West 2001)(CDBG recipient must certify that "the grant will be conducted and administered in conformity with the *Civil Rights Act of 1964* [42 U.S.C. §§ 2000a *et seq*.] and *the Fair Housing Act* [42 U.S.C. §§ 3601 *et seq*.], and the grantee will affirmatively further fair housing.").

[79]*See, e.g., Shannon v. United States Department of HUD ("Shannon")*, 436 F.2d 809, 819 (3rd Cir. 1970) (Addressing HUD's affirmative fair housing duties: "We agree that broad discretion may be exercised [by the department]. But that discretion must be exercised within the framework of the national policy against discrimination in federally assisted housing, 42 U.S.C. § 2000d, and in favor of fair housing. *Id*. § 3601.").

[80]*See, e.g.,* The Civil Rights Project, Harvard University, *Census 2000 Confirms Persistent Segregation, Need for Civil Rights Priorities in the New Century* (Apr. 3, 2001) *available at* www.law.harvard.edu/civilrights/publications/pressrelease.html.

[81]*See, e.g.,* Mark A. Malaspina, Note, *Demanding the Best: How to Restructure the Section 8 Household-Based Rental Assistance Program*, 14 Yale L. & Pol'y Rev. 287, 288, 311 (1996) (noting that Section 8 recipients often cannot find desirable apartments because many landlords refuse to rent to such individuals and that low landlord participation is a serious, if not the most serious, problem with the Section 8 program; cited in *Franklin Tower One, L.L.C. v. N.M.*, 157 N.J. 602, 725 A.2d 1104 (1999)); Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, 31 Harv. C.R.—C.L. Rev. 155, 162 (1996)("Possession of a Section 8 subsidy marks its holder as a low-income person, a status that carries with it a multitude of negative stereotypes.").

[82]*See Cuomo Expands Rental Opportunity for Hundreds of Thousands of Low-Income Families*, HUD No. 00-223 (Sept. 12, 2000)(identifying 39 metropolitan areas across the country with severe geographic concentrations of tenant-based voucher holders), *available at* www.hud.gov/pressrel/pr00-223.html.

A Note on Racial Motives and Preferences

PHAs may go one step further and point to racial desegregation as a justification for its plan to remove units.[83] This is a racial motive. It is unfair and illegal to seek to desegregate housing at the expense of families of color who will be displaced from their homes or denied the chance to occupy public housing.[84] If a PHA denies housing opportunities to current residents or families on the waiting list on the basis of a racially conscious motive, it has violated Title VIII.[85]

The Loss of Assisted Multifamily Developments

Units are lost[86] from the assisted multifamily inventory when the owners of assisted developments prepay their federally subsidized mortgages or decline to renew (also known as "opting-out") their project-based Section 8 subsidy contracts and are thereby no longer subject to use restrictions that require their developments[87] to be operated as affordable low income housing.[88]

Discriminatory Effect and the Loss of Assisted Multifamily Housing

The same types of disparate impact and perpetuation of segregation claims that are available against PHAs for the loss of public housing discussed above are available against project owners for the loss of assisted multifamily units. However, nature and effect of these claims are significantly affected by differences in the public housing and assisted multifamily housing programs.

The Effect of Enhanced Voucher Protections on Discriminatory Effect Claims

The most significant difference between the public housing and multifamily housing programs for discriminatory effect purposes is the role of special anti-displacement in the multifamily housing context. In most cases involving the withdrawal of units from the assisted multifamily inventory, assisted residents living in the development at the time of the conversion should be eligible for special "enhanced vouchers," informally known as "sticky vouchers," that will allow them the right to remain in their current units with no increase in the amount they pay towards rent.[89] Even though some uncertainty with regard to the extent of enhanced voucher protections persists,[90] if enhanced vouchers work as they should,[91] current residents should not be displaced from their homes or be forced to pay more towards rent. Because HUD has not taken all steps necessary to ensure that current residents of expired properties will not be harmed by conversion and will receive the full benefit of enhanced vouchers, the protection of these residents through enhanced vouchers should not be taken for granted.[92] However, if current residents are fully protected, they will generally not have disparate impact claims against project owners since the withdrawal of the property will not leave residents any worse off than they would have been had the development remained subject to project-based use restrictions and subsidies.

In contrast, families on the development's admission waiting list are not eligible for enhanced vouchers.[93] Waiting-list families face significant harm from the withdrawal of a development from the federal project-based assistance programs. The harm faced by these families is actually

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[83]It might not be unreasonable to suspect that "poverty" in the context of the "deconcentration of poverty" is often a code or proxy for race.

[84]*See* John Calmore, *Fair Housing v. Fair Housing*, 14 CLEARINGHOUSE REV. 7 (1980). In *Charlottesville*, the district court recognized that the *Fair Housing Act's* twin purposes of eliminating discrimination in housing and furthering integration in housing are both important, but may occasionally be incompatible:

> The legislative history of the Fair Housing Act suggests to this court that the prime focus or the 'quickening' force behind that legislation is prohibition of discrimination in the provision of housing, but also that integration was seen by the creators of that legislation as a prominent goal and a value of great worth. From the perspective of over two decades, it is perhaps excusable to find the unexamined assumption in the Act's legislative history that the principles of nondiscrimination and integration will always necessarily go hand in hand. With our later perspective, that assumption may be unfounded, but it does not detract from the observation that this legislation was created with both legal (and moral) principles in mind, although primary weight is given to the prohibition of discrimination.

[85]*See* 42 U.S.C. § 3604(a); *U.S. v. Starrett City Assocs.*, 840 F.2d 1096 (2nd Cir. 1988). Title VIII also prohibits the making or publishing of a statement of racial preference in housing. *See* 42 U.S.C. § 3604(c). If a PHA includes a description of its motive in its demolition or revitalization application, press release, or other public document, or if it mentions this motive in a presentation or other public meeting, the mere fact that this statement of racial preference was made provides a basis for an independent Title VIII claim.

[86]More accurately, it is the guaranteed affordability for very-low and extremely low-income families that is lost.

[87]In some cases, only a portion of a development or a complex will be subject to a project-based Section 8 contract.

[88]Multifamily units may also be lost when HUD forecloses on a subsidized mortgage or refuses to renew a Section 8 contract because of an owner's program violations—*e.g.*, substandard or untenantable conditions or monetary defaults. In making such decisions, HUD must act in conformity with this affirmative fair housing duties. *See HUD's Fair Housing Duties*, 29 HOUS. L. BULL. 1.

[89]*See* 42 U.S.C.A. § 1437f(t)(West 2001). Some tenants in multifamily properties without a project-based Section 8 contract who are paying HUD-controlled below-market rents may experience a rent increase with a voucher.

[90]*See generally HUD Issues Guidance for FY 2000 Enhanced Vouchers*, 30 HOUS. L. BULL. 64 (May 2000)(describing gaps in HUD's planned administration of the enhanced voucher program that may operate to the disadvantage of residents of expired properties, potentially the largest of which are the re-screening of residents and Housing Quality Standards inspections by the PHA administering residents' enhanced vouchers).

[91]Last year, Congress clarified the "right to remain" feature residents' enhanced voucher protections. *See* FY 2001 *Military Construction* and FY 2000 *Emergency Supplemental Appropriation Act*, Pub. L. No. 106-246, § 2801 (Jul. 13, 2000). HUD has since issued guidance that the resident's right to remain with an enhanced voucher lasts until the owner has good cause to terminate the tenancy, even beyond the initial lease term. *See* HUD, Office of Multifamily Housing, *Section 8 Renewal Policy: Guidance for the Renewal of Project-Based Section 8 Contracts*, § 11-4 (Jan. 19, 2001) *available at* www.hud.gov/fha/mfh/exp/guide/s8renew.pdf.

[92]*See* n. 90, *supra.*

[93]*See* 42 U.S.C. § 1437f(t)(1)(A).

greater than the harm that will usually be faced by public housing waiting-list families.[94] Since each development's waiting list is generally separate from any other, families on assisted multifamily development waiting lists will see their opportunity for an assisted unit entirely extinguished by an opt-out or prepayment.[95]

The harm to waiting-list families may provide the basis of a disparate impact claim if families of color are disproportionately affected by the loss of the development.

The harm to waiting-list families may provide the basis of a disparate impact claim if families of color are disproportionately affected by the loss of the development. Data regarding assisted development waiting lists is less readily available than public housing waiting list data, which is reported in public housing agency plans.[96] As a rule of thumb, it should be reasonable to assume that the demographics of a development's waiting list reflects the current assisted occupancy of the development. In determining disparity of impact on waiting-list families with respect to race or national origin, the analysis is essentially the same as the analysis performed in the public housing context.[97]

The Effect of Project Site Selection Criteria and Affirmative Fair Housing Marketing Requirements on Discriminatory Effect Claims

Other differences between public housing and multifamily housing are the federal fair housing policies in effect when developments were constructed or designated for participation in subsidy programs. Unlike the public housing stock, essentially all assisted multifamily developments were constructed after some or all of the contemporary civil rights protections were in place.[98] As a result, assisted multifamily developments were originally constructed or designated for participation in project-based assistance programs to advance civil rights objectives. In general, assisted multifamily development sites were required to be selected outside of areas of "minority concentration," or if sites in such areas were selected, it was because of a special affordable housing need of families in these areas.[99] In addition, owners of assisted multifamily developments have continually been subject to affirmative fair housing marketing requirements intended to promote equal access to this housing to all families.[100]

If a development was sited to meet the special affordable housing needs of an area of "minority concentration," this fact ought to be able to be used to strengthen a claim of disparate impact relating to the development's withdrawal from the federal housing programs. Alternatively, affirmative fair housing marketing requirements may support a perpetuation-of-segregation claim brought by waiting-list families or other area residents[101] who stand to lose an integrated housing opportunity or the benefit of a housing integration resource in their community.[102]

"Marking Up" and the Project Owner's Rebuttal or Justification

Presumably, unlike public agencies and non-profit housing providers, a profit motive is what drives most owners to convert their projects. Owners will seek to convert where they can realize a higher return on their property outside of the federal housing programs. Profit seeking is very likely to be regarded as a legitimate interest and accorded significant weight under any of the discriminatory effect decisional frameworks employed by the federal circuits.

Tenants are not without counter-arguments. First, and most important, owners of Section 8 properties will usually be eligible for subsidy increases and restructuring (known as "Marking Up to Market" ("MU2M")) that will provide them

[94]Except in situations involving site-specific public housing waiting lists, public housing waiting list families will generally be faced with substantial delays in obtaining affordable housing. This delay is a cognizable injury that can provide the basis for a fair housing claim, *see* n. 53, *supra*.

[95]Other families in the area eligible for Section 8 housing will also face harm from the loss of a development.

[96]*See* n. 21, *supra,* and accompanying text.

[97]*See* n. 53-6, *supra,* and accompanying text. Note that because assisted multifamily developments are often formally owned by single-asset mortgagors—essentially "shell" entities that own only one development each—this can complicate attempts to compare the composition of the waiting list of the threatened development with waiting lists of the owner's other developments. This kind of analysis, analogous to contrasting the demographic composition of a threatened public housing development to other public housing developments operated by a PHA, is still potentially fruitful. However, rather than focusing on the single asset mortgagor, it would make more sense to focus on the mortgagor's managing partner (if it is a partnership) or majority stakeholder (if it is a corporation) and to compare the composition of the threatened development's waiting list to the composition of other developments owned by entities in which the managing partner or majority stakeholder also has a controlling interest. As with public housing, comparing the composition of developments is not the only way to approach a discriminatory effect analysis.

[98]Most units constructed prior to the passage of Title VIII in 1968 were nonetheless subject to the antidiscrimination requirements of Title VI (1964) and *Executive Order 11063* (1962).

[99]*See, e.g.,* 24 C.F.R. § 882.404(b)(1984) (Section 221(d)(4) Program "Site and Neighborhood-Performance Requirement[s]"); *Id.* § 200.710, 37 Fed. Reg. 205 (Jan. 7, 1972)("Project Selection Criteria" for the Section 236 Program).

[100]*See, e.g.,* 24 C.F.R. § 880.601(a) (1999) ("Responsibilities of owner" in Section 221(d)(4) Program); *Id.* § 886.321(a), 44 Fed. Reg. 70,365 (Dec. 6, 1979), *as amended* (affirmative fair housing marketing requirements).

[101]If the development was specifically sited outside of an area of minority concentration, this may also lend support to a perpetuation of segregation claim.

[102]Enhanced vouchers are not necessarily as effective from a housing integration objective. In theory, vouchers should allow recipient families to access a wide range of private rental housing. In practice, this is not always the case. In a significant number of areas throughout the country, vouchers appear to be useable primarily in a small number of neighborhoods, which may also be distressed or impacted. HUD has recently noted serious geographic concentrations of Section 8 voucher families in 39 major metropolitan statistical areas across the country. *See* n. 82, *supra.*

with an actual market return based on an independent real estate appraisal commissioned by the owner.[103] Second, project owners are not as free as other private actors to pursue profit motives because project owners are subject to affirmative fair housing duties under their program contracts and agreements with the government.[104] Under HUD regulations implementing *Executive Order 11063* (1962), owners are prohibited from engaging in activities that have a discriminatory effect and are charged with an affirmative obligation to prevent discrimination.[105] Third, while a profit motive will probably be accorded substantial weight, it is not an absolute trumping interest in the context of civil rights. A merchant, for example, is not permitted to engage in purposeful racial discrimination even where he would receive a higher return because of the racial prejudice of his customers.[106] Since policies and practices having a discriminatory effect are the functional equivalent of purposeful discrimination,[107] profit motives ought not justify them in every instance either.

Under HUD regulations implementing Executive Order 11063, owners are prohibited from engaging in activities that have a discriminatory effect and are charged with an affirmative obligation to prevent discrimination.

Possible Limits on the Imposition of the Discriminatory Effect Liability

Courts have left open the question of how widely applicable discriminatory effect theories under Title VIII are. In its earliest discriminatory effects case under Title VIII, the Seventh Circuit "refuse[d] to conclude that every action which produces discriminatory effects is illegal." Instead, it explained, "the courts must use their discretion in deciding whether, given the particular circumstances of each case, relief should be granted under the statute."[108] In most instances, where a discriminatory effect has been shown, courts will apply one of the three decisional tests. But, this has not always been the case. The Seventh Circuit, for example, ruled that a disparate impact analysis was inapplicable in a real estate "steering" case.[109]

Title VIII discriminatory effect defendants may attempt to escape liability by presenting arguments from within the decision frameworks described above. For example, a project owner could challenge the "strength" or "significance" of the discriminatory effect alleged by the plaintiffs. The owner could also attempt to establish a "bona fide and legitimate justification" for the proposed project conversion and thereby rebut the plaintiff's prima facie showing. However, defendants may also present arguments attacking the applicability of Title VIII discriminatory effect theories against them in the first place. What follows is a discussion of several possible arguments of this type.

Partially Unsettled Questions About Discriminatory Effect Liability for Private Project Owners

None of the Circuits have questioned the availability of discriminatory effect claims against public defendants, such as PHAs. Questions have been raised in early opinions by the Second Circuit and at the district level in the District of Columbia about the availability of this theory against private defendants,[110] such as project owners. The First, Third, and Eleventh Circuits have yet to address this question, and the Sixth Circuit has addressed it only obliquely in an unpublished opinion.[111]

However, the significance of this question with respect to private project owners should not be overstated. First of all, no federal appellate decision in recent years has questioned the availability of discriminatory effect claims against private defendants. Second, Title VIII was passed by Congress pursuant to its powers under the *Thirteenth Amendment*,[112]

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[103]*See* HUD, Office of Multifamily Housing, *Section 8 Renewal Policy: Guidance for the Renewal of Project-Based Section 8 Contracts* (Jan. 19, 2001) *available at* www.hud.gov/fha/mfh/exp/guide/s8renew.pdf. *See also HUD Issues New Section 8 Renewal Policy Guide*, 31 HOUS. L. BULL. 61 (Mar. 2001). Owners not eligible for "mark-up to market" as a matter of right may be eligible for a mark-up to market at HUD's discretion or a mark up to budget in the case of a nonprofit owner. *See id.*

[104]*See Part One*, 31 HOUS. L. BULL. 84-86.

[105]*Id.*

[106]*See, e.g., Village of Bellwood v. Dwivedi ("Dwivedi")*, 895 F.2d 1521, 1530–31 (7th Cir. 1990).

[107]*See, e.g., Mountain Side,"* 56 F.3d at 1250–51 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) ("the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination")).

[108]*Arlington II,* 558 F.2d at 1290 (cited in *Arthur,* 782 F.2d at 575).

[109]*See Dwivedi*, 895 F.2d at 1532 ("Some practices lend themselves to the disparate impact method, others not. We cannot imagine the practice (innocent in intent, discriminatory in impact, *Griggs v. Duke Power Co.*, 401 U.S. 424, 430, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971)) on which a disparate impact theory might be based in this case.").

[110]*See Brown v. Artery Organization ("Brown")*, 654 F. Supp. 1106, 1114-15 (D.C.Dist.Col. 1987); *Boyd v. Lefrak Organization ("Boyd")*, 509 F.2d 1110, 1113 (2nd Cir. 1974) (refusing to permit discriminatory effect claim against a private landlord). *But see Huntington*, 844 F.2d at 934 (2nd Cir. 1988) (questioning *Boyd)*; *Salute v. Stratford Greens Garden Apartments ("Salute")*, 136 F.3d 293, 302 (2nd Cir. 1998) (entertaining, but ultimately denying on the merits, a discriminatory effect claim against a private landlord).

[111]*Blaz v. Barberton Garden Apartment ("Blaz")*, 972 F.2d 346, 1992 WL 180,180, *3 (6th Cir. 1992) ("A discriminatory effect or 'disparate impact' case involves a facially neutral policy or practice which has the effect of discriminating against a particular protected group").

[112]*See U.S. v. Hunter*, 459 F.2d 205, 214 (4th Cir. 1972); *Williams v. Matthews Co.*, 499 F.2d 819, 828 n.11 (8th Cir. 1974) (citing *Jones v. Mayer Co.*, 392 U.S. 409, 442–43 (1968), which construed 42 U.S.C. § 1982: "When racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery."). *See also Black Jack*, 508 F.2d at 1184 (8th Cir. 1974); *U.S. v. Bob Lawrence Realty,* 474 F.2d 115, 120-21 (5th Cir. 1973), *cert. denied*, 414 U.S. 826 (1973).

meaning that direct regulation of private conduct is clearly permitted. Third, Title VIII expressly applies to project owners as recipients of federal housing funding.[113] Finally, as discussed above, *Executive Order 11063* regulations apply to project owners as participants in HUD housing programs and as parties to HUD HAP contracts and regulatory agreements.[114] While the availability of discriminatory effect claims against project owners is a partially unsettled issue, it is likely to be settled in favor of the availability of such claims.

Discriminatory Effect as Result of Income Disparity and not Racial Disparity

PHAs and project owners attempting to convert projects to higher income use may challenge the applicability of the discriminatory effect claims against them by arguing that the effects in this situation are only discriminatory as to wealth, not as to race. The displaced tenants, the defendant might argue, are free to remain or to return to the project after its renovation, regardless of their race, provided that they are able to pay the higher rent.

While it is true that wealth is not a protected classification for Equal Protection purposes, this is irrelevant to Title VIII discriminatory effect claims

There would appear to be some initial support for this argument. Income is not a suspect classification for Equal Protection purposes, the Supreme Court has held, except in unusual circumstances.[115] The Ninth Circuit held in an Equal Protection case that "discrimination against the poor does not become discrimination against a minority because there is a statistical correlation between poverty and ethnic background."[116]

However, while it is true that wealth is not a protected classification for Equal Protection purposes, this is irrelevant to Title VIII discriminatory effect claims. Discriminatory effect claims are not permitted under the Constitution. Plaintiffs are only entitled to relief under Equal Protection principles where they are able to show a policy that is discriminatory on its face (*i.e.*, that the policy makes express reference to membership in a protected class) or to show discriminatory purpose on the part of a defendant.[117] As Title VIII has been interpreted, however, discriminatory purpose is not required for a plaintiff to recover. Where facially neutral policies or practices affecting people on the basis of their income also have a significant adverse racial effect, this ought to be a sufficient initial showing of discriminatory effect for Title VIII purposes.[118] To say that adverse effects flowing from the loss of a development affects people on the basis of income rather than race simply means that the loss is the result of facially neutral policies. Any policy that is facially neutral will by definition involve classifications, such as income, that are not protected under the Constitution or the federal civil rights laws.

No Entitlement to Housing, Therefore No Violation of Law

PHAs and project owners displacing families through demolitions or conversions may challenge discriminatory effect liability by arguing that plaintiffs have suffered no injury because they have no entitlement to housing in the first place. The Supreme Court has held that the Constitution does not guarantee a right to access to "adequate housing."[119] The Court has also held that restrictions on the construction of low-income housing do not violate Equal Protection rights, unless the purpose of these restrictions is to harm members of a protected class.[120] A number of decisions have relied on these holdings to deny constitutional challenges and challenges under Title VI of the *Civil Rights Act of 1964*[121] by low-income people to substandard conditions in public housing,[122] to restrictive zoning provisions preventing the construction of low-income housing projects,[123] and to the refusal of local governments to provide for the construction of low-income housing.[124]

As with the discussion of income disparity above, defendants may not mix constitutional and Title VIII case law so easily. There is no constitutional right to employment, but this does not shield employers from Title VII[125] disparate impact liability.[126] As the Fourth Circuit has held, even though a municipality is not required to construct housing, it still "cannot construct housing and then operate it in an illegally

[113]*See* 42 U.S.C.A. § 3602(a)(2)(applying §3604 to recipients of federal housing funding as of Title VIII's 1968 date of enactment). This fact is not necessarily decisive as the availability of discriminatory effect claims against private defendants because Title VIII does not specify what level of intent is required for liability.

[114]*See Part One*, 31 HOUS. L. BULL. 84-86.

[115]*See San Antonio School District v. Rodriguez*, 411 U.S. 1, 20 (1973)(income discrimination will only result in a Equal Protection violation if the result is "absolute deprivation of a meaningful opportunity to enjoy [a] benefit").

[116]*Ybarra v. Town of Los Altos Hills ("Ybarra")*, 503 F.2d 250 (9th Cir. 1974).

[117]*See Washington v. Davis*, 426 U.S. 229 (1976).

[118]*See, e.g., Arlington II*, 558 F.2d at 1288 (drawing a link between income and race in its disparate impact analysis: "Because a greater number of black people than white people in the Chicago metropolitan area satisfy the income requirements for federally subsidized housing, the Village's refusal to permit MHDC to construct the project had a greater impact on black people than on white people."). *See also Laufman v. Oakley Building & Loan Co.*, 408 F.Supp. 489, 493 (S.D.Ohio 1976) ("[A] denial of financial assistance in connection with a sale of a home would effectively 'make unavailable or deny' a 'dwelling' " in violation of § 3604(b)."). *But see Boyd v. Lefrak Organization*, 509 F.2d 1110, 1115 (2nd Cir. 1974), *overruled in Huntington*, 844 F.2d 926 (2nd Cir. 1988).

[119]*Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

[120]*See James v. Valtierra* 402 U.S. 137, 140 (1971).

[121]42 U.S.C.A. §§ 2000d, *et seq.* (West 1999).

[122]*See Perry v. Housing Authority of the City of Charleston*, 664 F.2d 1210 (4th Cir. 1981).

[123]*See Ybarra*, 503 F.2d at 254.

[124]*See Acevedo v. Nassau County*, 500 F.2d 1078 (2nd Cir. 1974).

[125]42 U.S.C.A. §§ 2000e, *et seq.* (West 1999).

[126]*See, e,g., Griggs v. Duke Power Co. ("Griggs")*, 401 U.S. 424 (1971).

discriminatory manner."[127] If defendants have undertaken to provide housing, they must do so in a manner consistent with Title VIII.

Interference with the Conversion of Privately Owned Projects as Constitutionally Barred Takings

An owner of an assisted multifamily development may argue that a judicial remedy interfering with its decision to withdraw its development from the federal housing programs would amount to a government taking of the owner's property without just compensation and would therefore violate the owner's *Fifth Amendment* rights. *Takings Doctrine* is another unsettled area of the law, particularly in the area of land use regulation.[128] Only a brief summary of the issues involved will be presented here, but *Takings Doctrine* should not bar the applicability of Title VIII discriminatory effect theories against project owners.

Takings generally come in two forms: (1) per se takings, "[w]here the government authorizes a physical occupation of property (or actually takes title)," and (2) regulatory takings, where the state "deprives the owner of the economic use of [its] property" by regulation in a way that "unfairly single[s] out the property owner to bear a burden that should be borne by the public as a whole."[129] Nonetheless, the Court has permitted a substantial amount of regulation of landlord-tenant relationships without payment of compensation by governments.[130] The Court has explained:

> When a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge, see, *e.g.*, [*Pennell v. San Jose*, 485 U.S. 1, 12, n. 6 (1988)], or require the landowner to accept tenants he does not like, see, *e.g.*, [*Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 261 (1964)], without automatically having to pay compensation.[131]

The potential to regulate without triggering Fifth Amendment protections is not necessarily unlimited. Landlord-tenant regulations that went substantially further than those at issue in *Pennell* and *Heart of Atlanta Motel*, "effectively limiting land to only one use or requiring an owner to continue a particular use," could constitute per se takings.[132]

Even if interference with project conversion is not determined to be a per se taking, it could amount to a regulatory taking—particularly in light of the special protection given to private property interests in land ownership.[133] The question is uncertain because the Supreme Court has expressly acknowledged that a finding of a regulatory taking involves "essentially ad hoc, factual inquiries."[134] These inquiries are typically pursued with an eye towards the economic impact on the property owner, the regulation's interference with "interest-backed expectations," and the character of the government action[135]—and perhaps the extent to which the property owner's use of its property has created the problem that the government is attempting to address through regulation.[136]

Project owners have invoked the *Takings Clause* to challenge interference with project conversions in the past. Owners a decade ago attacked provisions of the *Emergency Low Income Housing Preservation Act of 1987* (ELIHPA),[137] which limited their right to prepay their federally insured mortgages, a required step for terminating owners' obligations under the regulatory agreements that prevent converting projects to higher income use.[138] These challenges stalled without the matter being clearly resolved.[139] Similarly, no case has clearly decided a *Fifth Amendment* challenge to the *Low Income Housing Preservation and Resident Homeownership Act of 1990* (LIHPRHA).[140]

Title VIII discriminatory effect plaintiffs can present a number of counterarguments to any alleged *Fifth Amendment* barriers to liability. First, Title VIII was enacted by Congress pursuant to its broad and special powers under the *Thirteenth Amendment*,[141] which may obviate the applicability of the *Takings Clause*.[142] Second, government restrictions

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[127] *See Smith v. Town of Clarkton ("Clarkton"),* 682 F.2d 1055, 1068 (4th Cir. 1982). *See also Otero v. New York City Housing Authority,* 484 F.2d 1122 (2nd Cir. 1973); *Citizens Comm. for Faraday Wood v. Lindsay*, 507 F.2d 1065 (2nd Cir. 1974).

[128] *See generally* Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings ("McUsic"),* 92 N.W. L. Rev. 591 (1998).

[129] *Yee v. City of Escondido ("Yee")*, 503 U.S. 519, 522 (1992) (citing *Loretto v. Teleprompter Manhattan CATV Corp. ("Loretto"),* 458 U.S. 419, 426 (1982); *Penn Central Transportation Co. v. New York City ("Penn Central")*, 438 U.S. 104, 123-125 (1978)).

[130] *Yee*, 503 U.S. at 528.

[131] *Id.* at 529.

[132] McUsic, 92 N.W. L. Rev. at 600 (citing *Yee,* 503 U.S. at 528).

[133] *See id.,* 92 N.W. L. Rev. at 598–602.

[134] *Penn Central,* 438 U.S. at 124.

[135] *See* McUsic, 92 N.W. L. Rev. at 597 (citing *Penn Central,* 438 U.S. at 124).

[136] *See id.,* 92 N.W. L. Rev. at 604 (citing *Pennell*, 485 U.S. at 20–21 (Scalia, J., dissenting in part). The district court in *Brown*, 654 F. Supp. at 1116 (D.C. 1987), appears to apply this type of reasoning, although it does not mention *takings* explicitly: "It is an unfortunate fact, for which individual private landowners have no more responsibility than any other member of the community, that the income of a disproportionate number of blacks and members of other minority groups is such that, although they are able to afford low income housing, many cannot afford the rentals being charged for upgraded or luxury housing." (footnote omitted).

[137] Pub. L. No. 100-242, § 202, 101 Stat. 1877 (1987), formerly codified at 12 U.S.C. § 1715*l* note.

[138] *See* Howard D. Cohen and Taylor Mattis, *Prepayment Rights: Abrogation by the Low income Housing Preservation and Resident Homeownership Act of 1990*, 28 Real Prop. Prob. & Tr. J. 1, 5 (1993).

[139] *See id.,* Real Prop. Prob. & Tr. J. at 5, n.18 (citing *Orrego v. 833 West Buena Joint Venture*, 943 F.2d 730 (7th Cir.1991); *Johnson v. United States Dep't of Hous. & Urban Dev.*, 911 F.2d 1302 (8th Cir.1990); *Thetford Properties v. United States Dep't of Hous. & Urban Dev.*, 907 F.2d 445 (4th Cir.1990)).

[140] Pub. L. No. 101-625, Tit. VI, § 601, 104 Stat. 4079, as amended by Pub. L. No. 104–134, § 101(e), Tit. II, 110 Stat. 1321 (1996), codified at 12 U.S.C.A. § 4101. *See also HUD Housing Programs and 1998 supplement*, §§ 15.3.1.1, *et seq.*

[141] *See* n. 112, *supra.*

[142] *See, e.g., Johns v. Evergreen Presbyterian Ministries*, 826 F.Supp. 1050, 1057, n. 2 (E.D.Tex.,1993) ("[T]he Thirteenth Amendment … which, confiscating 'property' by abolishing slavery without compensating the slaveowners, represents one of the greatest seizures of 'property' in world history.") (citing Sanford Levinson, *Unnatural Law, The New Republic*, July 19 & 26, 1993, 40-44 (reviewing Cass R. Sunstein, The Partial Constitution (1993)).

on purposeful discrimination are not takings.[143] Restrictions on policies and practices having discriminatory effects, which are the functional equivalent of purposeful discrimination, ought to be treated in the same way, at least where defendants are unable to put forth sufficient justification for their actions. Third, compliance with Title VIII and *Executive Order 11063* regulations is required of project owners not only because they are binding statutory and regulatory enactments but also because of the provisions included in owners' subsidy contracts and mortgage insurance regulatory agreements.[144] Fourth, even if interference with a project conversion is a taking, this interference is still permissible because owners have consented by contract to the application of fair housing requirements against them and because the mortgage insurance and direct subsidies project owners have already received, and will receive if they continue to participate in the programs, is sufficient just compensation.[145]

Conclusion

This article has analyzed the vulnerability of plans to demolish or otherwise withdraw federally assisted housing to discriminatory effect claims under federal fair housing law. While the case law is varied, a showing of significant discriminatory effect under such circumstances, in the absence of adequate justification, would be sufficient basis for the imposition of liability under Title VIII of the *Civil Rights Act of 1968*. Because of the extent to which families of color rely on federal housing programs according to national figures,[146] discriminatory effect claims have a potentially very broad applicability in situations involving the loss of federally assisted developments. ■

[143]*See Yee*, 503 U.S. at 529; *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 261 (1964).

[144]*See Part One*, 31 HOUS. L. BULL. 84-86.

[145]An owner disputing the terms of an agreement through which it has drawn thousands of dollars of benefits from for decades would appear to be in a fairly weak equitable position, especially if the owner is eligible for a "mark-up" rent increase under a renewed Section 8 contract. In addition, as previously mentioned, HUD has substantial fair housing duties of its own. *See HUD's Fair Housing Duties*, 29 HOUS. L. BULL. 1 (1999). If HUD's withholding of a discretionary subsidy increase threatens the loss of a development, it may also be liable for violation of its affirmative fair housing duties. *See id.*

[146]*See Part One*, 31 HOUS. L. BULL. 73-75.

HUD Issues Partial Final Rule on the Voluntary Conversion of Public Housing Developments to Vouchers

The Quality Housing and Work Responsibility Act of 1998[1] (QHWRA) amended and added sections of the *U.S. Housing Act* on the conversion of public housing developments to vouchers. The QHWRA amended Section 22 of the *U.S. Housing Act*,[2] providing authority to public housing authorities (PHAs) to convert developments on a voluntary basis. It also added a new Section, 33,[3] which requires conversion of developments determined to be severely distressed or that fail to meet long-term viability criteria.[4]

In June, the Department of Housing and Urban Development (HUD) issued a partial final rule implementing Section 22, which requires that PHAs submit to HUD initial assessments of their developments' suitability for voluntary conversion.[5] Pursuant to the QHWRA, the deadline for these submissions is October 1, 2001.[6] HUD's actions in implementing the conversion provisions of the QHWRA to date and the requirements of the partial final rule are discussed below.

HUD's Previous Steps in Implementing the Conversion Provisions of the QHWRA

In its initial guidance on the QHWRA, HUD has determined that Sections 533 and 537 are not self-implementing and require rulemaking.[7] Approximately two years ago, HUD

[1]Pub. L. No. 105-276 (Oct. 21, 1998).

[2]Codified at 42 U.S.C.A. § 1437t (West Supp. 2001).

[3]*Id.* § 1437z-5.

[4]The QHWRA repealed the previous mandatory conversion provision of § 202 of the *Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1996,* codified at 42 U.S.C. 1437*l* note, but let stand conversion decisions for developments already identified under the *1996 Act*. *See* Pub. L. No. 105-276, § 537(b), (c)(2). *The Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1996* was part of the *Omnibus Consolidated Rescissions and Appropriations Act of 1996* ("OCRA"), Pub. L. 104-134 (Apr. 26, 1996).

[5]*See* 66 Fed. Reg. 33,616 (Jun. 22, 2001)(*Voluntary Conversion of Developments from Public Housing Stock; Required Initial Assessments)*. Hereinafter, citations to the regulations will be limited to the affected section of the Code of Federal Regulations. These regulations will be codified in the 2002 volume of the 24 C.F.R.

[6]*See* 42 U.S.C.A. § 1437f(b)(2)(West. Supp. 2001). However, HUD considers this deadline to be flexible. *See* n. 26, *infra.*

[7]*See* 64 Fed. Reg. 8,192, 8,207 (1999)(*Quality Housing and Work Responsibility Act of 1998; Initial Guidance; Notice*).

issued proposed regulations to implement these sections of the QHWRA.[8] The June 2001 partial final rule is the only QHWRA-conversion regulation currently in effect.[9]

The Provisions of the Partial Final Rule on Voluntary Conversion

The partial final rule was issued to allow compliance with the October 1, 2001 deadline for the submission of PHAs' "required initial assessments" for voluntary conversion to HUD.[10] The partial final rule consolidates regulatory provisions on initial assessments in the proposed rule into a single subsection, 24 C.F.R. § 972.200.[11] The subsection on initial assessments has four main parts dealing with:

- developments exempt from assessment;
- PHA assessment certification procedures;
- "necessary conditions" for the voluntary conversion of a development; and
- documentation and submission requirements.

Developments Exempt from Initial Assessment

A PHA must conduct required initial assessments once for each of its public housing developments, if the development falls under one of four exemptions. Conditions for exemption include:

- that the development is already subject to required conversion under 24 C.F.R. § 971;[12]
- that the development is the subject of a demolition or disposi*tion application under Section 18 of the U.S. Housing Act* that has not been disapproved by HUD;
- that the development is the subject of a HOPE VI revitalization award; or
- that the development is designated for occupancy by the elderly and/or persons living with disabilities.[13]

In its commentary to the partial final rule, HUD explains that it has exempted developments designated for occupancy by elderly and/or persons living with disabilities because it "believes that few such developments are likely to be proposed for voluntary conversion" and that conducting assessments of such development would be "confusing to the public."[14] HUD states that exempting these developments will focus initial assessments on "family … developments which are more likely to merit consideration for voluntary conversion."[15] However, HUD never describes any basis for these beliefs.

Assessment Certification Procedures

Initial assessments take the form of PHA certifications. For each of their developments, PHAs are to certify in very general terms that they have "[r]eviewed the development's operation as public housing," "considered the implications" of converting to vouchers, and reached a conclusion as to whether or not the development meets the necessary conditions for voluntary conversion.[16] Essentially, what HUD has done is to allow all PHAs to submit what were "streamlined" initial assessments under the proposed rule.[17] A PHA is not bound by its required initial assessments, and retains its discretion as to whether to submit voluntary conversion applications for any of its developments in the future.[18]

Necessary Conditions for the Conversion of Public Housing Developments

The partial final rule lists three "necessary conditions" for the conversion of public housing developments. These conditions require that the conversion of a development will:

- not be more expensive than continuing to operate the development (or portion of it) as public housing;
- principally benefit the residents of the public housing development to be converted and the community; and
- not adversely affect the availability of affordable housing in the community.[19]

If a PHA determines that these three conditions are present, "[c]onversion … may be appropriate."[20]

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[8]*See id.* at 40,231 (July 23, 1999)(*Section 22: Required Conversion of Developments From Public Housing Stock; Proposed Rule*); *id.* at 40,240 (*Section 33: Voluntary Conversion of Developments From Public Housing Stock; Proposed Rule*).

[9]In the commentary to the partial final rule, HUD states that a "more comprehensive final rule" on voluntary conversion will be published "in the near future," but does not give a more specific date or time frame. *See* 66 Fed. Reg. at 33,616 (June 22, 2001).

[10]*See id.*

[11]*See id.*

[12]Part 971 implements required conversion provisions of the OCRA. *See* n. 4, *supra.*

[13]*See* 24 C.F.R. § 972.200(a).

[14]*See* 66 Fed. Reg. at 33,616 (June 22, 2001).

[15]*See id.*

[16]*See* 24 C.F.R. § 972.200(b).

[17]*See* 66 Fed. Reg. at 33,616 (June 22, 2001). HUD's authority to streamline voluntary conversion assessments is provided under the QHWRA. *See* 42 U.S.C. § 1437t(b)(3)(West Supp. 2001). The QHWRA requires a more detailed, five-part assessment that includes an analysis of local rental market conditions. *See id.* at § 1437t(b)(1).

[18]*See id.*

[19]*See* 24 C.F.R. § 972.200(c).

[20]*See id.*

Documentation and Submission Requirements

The partial final rule requires that PHAs "maintain documentation of the reasoning" behind their required initial assessments.[21] Required initial assessment certifications are to be submitted to HUD as part of each PHA's next Annual Plan.[22]

HUD's Subsequent Clarification of the Partial Final Rule

HUD has published an undated clarification of the partial final rule on the Office of Public and Indian Housing Public Housing Agency Plans Web site.[23] The clarification appears to indicate that HUD intended to affect only minimum compliance with statute with its partial final rule. The clarification emphasizes that the required initial assessment "is intended to be a commonsense assessment and does not require a market study."[24]

The clarification lists several factors that PHAs "can consider" in performing their required initial assessments. These factors include cost, ability to rent-up the development, and the cost and feasibility of vouchers. However, HUD does not require PHAs to collect any specific information in conducting their assessments.

Most dismaying is the clarification's treatment of the partial final rule's documentation requirement. According to the clarification, a PHA's documentation of its reasoning in supporting its conversion assessments for individual developments must be made available for public review, but this documentation need only be a "brief narrative description… (which may be as short as a few sentences)."[25]

As thoroughly streamlined as HUD has made them, it is difficult to see how the PHAs' initial assessments for voluntary conversion will serve any useful function. As superficial as they are permitted to be, it is unlikely that they will provide sufficient basis for any principled voluntary conversion decision by a PHA. The minimal documentation requirements will not provide residents and other members of communities in which public housing developments are located with any meaningful information about a PHAs' conversion plans.

In the clarification, HUD states that it recognizes that PHAs' initial assessments may not be completed by October 1, 2001, but that it expects PHAs to "proceed expeditiously and responsibly."[26] PHAs will be required to include required initial assessment certifications in their PHA Annual Plans beginning with those plans covering fiscal years January 1 to December 31, 2002. HUD will issue further guidance on the format of certifications.[27] ■

[21] *Id.* § 972.200(d).

[22] *Id.* § 972.200(e).

[23] *See Clarification of PHA Action Required by Voluntary Conversion of Developments From Public Housing Stock; Required Initial Assessments Final Rule* ("Clarification"), *available at* www.hud.gov/pih/pha/plans/fr4476_clarification.html.

[24] *See id.*

[25] *Id.*

[26] *Id.*

[27] *See id.*

HUD Publishes Proposed Rule and Interim Rule Affecting Existing Section 8 Homeownership Program

Introduction

The Department of Housing and Urban Development (HUD) recently published a proposed regulation and an interim regulation to supplement its nine-month-old Section 8 Homeownership Option. Originally authorized under the *Quality Housing and Work Responsibility Act of 1998* (QHWRA), the current homeownership option allows eligible families to use federal Section 8 voucher assistance to purchase their own homes.[1] The first part of the proposed rule seeks to implement Section 301 of the *American Homeownership and Economic Opportunity Act of 2000*, which amends the existing homeownership option, by providing an alternative downpayment assistance grant option for low-income families already participating in the Section 8 voucher program.[2] The second part of the proposed rule clarifies and streamlines the regulations of the existing homeownership option. These changes include:

- clarification that the homeownership option must be offered to disabled persons if needed as a reasonable accommodation;
- expansion of the homeownership option to include, under certain circumstances, manufactured homes;
- removal of the recapture requirement; and
- authorization for every public housing authority (PHA) to adopt a higher minimum-income eligibility standard that is based on local housing costs and the practices of participating lenders.

The interim rule establishes regulations that implement the homeownership assistance program for disabled families as authorized under Section 302 of the *American Homeownership and Economic Opportunity Act of 2000*. These interim regulations permit PHAs to implement a three-year pilot program allowing disabled families with incomes up to 99 percent of area median income (AMI) to use Section 8 assistance for homeownership.

[1] Public Law 105-276, Title V, § 501 *et seq.*, 112 Stat. 2518 (Oct. 21, 1998). The QHWRA amended the *United States Housing Act of 1937* (42 U.S.C.A. 1437 *et seq.*). The homeownership option is authorized under § 8(y) of the *United States Housing Act of 1937*, 42 U.S.C.A. 1437f(y)(1)(B), as amended by § 555 of the QHWRA. The Section 8 Homeownership Program became effective on October 12, 2000 and is codified in 24 C.F.R. § 982.625 *et seq.* (2001). *See* 65 Fed. Reg. 55,134 (Sept. 12, 2000).

[2] Public Law 106-569, Title III, § 301 *et seq.*, 114 Stat. 2944 (Dec. 27, 2000). *The American Homeownership and Economic Opportunity Act of 2000* amended § 8(y) of the *United State Housing Act of 1937*, 42 U.S.C.A. 1437f(y)(7)(West Supp. 2000).

The Downpayment Assistance Grant Program[3]

The downpayment assistance grant program (DAG program) advances a drastically different form of assistance under the homeownership option than that currently available to Section 8 voucher participants. Under the current Section 8 homeownership program, PHAs have the discretion to offer monthly homeownership assistance payments—instead of the traditional monthly rental assistance payment—to eligible families applying for, or participating in, the Section 8 voucher program.[4] Depending on the length of the mortgage, eligible families may receive mortgage assistance for a period of up to 15 years or longer, if the family qualifies as an elderly or disabled family.

The downpayment assistance grant program advances a drastically different form of assistance under the homeownership option than that currently available to Section 8 voucher participants.

The DAG program, which may be offered in addition to (or instead of) the existing monthly homeownership assistance payment option, will permit PHAs to offer a single downpayment grant program to Section 8 participants. It permits households already participating in the Section 8 tenant-based voucher program to receive a one-time downpayment grant to purchase a home. In exchange, the participants may be permanently barred from the Section 8 voucher program.

To qualify for a downpayment assistance grant, the family must have received Section 8 tenant-based voucher assistance for at least one year prior to receiving the grant.[5] The family must also meet the eligibility requirements established by HUD for the existing Section 8 homeownership program as well as any further discretionary eligibility criteria set out in the local PHA Administrative Plan.[6]

The size of the downpayment assistance grant is discretionary. However, it may not exceed 12 months of the PHA payment standard, less the total tenant payment (TTP).[7] In calculating the grant amount, the TTP is based on the income of the family at the time the grant is made (*i.e.*, while the family is still receiving Section 8 tenant-based assistance).[8] Unlike the existing homeownership option, however, the PHA may not consider any homeownership expenses in determining the downpayment assistance grant amount for the family.[9]

The downpayment assistance grant must be applied to the purchase price of the home at the closing or settlement of the sale.[10] Although not addressed in the proposed regulations, the preamble to the regulations makes clear that the use of the downpayment assistance grant for any fees or charges related to purchasing the home, including closing costs, is prohibited.[11]

Importantly, the proposed regulations mandate that a member of a family that has received a downpayment assistance grant may not ever receive monthly homeownership assistance or a downpayment assistance grant from the same or any other PHA.[12]

Lastly, the proposed regulations make clear that disabled families are entitled to participate in either the existing homeownership or the DAG program—even if the PHA chooses not to offer either program to its Section 8 participants—as a reasonable accommodation if such an accommodation is necessary to make the special program accessible and usable by the family.[13]

According to HUD, the objective of the DAG program is to help "relatively higher income families with vouchers

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[3]*Section 8 Homeownership Program; Downpayment Assistance Grants and Streamlining Amendments,* 66 Fed. Reg. 32,198 (June 13, 2001)(Proposed Rule).

[4]For more information regarding both the current Section 8 Homeownership Program and the local programs designed under the demonstration authority created by QHWRA, *see HUD Issues Final Rule Implementing the Section 8 Homeownership Program,* 30 HOUS L. BULL. 127 (Sept. 2000); *The Section 8 Homeownership Demonstration Program: A Selective Review of Its Success*, 31 HOUS. L. BULL. 1 (Jan. 2001); and *Community Participation and Program Flexibility Are Key to Creating a Successful Section 8 Homeownership Program*, 31 HOUS. L. BULL. 101 (May 2001), available *at* www.nhlp.org.

[5]66 Fed. Reg. 32,202 to be codified at § 982.643(a)(2).

[6]*Id*. at 32,201 to be codified at § 982.625(e)(4).

[7]*Id.* at 32,202 to be codified at § 982.643(b). Assuming that the rental unit is leased at the full amount of the payment standard, the payment standard and TTP are traditionally used to calculate the HAP paid by the PHA to the owner. 24 C.F.R. §§ 5.628, 982.4(b), 982.515(a)(2001).

[8]Public Law 106-569, Title III, § 301 *et seq.*, 114 Stat. 2944, 2952 (Dec. 27, 2000).

[9]*See* 66 Fed. Reg. at 32,199 (June 13, 2001). Under the existing homeownership option, the monthly HAP is the *lesser* of (1) the payment standard minus the TTP, or (2) the family's monthly homeownership expenses minus the TTP. 24 C.F.R. § 982.635(a)(2001). Monthly homeownership expenses include the mortgage debt (principal and interest), taxes and insurance, assessments, utility allowances, and maintenance, repair and replacements for both homeowners and for owners of cooperative and condominium units. § 982.635(c). Homeownership expenses may also include cooperative or condominium operating charges or maintenance fees assessed by a homeowners association and may also include the cost for financing improvements to make a home accessible for a member of the family who has a disability. *Id*.

[10]66 Fed. Reg. at 32,202 to be codified at § 982.643(c).

[11]*Id*. at 32,199.

[12]*Id.* at 32,202 to be codified at § 982.643(a)(3).

[13]24 C.F.R. § 982.601(b)(3)(2001). The homeownership option is a "special housing type" under the Section 8 voucher program. *Id.* Subpart M, § 982.601 *et seq*. Generally, PHAs are *not* required to permit Section 8 voucher participants to use their federal subsidies for special housing types. However, a PHA *must* permit the use of any special housing type, including one of either form of homeownership assistance, to disabled families if necessary as a reasonable accommodation. *See* 66 Fed. Reg. at 32,201 to be codified at 24 C.F.R. § 982.625(3)(2). Note that generally, a single unit cannot be designated as more than one "special housing type." 24 C.F.R. § 982.601 (e)(3)(2001). However, HUD specifically permits the homeownership option to be used for several special housing types, including cooperative housing and manufactured homes (with certain requirements). *See id*. § 982.628(a)(3); *see also* 66 Fed. Reg. at 32,202 to be codified at §982.628(b).

move 'up and out' and become homeowners, freeing up vouchers for other needy renter families."[14] While a laudatory goal, the program as proposed has several potential flaws that may end up leaving both participants and lower-income families, for whom vouchers may be freed up, at a disadvantage.

Undeniably, if it works as intended, the DAG Program could indirectly benefit very low- and extremely low-income families waiting for Section 8 voucher rental assistance by freeing up vouchers currently used by "higher-income" families. However, because of ease of administration and incentives, in the form of administrative fees, available for the DAG program and not for the existing homeownership option, it is likely that many PHAs will choose to implement only the DAG program. As a result, PHAs will be denying homeownership opportunities to many lower-income families, who also are able to purchase homes by using their Section 8 voucher in conjunction with a variety of specialized loan products and/or local first-time homebuyer programs.[15] Accordingly, PHAs should be encouraged by HUD and others to offer both homeownership assistance options to its Section 8 voucher holders.

Under the DAG program, once the participating household has closed its home loan using the DAG grant, it will have no further contact with the PHA. Consequently, it is extremely important for the PHA to carefully review the participant's financial condition and capacity to become a successful homeowner. This entails, among other things, giving close scrutiny to the household's income, the projected homeownership expenses, the proposed financing, sales contract, appraisal and other documents to ensure that the sale price of the home and monthly mortgage payments are affordable. It will also require that the PHA scrutinize the lender and the terms of the loan to ensure that the borrower is not subject to abusive loan terms or predatory lending tactics.[16] It may also be advisable to limit participation in the DAG Program to families who can demonstrate that their monthly mortgage payment will be less than the average TTP paid by the family over the last year. Unfortunately, the proposed regulations do not provide PHAs with any incentives to carry out a rigorous review of the participant's financial circumstances, the lender or the transaction to ensure long-term, successful homeownership. Indeed, by virtue of the fact that the PHA will have no further dealings with the household after the loan is closed, and no accountability for failures, PHAs may be inclined to take a shortcut in whatever review they are required to undertake.

Once the participating household has closed its home loan using the DAG grant, it will have no further contact with the PHA.

The fact that DAG is restricted to downpayments and may not be used for closing costs may be detrimental to participating families. Participating households who are low-income, first-time homebuyers may be able to qualify for a loan that requires little or no downpayment.[17] On the other hand, in many instances, closing costs can be substantial, requiring the family to pay several thousands of dollars or more from its own funds. Unless the family is participating in a Family Self-Sufficiency or similar program, it is unlikely that it will have developed a substantial savings account to pay such fees and costs.[18] In these cases, the DAG Program may not be as helpful to the family as would the receipt of continuing monthly mortgage assistance for the next 15 years under the existing Section 8 homeownership option.

The fact that members of a household who receive DAG program assistance are permanently disqualified from receiving Section 8 homeownership assistance poses a problem. As proposed, the disqualifying language is sufficiently broad to encompass persons other than those who take title to the property and could potentially disqualify children and others who

[14]66 Fed. Reg. 32,198-99 (June 13, 2001.)

[15]For more information regarding financing tools and program development, *see Community Participation and Program Flexibility Are Key to Creating a Successful Section 8 Homeownership Program*, 31 HOUS. L. BULL. 101 (May 2001).

[16]HUD should also amend its existing homeownership regulations under 24 C.F.R. § 982.632(d) to require the PHA to review lender qualifications and the loan terms of the mortgage prior to approving monthly homeownership assistance (or the downpayment assistance grant) and to disapprove the assistance, if necessary, to avoid participants purchasing homes that are not affordable to them and to protect the family against predatory or abusive lending tactics.

[17]For example, a homebuyer with very low income may qualify for an USDA/Rural Housing Service direct loan under the Section 502 loan program. Under that program, a qualified homebuyer can receive a loan equal to, and in some instances greater than, the appraised value of the house that is amortized over 38 years at an initial interest rate of 1 percent. When the purchase price of the home is less than the appraised value, the purchaser may not be required to make a downpayment since the loan amount will cover both the purchase price and the closing costs.

[18]The Family Self-Sufficiency (FSS) program is HUD's primary program for assisting Section 8 voucher recipients who are moving from welfare to work. 42 U.S.C.A. § 1437u (West 1994 & Supp. 2000); 24 C.F.R. Part 984 (2001). In addition to providing case management to develop individual program contracts and to provide assistance in accessing supportive services, the FSS program features an escrow account provision to support the family in its work efforts. *See id.* § 984.305. If an FSS participant's earnings from work increase, an amount equal to 30 percent of the participant's net increase in income (or 30 percent of the participant's increased earnings, whichever is lower) is deposited into an escrow account. If the participant graduates successfully from FSS, the participant will receive all of the funds in the escrow account. However, if the participant fails to complete the program, the participant loses the funds in the escrow account. PHAs receive additional funding from HUD to cover their contribution to FSS escrow accounts. *See also* Barbara Sard & Jeff Lubell, *The Family Self-Sufficiency Program*, at www.cbpp.org/5-5-99hous.htm (Mar. 28, 2001).

will not benefit directly from the DAG. Thus, if a prohibition on future receipt of Section 8 homeownership assistance is at all necessary, it should be directed only at those household members who are taking title to the property.

The regulations are unclear whether members of a household who receive DAG program assistance are permanently disqualified from receiving Section 8 tenant-based voucher assistance

The regulations are unclear whether members of a household who receive DAG program assistance are permanently disqualified from receiving Section 8 tenant-based voucher assistance, or whether the future receipt of assistance is at the discretion of the PHA. In any event, DAG recipients should be permitted to return to the Section 8 rental assistance program if necessary. Even in high-cost areas, participants are not likely to ever receive more than about $10,000 in the form of a downpayment grant. In return, they may not be forever disqualified from receiving Section 8 assistance. This would appear to be a harsh tradeoff that a participating family, enticed and blinded by the dream of homeownership, may not fully appreciate at the time that it enters the DAG program. Households receiving Section 8 assistance, even when they are at the higher end of the income spectrum, are financially vulnerable and subject to personal and economic hardships. A household that is well qualified for the program at the beginning may find itself in a difficult financial situation one or more years down the road due to the loss of a job, illness or death. Regardless of the time interval, because the household participated in the DAG program, it is subject to never again being able to receive a Section 8 voucher and will be required to endure whatever economic hardships may befall it, including homelessness, because it received a one-time grant of less than $10,000. Such a result is hardly just and it is doubtful that households entering the DAG program will have both full disclosure and complete appreciation of the potential consequences of receiving this one-time grant. It would seem that in most instances, it would be far more advisable for households to participate in the existing homeownership program and avoid those consequences. Unfortunately, in cases where PHAs choose to only implement the DAG program, participants will not be able to have even that option.

If disqualification is a desired policy choice, a more equitable approach would be to disqualify participating households from receiving Section 8 assistance for a period equivalent to the number of months of assistance which they have received. Such an alternative is not precluded by the DAG program authorizing legislation.

Thus, while the DAG Program can be successful for both higher-income and lower- income families who are purchasing homes in lower-cost and/or rural areas who simply need access to unrestricted downpayment funds to purchase a home, the program has significant associated risks that will lead to individual and program-wide failures. HUD and PHAs therefore, should do everything in their power to minimize those risks.

Streamlining and Clarifying Amendments to the Existing Homeownership Option[19]

The clarifying amendments to the existing Homeownership Option include: modification of the minimum income requirements, an expansion of the types of eligible units for which the program can be used and removal of the recapture provisions.

Minimum Income Requirement

Under the existing homeownership option, the adult family members who will own the home at the commencement of homeownership assistance must have an annual (gross) income that is not less than the federal minimum hourly wage multiplied by 2,000 hours (*i.e.*, currently $10,300 per year.)[20] Welfare assistance may not be included in determining annual income unless the participating family is elderly or disabled.[21]

According to HUD, PHAs are expressing concern that an annual income of $10,300 per year is too low to purchase homes in some housing markets. PHAs are also asserting that the current minimum income requirement "unrealistically raises the expectations of many families and results in an unnecessary administrative burden for PHAs who must process a large number of applications that have no realistic chance of leading to homeownership."[22] Accordingly, HUD proposes to provide each PHA with the discretion to establish a higher minimum income standard that is based on local housing costs and the practices of participating lenders.[23]

However, HUD also expresses concern about the potential denial of the homeownership option by the PHAs to families who would otherwise qualify for mortgages from a reputable lender. As a result, HUD proposes that a family that does not meet a higher minimum income standard established by the PHA (but otherwise is eligible under program requirements) shall not necessarily be precluded from participating in the homeownership program. To be exempt from any higher PHA income standard that may be adopted, the family would need to meet the minimum income requirements established by HUD and obtain pre-qualification or preapproval for financing to purchase a home. The family would also be required to meet any other

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[19]*Section 8 Homeownership Program; Downpayment Assistance Grants and Streamlining Amendments*, 66 Fed. Reg. at 32,199 (June 13, 2001)(Proposed Rule).

[20]24 C.F.R. § 982.627(c)(2001).

[21]*Id.*

[22]66 Fed. Reg. at 32,199 (June 13, 2001).

[23]*Id.* at 32,201 to be codified at § 982.627(c)(3).

financing requirements established by the PHA. The PHA then must ensure that the pre-qualified financing amount is "sufficient to purchase decent, safe, and sanitary housing of a modest nature in the PHA's jurisdiction."[24]

Other than to assuage PHAs, there appears to be little justification to allow PHAs to establish, locally, higher minimum income standards.[25] In fact, there is ample evidence and experience to suggest that the current income limits are too high and that the limits should, instead, be lowered because the current limits preclude many otherwise qualified families, with incomes lower than $10,300, from using the program.

There are many loan programs that are designed for very-low income persons and households, the elderly, and disabled, that when combined with the Section 8 assistance payment can serve households with incomes well below the $10,300 threshold set by HUD. For example, the USDA/Rural Housing Services Section 502 Direct Loans program, which provides long-term (33 to 38 years), very low-interest (as low as 1 percent) loans to households purchasing homes in rural areas, can serve families with annual incomes at or even below $6,000. Other programs are available for households that include a person with a disability or seniors living on fixed, government incomes,[26] which typically is well under the HUD set threshold of $10,300. Several of these loan programs have been, and are being, used successfully by households with income under the minimum limit in the demonstration programs authorized under the originally proposed homeownership option rules before HUD adopted the nationwide $10,300 eligibility standard. In short, the current minimum income requirement unjustly excludes poor people and discriminates against seniors and disabled persons,[27] particularly those living on fixed, government incomes. Thus, if HUD does not lower the income limits, the very least it should do is to allow households with lower incomes to automatically qualify if they are able to obtain pre-qualification or preapproval for financing from a reputable lender to purchase a home.

Manufactured Homes and Other Homes on Leased Land

Under the existing Section 8 homeownership regulations, a family may use the homeownership option to purchase a single family home, condominium, an interest in a cooperative, units that are under construction and units being purchased through a lease-purchase agreement.[28] The proposed regulations clarify that manufactured homes, including manufactured homes where the family will not own the underlying real property, also qualify for the program if the home is located on a permanent foundation and if the family has the right to occupy the home-site for a minimum of 30 years.[29]

There is ample evidence and experience to suggest that the current income limits for the homeownership program are too high and that the limits should be lowered instead of raised.

Although this clarification will open more homeownership opportunities for Section 8 participants, HUD should provide additional discretion to PHAs to include other manufactured housing types, such as mobilehomes in resident-owned or nonprofit-owned mobilehome parks. Because the definitions of mobilehome parks, condominiums and cooperatives overlap and vary according to state laws, it is difficult for HUD to attempt to regulate all eligible housing types and requirements. By allowing the PHA to use its discretion, the PHA can determine whether certain types of ownership are eligible under the homeownership option, taking into account the differing needs of local communities and the different statutory definitions of local nontraditional housing

[24]*Id.*

[25]PHAs' argument that the lower eligibility standards increase administrative burdens and unrealistically raise the expectations of low-income households has little merit. While administrative burdens may be substantial when a PHA initially develops and implements a Section 8 homeownership program, once operational, the burdens diminish substantially. This is especially true if the PHA elects to use an already established housing counseling provider or if the family has already completed the required housing counseling. Indeed, administrative burdens on the PHA are *not* likely to occur until the family has pre-qualified for financing, has found a home to purchase and is ready to enter into a contract of sale—at which time, the PHA should consider *all* viable applicants that can successfully move into homeownership. As for participants' expectations, since loan products and other resources *do* exist for very low-income families, the expectations of low-income households to achieve homeownership is *not* unrealistic.

[26]For example, Fannie Mae offers its HomeChoice loan program designed to provide more housing opportunities for people with disabilities. The Colorado Housing Finance Agency (CHFA) also offers financing through its HomeAccess Pilot Program for both disabled homebuyers and for parents of a disabled child. Under the CHFA program, preference is given to borrowers who are receiving, or are eligible to receive, federal benefits for people with disabilities, namely SSI and SSDI. Similarly, Citibank, Washington Mutual and California Federal, among others, offer special loan products for seniors and/or people with disabilities. For more information regarding financing tools and flexible program requirements, *see Community Participation and Program Flexibility Are Key to Creating the Successful Section 8 Homeownership Program,* 31 HOUS. L. BULL. 101 (May 2001).

[27]To the extent the income of an elderly or disabled applicant still falls below the HUD-established minimum income standard, HUD should encourage PHAs to consider any necessary reasonable accommodation to make the Section 8 homeownership program readily accessible to, and usable by, persons with disabilities or the elderly. This may include consideration of the homeownership assistance made available from the PHA to the household or lender as income to the homeowner. Encouraging reasonable accommodations will serve to affirmatively further fair housing and create more stable, permanent and accessible living conditions for people who often must go without such security.

[28]24 C.F.R. §§ 982.628(a)(2) and (3), 982.317, 982.319 (2001).

[29]66 Fed. Reg. at 32,202 to be codified at §§ 982.628(a)(3) and (b).

types.[30] It would also be prudent for HUD to clarify that land trusts[31] and other long-term leasehold interests, such as tribal lands and leased land in Hawaii, are eligible for the program.

Eligibility of Units Not Yet Under Construction

Currently, the homeownership option can be used to purchase a home that is "under construction" (*i.e.*, the footings or foundation of the home have been poured).[32] It may not be used to purchase a home on which construction has not commenced. Because this may limit homeownership opportunities for some families, particularly those participating in the "sweat equity" programs like the Rural Housing Service's Self Help Housing Program,[33] HUD is considering expanding the program to allow housing that is not yet under construction to be included in the program if it can be done without violating the *National Environmental Policy Act* (NEPA) and other related federal authorities.[34] HUD anticipates that it will be able to determine whether it is feasible to permit the homeownership option to purchase units prior to construction by the date of the publication of the final rule.[35] Ironically, at the same time HUD has expressed concern about—and has sought comments on—whether expanding the homeownership option to include "sweat equity" units may also pose an undue administrative burden on PHAs. HUD should not be concerned about this issue. In most circumstances, "sweat equity" programs are conducted under the direction of nonprofit agencies who assume the burden of qualifying the households for the program and supervise the construction.

Removal of the PHA Recapture Provisions

Under the existing homeownership regulations, the PHA is required to "recapture" a percentage of the homeownership assistance that was provided to the family when the family either sells or refinances the home.[36] The proposed rule seeks to eliminate the recapture requirement for a variety of reasons, including undue complications in administering the homeownership program and possible discouragement of families who would otherwise participate in the program.[37]

HUD is considering expanding the program to allow housing that is not yet under construction to be included in the program if it can be done without violating the National Environmental Policy Act and other related federal authorities.

The removal of the recapture provision is beneficial to families participating in the Section 8 homeownership program for several reasons. First, the provision limits the amount of equity the family can accumulate in their home during the first 10 years of the program and may limit the ability of the family to sell or refinance their property. Second, many lenders offering below market loans to low-income borrowers already incorporate recapture requirements in their loans. The existence and impact of more than one recapture provision may be confusing to borrowers and raises concern among lenders that the family has little or no equity in the property. This may diminish a family's incentive to maintain the property properly and potentially threaten the lender's security interest. To ensure both family and lender participation in the program, the removal of the recapture provisions is appropriate.

Pilot Program: Homeownership Assistance for Disabled Families[38]

The interim rule implementing Section 302 of the *American Homeownership and Economic Opportunity Act of 2000*, which establishes a pilot program for Homeownership Assistance for Disabled Families, creates a new program independent of the existing Section 8 homeownership op-

[30]For instance, instead of automatically assuming that a certain housing type is not a viable option for a Section 8 purchaser, the PHA should use its regulatory discretion to actually review the financing to determine whether the purchase is affordable. If the purchase is unaffordable, the PHA may deny the use of the Section 8 homeownership voucher for that unit. In addition, the PHA must complete a Housing Quality Standards (HQS) inspection and review—an objective third-party inspection to determine the condition of the property. If the property does not meet applicable standards, the PHA may prohibit the purchase by the homebuyer. Accordingly, HUD should encourage the PHA to focus on the affordability and quality of the home on a case-by-case basis without categorically excluding the homeownership option to families based solely on certain types of housing.

[31]Many communities have or are establishing land trusts as a means of providing more affordable housing opportunities. Under the land trust concept, the family purchases only the housing unit and agrees to lease the land for a nominal fee. Often, the family agrees to sell the home to another qualified low-income family upon resale. In exchange, the family receives a substantial downpayment grant or an affordable purchase price for the home.

[32]24 C.F.R. § 982.628(a)(2)(2001).

[33]Referred to by HUD as "Rural Housing Service Mutual Self-Help Housing Loan Program." 66 Fed. Reg. at 32,200 (June 13, 2001).

[34]*Id.*

[35]*Id*.

[36]24 C.F.R. § 982.640 (20011); *see also* 65 Fed. Reg. at 55,134, 55,135, 55,143, and 55,158 (Sept. 12, 2000). The percentage recaptured by the PHA decreases in annual increments of 10 percent over a 10-year period. Thus, at the end of the 10-year period, the amount of homeowners assistance that is then subject to recapture will be zero.

[37]Under the existing program, PHAs may have recorded recapture liens against the property of families who are already participating in the homeownership program. Under the proposed regulation, any lien already recorded by the PHA against the homeowner's property should be immediately released by the PHA.

[38]*Section 8 Homeownership Program; Pilot Program for Homeownership Assistance for Disabled Families,* 66 Fed. Reg. 33,610 (June 22, 2001)(Interim Rule).

tion.[39] As with the DAG Program, HUD also used the Section 302 interim rule to make additional clarifying and technical amendments to the existing Section 8 homeownership program.[40]

Under the Section 302 program, PHAs are permitted to develop a three-year pilot program designed to enable eligible, disabled families to utilize Section 8 voucher assistance to purchase a home. The home may be owned by one or more members of a qualified disabled family and must be occupied by the family in order to continue to receive assistance. PHAs may choose to offer the Section 302 pilot program, or the existing homeownership option, or both, to its Section 8 participants.

Most of the eligibility requirements under the existing homeownership option are equally applicable to the Section 302 pilot program. However, three notable exceptions apply. First, under the program the participant need not be a first-time homebuyer;[41] however, she may not be a current homeowner. Second, the monthly Section 8 housing assistance payment (HAP) must be paid directly to the lender and may not be paid to the family.[42] Third, and most significantly, the income limits under the program deviate substantially from the maximum family income limits imposed by the traditional Section 8 voucher assistance program by permitting qualified disabled families to use Section 8 vouchers for homeownership assistance as long as their family annual income does not exceed 99 percent of the AMI.[43] An additional requirement not applicable to the existing Section 8 option is that the escrow on the purchase must close before the expiration of the pilot program period, which is June 23, 2004.[44]

Importantly, all new admissions into the Section 302 pilot program must be selected from the PHA waiting list and are counted towards the PHA income targeting requirements,[45] which require, among other things, that "not less than 75 percent of the families admitted to a PHA's tenant-based voucher program during the PHA fiscal year from the PHA waiting list shall be extremely low income families," or families whose annual income does not exceed 30 percent of the AMI as determined by HUD.[46] As a result, PHAs must use care in admitting disabled families with higher incomes into the Section 8 program in order to comply with the income targeting requirements. Moreover, to ensure that families with annual incomes above 80 percent have the opportunity to participate in the Section 302 pilot program, it may be necessary for the PHA to admit higher-income, disabled families to its existing Section 8 waiting list, if it is open, or at such time as the PHA reopens a currently closed waiting list.

Under the Section 302 program a family is permitted to use homeownership assistance more than once—even if the family has defaulted on its previous mortgage.

Under the Section 302 program a family is permitted to use homeownership assistance more than once—even if the family has defaulted on its previous mortgage.[47] Families assisted by the Section 302 pilot program are permitted to receive continued Section 8 homeownership assistance after a default or foreclosure if the "PHA determines that the default is due to catastrophic medical reasons or due to the impact of a federally declared major disaster or emergency." HUD should be encouraged to extend this exception to include:

- the death of a partner, spouse or family member upon whom the family is dependent for income;
- a temporary loss, or termination, of benefits caused without fault of the participant; or
- any other circumstances beyond the participant's control which is the cause of the default.

[39]The American Homeownership and Economic Opportunity Act of 2000, enacted as Public Law 106-569, Title III, § 302, 114 Stat. 2944 and approved on December 27, 2000, amended § 8(y) of the *United States Housing Act of 1937* (42 U.S.C.A. 1437f(y)(7)).

[40]As noted below, several of the "clarifying" amendments introduced by HUD in the June 22, 2001 Section 302 Interim Rule are inconsistent with the "clarifying" amendments proposed by HUD in the previous Downpayment Assistance Grant Program Proposed Rule published on June 13, 2001. The most significant contradiction involves the retention of the PHA recapture requirement under 24 C.F.R. § 982.640 which will be removed under the proposed rule.

[41]Defined in 24 C.F.R. § 982. 627(b)(2001).

[42]66 Fed. Reg. at 33,613-14 (June 22, 2001) to be codified at 24 C.F.R. §§ 982.642(c)(3) and (5), 982.642(e). However, if the HAP exceeds the amount to be paid to the lender (usually due to increased homeownership expenses), the PHA must pay the excess directly to the family. *Id.* Advocates must ensure that such payments do not threaten the receipt of public assistance and/or disability benefits.

[43]*Id*. at 33,614 to be codified at 24 C.F.R. § 982.642(d). Generally, low-income families are defined as households with annual incomes of 80 percent or less of the AMI. 24 C.F.R. § 5.603(b)(2001). Under the Section 302 program, PHAs must adjust the HAP amount for families with incomes reaching 81 percent or more of the AMI. For example, families with annual incomes between 81 percent and 89 percent of AMI will receive the benefit of a monthly HAP equal to 66 percent of the total calculated HAP. Families with annual incomes exceeding 89 percent, but less than 100 percent of AMI, will receive a monthly HAP of 33 percent of its total value. *Id*.

[44]66 Fed. Reg. at 33,613-14 (June 22, 2001) to be codified at 24 C.F.R. §§ 982.642(c)(4).

[45]*See* 66 Fed. Reg. at 33,611 (June 22, 2001).

[46]*Id., see also* 24 C.F.R. § 5.603(b).

[47]66 Fed. Reg. at 33,614 to be codified at 24 C.F.R. § 982.642(f). The existing homeownership option prohibits the use of *homeownership* assistance (but not tenant-based assistance) to assist a family that previously received Section 8 assistance to purchase a home if the loan for that home was foreclosed on pursuant to a court judgment or order of foreclosure. 24 C.F.R. 982.638(d). The family may, at the discretion of the PHA, return to Section 8 tenant-based assistance after being dispossessed from the home. However, if the family has received and defaulted on a FHA-insured loan, it must meet additional requirements in order to receive continued rental assistance. *Id., see also proposed technical amendments at* 66 Fed. Reg. at 33,613.

Although HUD is willing to accept comments on the interim rule, it is implementing the Section 302 pilot program without the formal solicitation of public comment or issuance of a proposed rule, citing good cause "to omit advance notice and public participation" because "prior public procedure is 'impracticable, unnecessary, or contrary to the public interest.'"[48] HUD made its determination of good cause based on the assertion that the regulatory language is largely a reiteration of the statutory provisions mandated by Congress under Section 302. HUD also declared that immediate implementation of Section 302 will permit disabled families to expeditiously access the homeownership program.

Lastly, as noted above, the interim rule makes several additional technical or clarifying changes to the existing Section 8 homeownership option. These changes include:

- clarification of the term "present homeownership interest;"[49]
- clarification that the PHA cannot require a participant to secure financing from any specific lender;[50]
- a highlighting of the efforts PHAs must make to constrict predatory lending and abusive loan practices, including an expansion of the examples of the ways by which borrowers can be protected against predatory loans;[51]
- clarification that under the existing recapture requirement, the PHA, rather than HUD, is responsible for preparing lien documents that are consistent with state and local requirements and protect the PHA's recapture interest in the property;[52] and
- a relaxation of the requirements that must be met before a family participating in the Section 8 homeownership program will be allowed to return to tenant-based assistance following default on a FHA-insured mortgage.[53] ■

[48]*See id.* at 33,612 (June 22, 2001).

[49]*Id.* at 33,613 (June 22, 2001) to be codified at § 982.4(b).

[50]*Id.* to be codified at § 982.632(a).

[51]*Id., see also* 65 Fed. Reg. at 55,159 (Sept. 12, 2000) (Section 8 Homeownership Program Final Rule).

[52]*Id.* at 33,613 (June 22, 2001) to be codified at § 982.640(b). As noted above, however, this clarification is inconsistent with the DAG Program Proposed Rule which provides for removal of the entire recapture requirement under the existing Section 8 Homeownership Program.

[53]*Id.* to be codified at § 982.638(d)(2).

Opt-Out and Prepayment of Four Section 8 Projects Preliminarily Enjoined

Tenants in four Department of Housing and Urban Development (HUD)-insured and project-based Section 8 assisted properties located east of Sacramento, California, recently obtained a preliminary injunction that prevents the owners from selling the properties and terminating their Section 8 contracts. The injunction was issued by a federal district court on the grounds that the owners failed to comply with California law requiring notice to the tenants and others and failed to grant a right of first refusal to purchase the properties to specified public and private entities. *Kenneth Arms Tenant Association v. Martinez*.[1]

The properties, which are insured and subsidized in part by HUD under the Section 236 program, are all owned by separate limited partnerships controlled by Apartment Investment Management Company (AIMCO).[2] Collectively, they proposed to prepay their loans and to sell the four developments, containing a total of 351 units, to U.S. Housing Partners (Bridge Partners).[3] As part of the transaction, the parties involved contemplated that the project-based Section 8 contracts, covering 168 of the units, would not be renewed upon expiration. In addition, Bridge Partners proposed to accept enhanced vouchers for eligible tenants and, in an effort to comply with California law, agreed to an affordability restriction limiting occupancy to families earning less than 80 percent of area median income (AMI) through a restrictive-use agreement entered into with HUD.

Plaintiffs, consisting of four low-income disabled residents in each of the developments, tenant associations composed of residents in each of the developments and the California Coalition for Rural Housing Project, brought suit against HUD and the owners seeking to enjoin the proposed prepayment and termination of the project-based Section 8 assistance (opt-out). The plaintiffs claimed that the owners failed to comply with state law by giving the residents and others adequate notice of their intent to opt-out[4] and by fail-

[1]No. Civ. S-01-832 LKK/JFM (E.D. Cal. order July 3, 2001). A scanned version of the opinion is available *at* www.nhlp.org.

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

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

[4]Cal. Gov't Code § 65863.10. The owners' notices failed to do the following: give nine months advanced notice of the intent to prepay; state the rent at the time the notice was given and the resulting rent after prepayment; advise tenants that the state and county officials were receiving such notices; advise tenants of the contact information for the state and county officials; or advise tenants of the possibility of remaining in the federal program after prepayment. Plaintiffs also alleged failure by the owners to send notices to public entities, and failure to include information that must be provided to those entities.

ing to grant qualified purchasers a right of first refusal to purchase the properties prior to the sale to Bridge Partners.[5] Further, the plaintiffs claimed that HUD violated various federal laws by failing to require the owners to:

- comply with the state notice requirement;
- require more stringent affordability restrictions as part of the prepayment and sale of the projects; and
- enforce its obligations to affirmatively further fair housing.

The court dismissed all the plaintiffs' claims against HUD with prejudice. It found that since 1996 there is no federal statute or HUD regulation, other than certain notice requirements which the owners had met, that restricts owners' right to prepay their mortgage or opt-out of the Section 8 program. The court rejected the plaintiffs' contention that a HUD notice,[6] which states that the owner has an obligation to comply with state notice requirements, placed an affirmative obligation on HUD to enforce state laws. It concluded that the statements in the HUD notice do not place any obligations on HUD but are mere reminders to the owners of their obligations to follow state law.[7]

The owners did not dispute the plaintiffs' claims that they failed to give proper notice to the tenants and others as required by California law.

The court also rejected the plaintiffs' claim that HUD could place restrictions on the sale by virtue of its statutory power to place conditions on the sale of subsidized projects. The court reasoned that the owners in this case intended to first prepay their mortgages and then sell the projects. Since, at the time of sale, the projects will no longer be subsidized, the court concluded that HUD has no authority to place restrictions on the sale.[8] It used similar reasoning to reject the plaintiffs' other claims (including their fair housing claims), finding that HUD had no approval authority over either the prepayment or opt-out, thus limiting its authority to impose any restrictions with respect to the owners' decision.

In considering the plaintiffs' state claims against the owners and weighing whether the plaintiffs are likely to succeed on the merits of their claims to warrant issuance of a preliminary injunction, the court first addressed the owners' contention that with respect to prepayments the California statute was explicitly preempted by a provision in the *Low-Income Housing Preservation and Resident Homeownership Act of 1990*[9] (LIHPRHA) and that the statute was, by implication, preempted by virtue of its frustrating the Congressional determination to move from project-based to tenant-based subsidies. The court rejected both arguments. It rebuffed the express-preemption argument based on the fact that Congress abandoned the preservation scheme set out in LIHPRHA when it adopted the *Housing Opportunity Program Extension Act of 1996* (*1996 Act*).[10] Since the owners never participated in the LIHPRHA preservation program and were following the prepayment scheme authorized by the *1996 Act*, the court concluded that LIHPRHA's did not explicitly preempt the California statute.[11] The court also found that the doctrine of implied or conflict preemption was inapplicable to the case because no federal law restricts prepayments or requires HUD approval. Accordingly, the court concluded that there is no inconsistency or competition between federal and state requirements. In addition, regardless of the merit of the owners' argument that federal law favors tenant-based vouchers, the court ruled that California law does not favor tenant-based assistance over project-based assistance but attempts "to insure that any transfer preserves affordable housing, however achieved."[12]

The owners did not dispute the plaintiffs' claims that they failed to give proper notice to the tenants and others as required by California law. However, they argued that they materially complied with the law and that that was sufficient. The court rejected the argument, finding that the California statute is a "notice statute" which "explicitly requires the communication of detailed information to specified persons and entities."[13] Under those circumstances, the court concluded that substantial performance requires actual compliance with every reasonable objective of the statute. A notice that contains only major ideas or concepts is not sufficient.[14] Thus, the court held that the plaintiffs established a probability of success on the merits due to the owners' failure to comply with the state law notice requirements to tenants and public entities.[15]

[5]*Id.* § 65863.11.

[6]HUD Notice H 99-36. See ¶ XVI-G. The notice is available *at* www.hudclips.org/sub-nonhud/cgi/pdfforms/99-36h.doc. It expired in 2000 and was replaced by the *Section 8 Renewal Guide*, which contains similar language. See Section 11-4, ¶ E. The guide is available *at* www.hud.gov/fha/mfh/exp/guide/s8guide.html.

[7]Slip op. at 10.

[8]*Id.* at 11.

[9]Preemption language is contained at Section 232 of LIHPRHA, codified at 12 U.S.C. § 4122 (West Supp. 2000).

[10]Pub. L. No. 104-120, § 2(b), 110 Stat. 834 (Mar. 28 1996).

[11]Slip op. at 19. The court's conclusion was buttressed by a HUD letter to the court stating that, with the exception of properties that were involved in the LIHPRHA preservation program prior to its partial repeal by HOPE, HUD no longer has the authority to administer the LIHPRHA program.

[12]Slip op. at 21.

[13]*Id.* at 24.

[14]*Id.* at 24.

[15]*Id.* at 24-25.

The owners also conceded that they had not given a right of first refusal to the entities specified in the statute. They argued, however, that they were not required to do so because they had entered into a purchase agreement with Bridge Partners which, in their view, was a "qualified purchaser" under the statute and thus specifically exempted them from having to offer the right of first refusal to anyone else. The owners based their claim on the use agreement which they had executed with HUD[16] and which obligated them to rent the units to tenants whose incomes did not exceed 80 percent of AMI for the areas in which each of the properties is located and to charge no more than 30 percent of that 80 percent figure for rent. The plaintiffs countered that while the agreements would protect current tenants who were eligible for enhanced vouchers, they effectively convert the properties to moderate-income properties with respect to new, incoming tenants who were not eligible for vouchers. The plaintiffs maintained that the agreements thus violate the statutory provision that requires buyers to maintain the developments as affordable housing for either moderate and very low-income families or low-income families. The court agreed and found that the use agreement executed by Bridge Partners did not appear to protect either class of tenants. Thus, the court concluded that the plaintiff met their burden for the issuance of a preliminary injunction.[17]

It is expected that the affordability protections adopted for these properties will be more favorable than the protections that the owners had entered into and which the court preliminarily enjoined.

Whether the owners will proceed with the prepayment, opt-out, or sale of the properties is unclear. Regardless of the outcome, it is expected that the affordability protections adopted for these properties will be more favorable than the protections that the owners had entered into and which the court preliminarily enjoined.

Anne Pearson and Mona Tawatao of Legal Services of Northern California co-counseled the case together with The Minnesota Housing Preservation Project. Both were assisted by the National Housing Law Project. ■

[16]Although HUD signed the use agreements with Bridge Partners, HUD claimed, during the litigation, that the official who signed the use agreements did not have authority to enter into such agreements and that consequently the agreements were void *ab initio*. The court, having found ground to dismiss HUD from the action altogether, declined to reach this issue. *Id.* at 12.

[17]*Id.* at 31.

Virginia Court Reverses Conviction for Trespass on Privatized Streets Surrounding Public Housing

The Decision

A deeply split Virginia Court of Appeals, upon a rehearing *en banc*, recently reversed the trespass conviction of a visitor barred from entering "privatized streets" surrounding a Richmond public housing development. *Hicks v. Commonwealth of Virginia.*[1] In doing so, the court struck down an effort by the City of Richmond and the Richmond Redevelopment and Housing Authority (RRHA) to bar unauthorized access to the development, Whitcomb Court, by privatizing heretofore public streets around the development and authorizing the city police department to cite anyone who trespasses on the streets after receiving a notice of barment.

Whitcomb Court is owned by the RRHA. In 1997, the City of Richmond deeded the streets surrounding Whitcomb to the RRHA in an attempt to prevent criminal activity at the development. After the transfer, the RRHA posted red and white "private property, no trespass" signs every one hundred feet on each block. However, the streets were in no way closed or physically restricted to public, vehicular or pedestrian traffic. The RRHA next authorized the Richmond police to serve notice of permanent barment to any unauthorized person, defined as "all nonresidents who cannot demonstrate that they are on the premises visiting a lawful resident or conducting legitimate business." A barred person who returns to the property is deemed to be a trespasser regardless of whether she has a legitimate purpose or an invitation from a resident.

Hicks, the convicted defendant in this case, had been previously convicted of trespassing and damaging property at Whitcomb Court. In April of 1998, he was barred from the streets surrounding Whitcomb Court. On two subsequent occasions he sought permission to return to the project explaining that his mother, baby, and the baby's mother were all residents of the development. His requests were denied. In January of 1999, Hicks was on the privatized streets when a police officer issued the trespass summons that gave rise to the present case. At the time, Hicks and his baby's mother explained to the officer that he was there only to bring diapers to his baby.

Hicks' conviction on trespass charges in a general district court was affirmed by a circuit court despite the fact that Hicks sought to dismiss the charge on the ground that the RRHA's trespass-barment policy violated the *First* and *Fourteenth Amendments* of the Constitution. When the conviction was also affirmed by a panel of a Virginia Court of Appeals, Hicks sought and obtained a rehearing *en banc*.

[1]2001 WL 744,170, 548 S.E.2d 249, (Va. App., July 3, 2001).

The critical issue on appeal was whether the privatized streets are a traditional public forum, in which case the trespass-barment procedure would have to pass strict scrutiny in order to survive a challenge under the *First* and *Fourteenth Amendments*. The Commonwealth of Virginia argued that the court's prior decisions have upheld the right of housing authorities to restrict access to their property with identical no-trespassing policies and barment proceedings. However, the court distinguished these decisions on the basis that they dealt with non-public grounds and buildings and that in this case the streets surrounding the project remained open to the public.

The court found that streets have always been held in trust for the use of the public, and that the rights and privileges of citizens must not, in the guise of regulation, be abridged or denied. Citing instances where courts have found that even privately owned streets built and operated primarily for the benefit of the public in company-owned towns are treated as traditional public forums protected by the *First Amendment*, the court concluded that the streets surrounding Whitcomb Court were built and maintained with public funds to provide the public with access to that part of Richmond. The court pointed to the fact that, with the exception of the signs, there was no indication that the streets were any different from all other streets in the City of Richmond, and that the streets and sidewalks continued to serve the same functions and accessibility to the public as before their privatization: "The City cannot transform the public streets surrounding Whitcomb Court into non-public streets by declaring them closed by ordinance and conveying them to another governmental entity when they continue to serve the same public purpose as before."[2]

Thus, the court concluded that in order to survive constitutional muster, the trespass-barment procedure must satisfy the strict scrutiny test, namely, that the policy must have been narrowly tailored to serve a compelling state interest of providing safe housing to the residents.[3]

A regulation will not pass strict scrutiny if it is so broad that it unduly restricts or criminalizes innocent, constitutionally protected behavior. Accordingly, the court held that the RRHA trespass-barment regulation was too broad because it inhibited a person's protected right to move from one place to another and remain in the public place of his/her choice. In the instant case, a citizen need not commit a crime, intend to commit a crime or infringe upon the privacy of the residents of Whitcomb Court to be in violation of the regulation; they merely need to walk or drive upon one of the streets. Therefore, the court held that a public entity cannot restrict access to public property that is being used in a lawful way and for a lawful purpose that is constitutionally protected. Thus, it found the trespass-barment procedure unconstitutional and dismissed Mr. Hicks' conviction.[4]

Five of 11 judges dissented from the majority opinion and advanced three arguments in support of their position. First, they contended that Hicks did not raise his objections to the proceedings properly. Having previously been convicted of trespass without challenging the underlying banning order and having failed to administratively appeal the debarment, the dissent claimed that Hicks was barred from attacking his current barment—in their view—collaterally.[5] Second, they challenged the majority's holding that the ordinance was too broad. They found significant the fact that unauthorized persons were not automatically arrested, but instead first received a warning, and, that once formally barred, they could request through the RRHA to have the ban removed.[6]

Third, the dissenters challenged the majority's conclusion that every public street and sidewalk is a public forum. They considered the location and purpose of the street to determine its character as public or private. The dissent found no evidence in the record that the streets in question remained open to the public flow of traffic and attributed the majority's determination to speculation outside of the record. Furthermore, they considered the signs to be sufficient warning to make the streets a non-public forum. Accordingly, the dissent would have subjected the trespass-barment procedure to a lower standard, namely, one of reasonableness. Applying that standard to the procedure, the dissenters found that the policy satisfied the legitimate purpose of reducing crime.[7]

The RRHA Responds

In an article in the Richmond Free Press entitled *RRHA Responds to Ruling*, the housing authority's executive director, Tyrone Curtis, is quoted as stating that the policy is being rewritten pursuant to the court of appeals' holding and that area of enforcement of the trespass-barment penalty will be retracted from the common areas like streets and sidewalks surrounding the buildings.[8] Under the revised policy, a non-tenant could still be arrested if, without permission, he left the sidewalk and entered areas belonging to the authority such as buildings or yards. The article notes that Mr. Curtis hopes the Virginia Attorney General's office will appeal the decision to the state Supreme Court. Mr. Hicks' attorney is quoted as expressing concern that the RRHA is not tailoring its policy narrowly enough and that under the revised policy the RRHA is still preventing people from exercising their right to visit family members, thereby arguably violating the *First* and *Fourteenth Amendment* guarantees of freedom of association. Additionally, the article reported that a Richmond Circuit Judge has thrown out two other trespass arrests made while the individuals were visiting their family on RRHA property. He is quoted as having characterized the policy as "poorly written, ill-defined and virtually unenforceable."[9] ■

[2]548 S.E.2d 249, 255.

[3]*Id.*

[4]*Id.* at 257.

[5]*Id.* at 257-8.

[6]*Id.* at 258.

[7]*Id.* at 261.

[8]Jeremy M. Lazarus, *RRHA Responds to Ruling*, Richmond Free Press, at A1 (July 12-14, 2001).

[9]*Id*.

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.

Chancellor Manor v. Edwards, 2001 WL 826,842 (Minn. App., July 24, 2001). The Minnesota Court of Appeals upheld the district court's denial of eviction of a Department of Housing and Urban Development (HUD)-subsidized tenant for failure to report changes in his employment until four months after his employment began. The tenant claimed that his failure to report the change was based upon his misunderstanding of the requirements and upon his mild mental retardation. The property manager, on behalf of Chancellor Manor, filed for the eviction alleging that the tenant's failure to report the change was fraudulent. The lower court held that Chancellor Manor failed to prove that the non-disclosure was fraudulent, citing evidence that the tenant had never failed to report changes in the past, he was widely known as a gentleman, and he ultimately self-reported the change. The Court of Appeals held that Chancellor Manor failed to meet its burden of proof that the non-disclosure was fraudulent.

Beckett v. Coatesville Housing Associates, 2001 WL 767,601 (E.D. Pa., July 5, 2001). On appeal from a bankruptcy court decision, the federal district court held that a HUD-subsidized tenant undergoing bankruptcy proceedings is not entitled to use the bankruptcy proceedings to cure a nonmonetary, material default and thereby re-assume her lease. In March of 2000, Coatesville Housing Associates (CHA) obtained an uncontested writ of eviction in state court against Ms. Beckett, a HUD-subsidized tenant, for failure to maintain her apartment in a clean, orderly and safe condition. Subsequently, Ms. Beckett filed for bankruptcy, and, under the Bankruptcy Code's Section 365—which provides that the debtor may assume a contract in default if the debtor cures, or provides adequate assurance that the trustee will promptly cure the default—she sought to cure the default underlying her eviction. The bankruptcy court held that Section 365 did not apply to Beckett's nonmonetary lease violations. The district court upheld the decision, citing to prior decisions in the Third Circuit that held that a debtor may only cure a nonmonetary breach through a bankruptcy proceeding if it was not material. The district court also determined that the earlier state court decision, that the tenant's failure to maintain the apartment in a sanitary manner constituted a material breach of her lease, had a preclusive effect on the present decision. Accordingly it held that material breaches of a nonmonetary nature are not curable under Section 365 of the bankruptcy code.

Rivera v. Phipps Houses Services, Inc., 2001 WL 740,779 (S.D.N.Y. June 29, 2001). The court held that it does not have subject matter jurisdiction in a case brought by Section 8 tenants against a landlord for failure to maintain decent, safe and sanitary housing. The court found that a Section 8 lease contract, between the owner and HUD, incorporating federal housing standards does not, alone, create a substantial federal question thereby failing to confer subject matter jurisdiction. The court relied on two prior decisions holding that the incorporation of federal standards into a contract does not transform a contract action into one arising under federal law. Furthermore, it held that entrusting the enforcement of disputes concerning private buildings to state courts, which handle such claims every day, when there is no conflict between state and federal standards, will not compromise federal standards.

Youngstown Metropolitan Housing Authority v. Scott, 2001 WL 744,496 (Ohio App. 7 Dist., June 26, 2001). The court upheld the eviction of a public housing tenant for drug possession by her guest after the tenant was arrested for permitting drug abuse in her apartment. The housing authority obtained a writ of eviction from the housing magistrate after the tenant refused to vacate the apartment. On appeal, the tenant argued that she had no knowledge of her guest's possession of drugs. The court held that under 24 C.F.R. Section 966.1, a public housing tenant has the obligation to assure that a guest does not engage in drug-related criminal activity. It further held that the regulation does not require that the tenant know that the guest is engaging in the illegal activity and, therefore, upheld her eviction.

James v. City of Dallas, Texas, 2001 WL 682,089 (5th Cir., June 18, 2001). On appeal from a decision of the Federal District Court for the Northern District of Texas to certify a "Race Discrimination Class" and a "Process Class" in a suit against the City of Dallas and HUD alleging racially discriminatory demolitions of repairable single family homes in predominantly Afro-American neighborhoods without proper notice based on HUD's alleged racial classification of the neighborhoods, the Fifth Circuit Court of Appeals vacated the district court's "Race Discrimination Class" on the ground that the class representatives did not have standing to seek the relief sought. As all the claims against HUD were brought by the "Race Discrimination Class," the court of appeals remanded the case to the district court with instructions to dismiss HUD as a defendant and to dismiss all the "Race Discrimination Class" claims against the City of Dallas. The court of appeals also found that the named plaintiffs did not have standing to seek relief for five of their 12 "Process Class" claims against the city and, accordingly, remanded the case with instructions to dismiss those claims. With re-

[1]www.westlaw.com.

[2]www.lexis.com.

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

spect to the seven remaining "Process Class" claims, the court of appeals affirmed the district court's class certification.

Lucas Metropolitan Housing Authority v. Carmony, 2001 WL 672,150 (Ohio App. 6 Dist., June 15, 2001). The court upheld the eviction of a project-based public housing tenant as a result of the seizure of more than 5,000 grams of narcotics brought into her apartment by a guest. On appeal, the tenant argued that the Lucas Metropolitan Housing Authority (LMHA) waived its right to evict her by continuing to accept rent payments for two-and-one-half years after the drug raid occurred and by recertifying the public housing contract and lease. The LMHA countered that the delay was caused by the police department's failure to provide LMHA with timely documentation of the drug raid. The court upheld the eviction on the basis of a provision in the lease that states that no delay by LMHA in exercising any right shall constitute a waiver. The court also dismissed the tenant's request for equitable relief on the grounds that the tenant did not have the requisite "clean hands" given the volume of drugs discovered.

Lorain Metropolitan Housing Authority v. Mayor of the City of Lorain, 145 F.Supp. 2d. 926, 2001 WL 674,214 (N.D. Ohio, June 11, 2001). The Lorain Metropolitan Housing Authority (LMHA) brought suit against the Mayor of the City of Lorain and three other public entities authorized to appoint commissioners to the LMHA for their failure to appoint at least one public housing resident to the LMHA board as required by the Quality Housing and Work Responsibility Act of 1998 (QHWRA). Having concluded that the LMHA board composition was not in compliance with QHWRA, the court solicited proposals from the defendants as to who should appoint the resident board member. After reviewing the proposals and Ohio law on the appointment of board members, the court decided that requiring the mayor of Lorain, who had authority to appoint two board members, to appoint a resident, was most consistent with the intent of the Ohio legislature. Accordingly, the court permanently reserved one of the Mayor's appointments for a resident. The court also ordered the LMHA board and the mayor of Lorain to provide written notice of appointments to tenant councils and set out a procedure for receiving applications for and appointments to the LMHA board.

Fair v. Finkel, 2001 WL 619,609 (N.Y.A.D., June 7, 2001). The New York appellate court reversed a lower court holding that the New York City Housing Authority's (NYHA) termination of Section 8 benefits was in violation of lawful procedure. In a prior judgement against the NYHA, a court required NYHA to issue three written notices prior to terminating Section 8 benefits: a warning letter, a notice of termination by certified mail; and if the tenant did not respond, a Notice of Default. The court held that mailing two of the three required notices, none by certified mail, did not satisfy the requirements for terminating benefits.

Alexandria Resident Council v. Alexandria Redevelopment & Housing Authority, 2001 WL 617,086 (4th Cir., June 6, 2001). The Court of Appeals for the Fourth Circuit affirmed the lower court's dismissal of the Alexandria Resident Council's (ARC) Section 1983 complaint against the Alexandria Redevelopment & Housing Authority (ARHA) for its rejection of a revised purchase proposal for Madden Homes, a public housing project which, under HUD regulations, ARHA was obliged to offer for sale after it had made an initial decision to demolish the development. The district court, whose original decision to order ARHA to accept the offer was vacated by the Fourth Circuit, now dismissed the action on the ground that the ARC failed to exhaust its administrative remedies by not appealing the rejection to HUD. ARC had successfully appealed to HUD ARHA's first rejection of its proposal but was unable to appeal the second rejection because during the pendency of its court action the period for filing an administrative appeal had expired. It filed the 1983 action in an effort to avoid the exhaustion issue, but both the district court and the Fourth Circuit Court of Appeals held that the exhaustion of federal administrative remedies is also a precondition to a Section 1983 cause of action. The Fourth Circuit, however, did modify the district court's dismissal with prejudice of a pendent state claim against ARHA. The court of appeals held that once the federal cause of action was dismissed prior to trial, the district court was without jurisdiction to consider the pendent state claim. As a result, the court of appeals modified the dismissal to one without prejudice.

Wessington House Apartments v. Clinard, 2001 WL 605,105 (Tenn. Ct. App., June 5, 2001). The Tennessee appellate court reversed the eviction of a tenant of a privately owned, government subsidized apartment complex after one marijuana cigarette, belonging to a guest, was found under a couch cushion. At the trial, the tenant's guest admitted possession of the cigarette and testified that the tenant had no knowledge of it and that he had been told by the tenant not to bring drugs to the apartment. The trial court granted the eviction on the grounds that the HUD "one-strike" lease addendum, entitled *Lease Addendum for Drug Free Housing*, did not require a showing that the tenant had knowledge or control of the acts of a guest. The appeals court reversed, relying on a recent Tennessee Supreme Court decision that found that Congress did not intend to hold tenants responsible for all criminal acts of their guests regardless of knowledge or ability to control them. The appeals court held that an eviction is permitted only if the tenant knew or should have known of the drug-related criminal activity of a guest or other person and failed to take reasonable steps to prevent or halt it. The court also held that the landlord has the burden of establishing that the tenant had knowledge or should have had knowledge of her guest's possession of drugs. The appeals court also rejected an alternative ground for the eviction, namely that the tenant violated a lease provision that authorized evictions for a guest's willful commission of a violent act or an act that constitutes a real and present danger to other tenants. Since there was no evidence that the guest attempted to sell or use the drugs, the court held that the undiscovered presence of a marijuana cigarette doesn't rise to the level of real and present danger. ■

Recent Housing-Related Regulations and Notices

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

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

HUD Regulations

Voluntary Conversion of Developments From Public Housing Stock; Required Initial Assessments; Final Rule
66 Fed. Reg. 33,616 (June 22, 2001)

Summary: On July 23, 1999, HUD published for public comment a proposed rule to implement statutory changes authorizing Public Housing Agencies (PHAs) to convert a development to tenant-based assistance where the conversion would satisfy statutory objectives. The statute requires every PHA to conduct and submit to HUD an initial assessment for its development no later than October 1, 2001. Given this statutory deadline, HUD is issuing this final rule, which provides regulatory guidance on the preparation and submission of the required initial assessments in a streamlined, simplified form. The final rule also takes into consideration the public comments received on the initial assessment requirements contained in the July 23, 1999 proposed rule. HUD is currently developing its more comprehensive final rule on voluntary conversions and expects to publish this final rule in the near future.

Effective Date: July 23, 2001.

Prohibited Purchasers in Foreclosure Sales of Multifamily Projects With HUD-Held Mortgages and Sales of Multifamily HUD-Owned Projects; Final Rule
66 Fed. Reg. 35,845 (July 9, 2001)

Summary: This final rule prohibits a mortgagor or any related party from bidding on or acquiring a multifamily property that was, itself, the subject of the mortgagor's default. The purpose of this rule is to prevent the mortgagor from benefitting from its default and failure to meet obligations under the term of its loan agreement. This rule follows a July 5, 2000 proposed rule and takes into consideration the public comments received on the proposed rule. After careful consideration of all the public comments received, HUD has decided to adopt the proposed rule without change.

Effective Date: August 8, 2001.

Exception Payment Standard to Offset Increase in Utility Costs in the Housing Choice Voucher Program; Interim Rule
66 Fed. Reg. 30,566 (June 6, 2001)

Summary: Currently, increased energy costs in some parts of the country have had an adverse impact on the ability of applicants and participants in the Housing Choice Voucher program to either lease a unit while paying no more than 40 percent of their income for rent, or, once having leased a unit, to continue to pay both rent and the higher utility costs. Therefore, HUD is temporarily approving higher exception payment standard amounts for certain PHAs that have adopted a new utility allowance schedule after October 1, 2000. These higher exception payment amounts will be between 110 percent and 120 percent of the Fair Market Rents (FMRs) without requiring the PHA to seek HUD approval in order to mitigate the adverse impact of increased energy costs. HUD will calculate these exception payment standards using new rental data (reflected in proposed FMRs for Fiscal Year (FY) 2002 published at 66 Fed. Reg. 23,770 (May 9, 2001)) with the result that in areas where energy costs have increased substantially, the exception payment standard amount will be between 110 percent and 120 percent of current FMRs. These exception payment standards are published in the Federal Register as Appendix A immediately following this rule. HUD is also permitting these exception payment standard amounts to be used at interim reexaminations of families until September 30, 2001. The provisions of this interim rule apply only for the balance of the federal fiscal year ending September 30, 2001. The proposed FMRs for FY 2002 published at 66 Fed. Reg. 23,770 (May 9, 2001) reflect the increased cost of utilities.

Effective Date: July 6, 2001.

Comment Due Date: August 6, 2001.

Section 8 Homeownership Program; Downpayment Assistance Grants and Streamlining Amendments; Proposed Rule
66 Fed. Reg. 32,198 (June 13, 2001)

Summary: This proposed rule would implement Section 301 of the *American Homeownership and Economic Opportunity Act of 2000*. Section 301 amends the statute authorizing the "homeownership option" under the Housing Choice Voucher Program. Under Section 301, a PHA may, in lieu of paying a monthly homeownership assistance payment on behalf of a family, provide homeownership assistance for the family in the form of a single grant to be used toward the downpayment required in connection with the purchase of the home. Implementation of these downpayment assis-

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

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

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

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

tance grants is anticipated for federal FY 2002. In addition to implementation of Section 301, this proposed rule also would clarify and streamline several regulatory requirements applicable to both downpayment grants and monthly homeownership assistance payments provided under the homeownership option.

Comments Due Date: August 13, 2001.

Section 8 Homeownership Program; Pilot Program for Homeownership Assistance for Disabled Families; Interim Rule
66 Fed. Reg. 33,609 (June 22, 2001)

Summary: This interim rule establishes regulations to implement the three-year pilot program authorized by Section 302 of the *American Homeownership and Economic Opportunity Act of 2000*. A PHA may elect to provide homeownership assistance to a disabled family under the pilot program, rather than under the Housing Choice Voucher Program homeownership option. Under the pilot program, a PHA provides homeownership assistance to a disabled family residing in a home purchased and owned by one or more members of the family. The interim rule incorporates the requirements for the pilot program in HUD's regulations for the homeownership option. In addition to the amendments implementing Section 302, HUD has taken the opportunity afforded by this interim rule to make several clarifying and technical amendments to its September 12, 2000 final rule establishing the homeownership option.

Effective Date: July 23, 2001.

Comments Due Date: August 21, 2001.

Mortgage Insurance Premiums in Multifamily Housing Programs; Increase in Certain FHA Multifamily Mortgage Insurance Premiums; Interim Rule
66 Fed. Reg. 35,069 (July 2, 2001)

Summary: HUD currently has statutory authority to set the mortgage insurance premiums (MIP) for multifamily programs from one-fourth to 1 percent of the outstanding principal balance per annum. However, HUD's current regulations currently set the MIP at a specific figure, one-half of 1 percent in most programs. This interim rule revises current regulations to permit the Secretary to set mortgage insurance premiums by program within the full range of HUD's statutory authority through notice, making it easier for HUD to respond more efficiently to changing market and programmatic conditions, and making it possible to continue these programs for the remainder of FY 2001 and into 2002.

Effective Date: August 1, 2001.

Comment Due Date: August 31, 2001.

Designation of Round III Urban Empowerment Zones and Renewal Communities; Interim Rule
66 Fed. Reg. 35,849 (July 9, 2001)

Summary: This interim rule governs the designation of Round III Urban Empowerment Zones (EZs) and Renewal Communities (RCs) nominated by state and local governments. The designation of an area as an EZ or an RC provides special federal income tax treatment as an incentive for businesses to locate within the area. This rule lays the foundation for designations to be made on the basis of applications submitted in response to the *Notice Inviting Applications* published elsewhere in this issue of the Federal Register.

Effective Date: August 8, 2001.

Comment Due Date: September 7, 2001.

Indian Housing Block Grant Allocation Formula; Notice of Intent To Establish a Negotiated Rulemaking Committee and Request for Nominations; Proposed Rule
66 Fed. Reg. 37,097 (July 16, 2001); Correction 66 Fed. Reg. 38,965 (July 26, 2001)

Summary: HUD announces its intent to establish a negotiated rulemaking committee for the purpose of negotiating a proposed rule that would revise the allocation formula used under the Indian Housing Block Grant (IHBG) Program.

Comment Due Date: August 15, 2001.

HUD Federal Register Notices

Notice of Request for Comments on Obstacles to the Participation of Faith-Based and Other Community Organizations;
66 Fed. Reg. 30,276 (June 5, 2001)

Summary: This notice invites interested parties to comment on regulatory, contracting and other programmatic obstacles to the participation of faith-based and other community organizations in HUD's grant funding programs.

Comment Due Date: Comments were due July 5, 2001.

Notice of a Computer Matching Program Between the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ);
66 Fed. Reg. 30,742 (June 7, 2001)

Summary: HUD is issuing a public notice of its intent to conduct a recurring computer matching program with the DOJ to utilize a computer information system of HUD, the Credit Alert Interactive Voice Response System (CAIVRS), with DOJ's debtor files. The CAIVRS data base now includes delinquent debt information from the Departments of Agriculture, Education, Veteran Affairs and the Small Business Administration. This match will allow for the prescreening of applicants for debts owed or loans guaranteed by the federal government to ascertain if the applicant is delinquent in paying a debt owed to, or insured by, the federal government. Before granting a loan, a lending agency and/or an authorized lending institution will be able to query the CAIVRS debtor file which contains the Social Security Numbers (SSNs) of HUD's delinquent debtors and defaulter and debtor files of the DOJ and verify that the loan applicant is not in default on a federal judgment or delinquent on direct or guaranteed loans of participating federal programs. As a result of the information produced by this match, the authorized users may not deny, terminate, or make a final decision of any loan assistance to an applicant or take other adverse action against such applicant, until an officer or employee of such agency has independently verified such information.

Effective Date: Computer matching was expected to begin July 9, 2001 unless comments were received which resulted in a contrary determination, or 40 days from the date a computer matching agreement is signed, whichever is later.

Comments Due Date: Comments were due July 9, 2001.

Notice of Annual Factors for Determining Public Housing Agency On-Going Administrative Fees for the Housing Choice Voucher Program and the Rental Certificate and Moderate Rehabilitation Programs;
66 Fed. Reg. 31,279 (June 11, 2001)

Summary: This notice announces the monthly per-unit fee amounts for use in determining the ongoing administrative fee for PHAs administering the housing choice voucher program, and the rental certificate and moderate rehabilitation programs (including Single Room Occupancy and Shelter Plus Care) during federal FY 2001. The rental certificate program terminates at the end of FY 2001. HUD will use the procedures in this notice to approve year-end financial statements for PHA fiscal years ending on December 31, 2000, March 31, 2001, June 30, 2000 and September 30, 2001. PHAs also must use these procedures to project earned administrative fees in the annual PHA budget. The procedures in this notice apply to ongoing administrative fees earned for that portion of the PHA fiscal year that falls in federal FY 2001 (*i.e.*, from October 1, 2000 to September 30, 2001).

Date: This notice was effective upon publication.

Notice of a Computer Matching Program—HUD and the Internal Revenue Service (IRS);
66 Fed. Reg. 33,265 (June 21, 2001)

Summary: HUD is issuing a public notice of its intent to conduct a computer matching program with the Internal Revenue Service (IRS). Under the terms of the agreement, the IRS has agreed to disclose to HUD taxpayer mailing addresses as authorized by the Commissioner or her delegate pursuant to section 6103(m)(2) of the Internal Revenue Code (IRC) for use in locating individuals to collect or compromise federal claims in accordance with 31 U.S.C. 3711, 3717 and 3718. This program is called the Taxpayer Address Request Program (TAR). It was established by the IRS to facilitate the retrieval of taxpayer mailing addresses from the individual Master File on a volume basis. The volume of addresses and the method in which the IRS maintains the information makes computer matching the most feasible method of extracting the data for disclosure to other agencies. Using the TAR computer matching program, current addresses can be obtained from the IRS within a one-week period, thereby avoiding the expenditure of substantial federal resources in the manual execution of a matching process or investigations by a large workforce to ascertain the current address of individuals against whom the agency has a claim or indebtedness.

Effective Date: Computer matching was expected to begin 30 days after publication of this notice in the Federal Register unless comments were received which resulted in a contrary determination, or 40 days from the date a computer matching agreement is signed, whichever is later.

Comments Due Date: Comments were due July 23, 2001.

Announcement of Funding Award—FY 2000 Lead Hazard Control;
66 Fed. Reg. 35,805 (July 9, 2001)

Summary: This announcement notifies the public of funding decisions made by HUD as a result of the *Lead Hazard Control Super Notice of Funding Availability* (SuperNOFA). This announcement contains the names and addresses of the awardees and the amount of the awards.

Notice of Regulatory Waiver: Requests Granted for the First Quarter of Calender Year 2001;
66 Fed. Reg. 36,415 (July 11, 2001)

Summary: This notice contains a list of regulatory waivers granted by HUD during the quarter beginning January 1, 2001 and ending March 31, 2001.

Notice of Funding Availability: Family Unification Program, Fiscal Year 2001;
66 Fed. Reg. 36,429 (July 11, 2001)

Summary: The purpose of the Family Unification Program (FUP) is to (1) promote family unification by providing housing choice vouchers to families for whom the lack of adequate housing is a primary factor in the separation—or the threat of imminent separation—of children from their families, and (2) provide housing choice vouchers to youths 18 to 21 of age who left foster care at age 16 or older and lack adequate housing. This second category of eligible participants for FUP vouchers has been added to this NOFA as a result of an amendment by Congress in FY 2001 to Section 8(x)(2) of the *U.S. Housing Act of 1937*.

Available Funds: The 11.466 million in one-year budget authority available under this NOFA will support approximately 2,000 housing choice vouchers. Approximately $6.4 million of these funds have been used to fund the approvable Family Unification Program applications submitted by PHAs in response to HUD's FY 2000 Family Unification NOFA. After funding these previously unfunded approvable FUP applications from FY 2000, there remains approximately $5.1 million under this NOFA to fund approximately 900 vouchers for new applications in FY 2001. The $5.1 million will be used to fund applications for FUP vouchers which can be used for either FUP-eligible families or FUP-eligible youths. Funding under this NOFA may only be used to provide tenant-based housing assistance, as prescribed by Section 8(x) of the *U.S. Housing Act of 1937*, so as to allow FUP-eligible families and FUP-eligible youths a choice in their selection of decent, safe, and affordable units on the private market.

Eligible Applicants: PHAs, Indian Housing Authorities, Indian tribes and their tribally designated housing entities are not eligible.

Application Deadline: August 10, 2001.

Match: None.

Notice of Funding Availability Housing Search Assistance Program Fiscal Year 2001;
66 Fed. Reg. 36,403 (July 11, 2001)

Summary: The purpose of the Housing Search Assistance Program (HSAP) is to assist housing choice voucher fami-

lies in expanding their housing opportunities and in accessing lower-poverty neighborhoods through their receipt of housing counseling and supportive services from PHAs partnering with nonprofit organizations. The counseling services will provide eligible families with information about a wide range of housing options, including options in lower-poverty neighborhoods, so that the families may make informed decisions in selecting housing and move closer to job sites, public transportation, shopping, schools, training opportunities and family/friend support networks. The program will also provide supportive services to help recipients comply with private owner rental lease requirements, housing quality standards (HQS) and other family obligations under the voucher program. It will also help recipients remain in stable housing and successfully adjust to their new communities.

Available Funds: The approximately $10 million in housing choice voucher program administrative fees available under this NOFA will support funding for up to 15 eligible applicants for three years for HSAP activities.

Eligible Applicants: PHAs that submit an application with one or more nonprofit organizations as the co-applicant (including but not limited to faith-based and other community-based organizations) for the provision of housing counseling services and related supportive services. Indian Housing Authorities (IHA), Indian tribes and their tribally designated housing entities are not eligible.

Application Deadline: October 9, 2001.

Match: None.

Notice of Request for Comments on Obstacles to the Participation of Faith-Based and Other Community Organizations;
66 Fed. Reg. 37,101 (July 16, 2001)

Summary: This notice reopens the comment period inviting interested parties to comment on regulatory, contracting and other programmatic obstacles to the participation of faith-based and other community organizations in HUD's grant funding programs.

Comment Due Date: August 15, 2001.

Announcement of Funding Awards for the Rural Housing and Economic Development Program; Fiscal Year 2001;
66 Fed. Reg. 37,700 (July 19, 2001)

Summary: This announcement notifies the public of funding decisions made by the Department in a competition for funding under the SuperNOFA for the Rural Housing and Economic Development Program. This announcement contains the names of the awardees and the amounts of the awards made available by HUD.

Notice Inviting Applications: Third Round Designation of Seven Urban Empowerment Zones;
66 Fed. Reg. 37,878 (July 19, 2001)

Summary: *The Community Renewal Tax Relief Act of 2000* authorizes the designation of nine Round III EZs. Seven of the Round III EZs are to be designated in urban areas by the Secretary of HUD. The remaining two Round III EZs are to be designated in rural areas by the Secretary of Agriculture. This notice invites applications for designation of nominated areas as EZs. The designation of the new EZs will be made in accordance with the designation process described in this notice.

Application Due Date: Completed applications must be submitted no later than September 28, 2001.

Notice Terminating Funding Availability for Public Housing Drug Elimination Program Gun Buyback Violence Reduction Initiative;
66 Fed. Reg. 38,301 (July 23, 2001)

Summary: On November 3, 1999, HUD published in the Federal Register a NOFA announcing funding for its Gun Buyback Violence Reduction Initiative. On February 3, 2000, HUD amended and republished this NOFA. The purpose of the notice published today is to announce that HUD is terminating funding under its *Gun Buyback Violence Reduction Initiative* NOFA. HUD is also announcing that it will recapture and reprogram any PHDEP matching gun buyback funds that are not expended by PHAs by the termination date of their grant agreements. Termination of funding for the PHDEP Gun Buyback Violence Reduction Initiative is effective immediately.

Notice of Funding Availability: Fair Housing Initiatives Program Education and Outreach—National Program—Model Codes Partnership Component;
66 Fed. Reg. 38,845 (July 23, 2001)

Summary: The purpose of the FHIP is to increase compliance with the *Fair Housing Act* and with substantially equivalent state and local fair housing laws. The activities funded under the Education and Outreach-National Program, Model Codes Partnership Component will seek to promote a collaborative partnership among builders and other housing industry providers and associations and disability advocacy or fair housing groups to encourage the adoption of model building codes at the state and local level that are consistent with the accessibility requirements of the *Fair Housing Act*, its regulations and the Fair Housing Accessibility Guidelines. This component first was announced in the FY 2000 FHIP NOFA. However, no timely applications for that component were received; therefore, HUD again is soliciting applications in this NOFA.

Community-Based Alternatives for Individuals With Disabilities;
66 Fed. Reg. 39,171 (July 27, 2001)

Summary: Under Executive Order 13217, the Departments of Health and Human Services (HHS), Labor, Education, Justice, HUD and the Social Security Administration are undertaking an evaluation of each agency's policies, programs, statues and regulations to determine whether any should be revised or modified to improve the availability of community-based services for qualified individuals with disabilities. As the designated lead agency, HHS seeks public comments to inform each agency's evaluation.

Date: All comments must be received on or before August 27, 2001.

HUD Notices

Guidelines for Continuation of Interest Reduction Payments after Refinancing: "Decoupling," Under Section 236(e)(2) and Refinancing of Insured Section 236 Projects Into Non-Insured Section 236(b) Projects;
Notice H 01-05 (HUD) (June 6, 2001)

Summary: Notice H 00-08 (HUD), which was issued on May 16, 2000 and expired on May 16, 2001, is being reinstated and extended to May 31, 2002.

Submission and Processing of Public Housing Agency (PHA) Applications in Fiscal Year (FY) 2001 for Housing Choice Vouchers for Relocation or Replacement Housing Related to Demolition or Disposition (Including HOPE VI), and Plans for Removal (Mandatory Conversion) of Public Housing Units Under Section 33 of the U.S. Housing Act of 1937, As Amended;
Notice PIH 2001-20 (HA) (June 21, 2001)

Summary: The purpose of this notice is to advise PHAs of the availability in FY 2001 of approximately $ 55.5 million in one-year budget authority that will fund approximately 9,700 housing choice vouchers to assist PHAs with relocation or replacement housing needs resulting from the demolition, disposition or mandatory conversion of public housing units. In addition, this notice advises PHAs and HUD's local field offices of the procedures for submitting a request for housing choice vouchers and the processing requirements.

Fiscal Year 2001 Policy for Capital Advance Authority Assignments, Instructions and Program Requirements for the Section 202 and Section 811 Capital Advance Programs, Application Processing and Selection Instructions, and Processing Schedule;
Notice H 2001-11 (HUD) (July 2, 2001)

Summary: This Notice transmits for Fiscal Year 2001: Changes to Application/Selection Process; Application Processing Schedule; Allocations for Section 202; Allocations for Section 811; Section 811 Workshop Instructions; Section 202 Funding Notification; Section 811 Funding Notification; Applications Processing and Selections Policy; Congressional Notification Memorandum Formats; Section 202 Minority Business Enterprise Goals; Section 811 Minority Business Enterprise Goals; Initial Screening for Curable Deficiencies; Technical Review Sheets; Section 202 Standard Rating Criteria Form; Section 811 Standard Rating Criteria Form; Draft Letter to Appropriate State or Local Agency with Enclosures; List of Statewide Independent Living Councils and Local Centers for Independent Living; Guidance on the Fair Housing and Equal Opportunity (FHEO); Review of FHEO-Related Provisions of Section 202 and Section 811 Applications.

Expiration Date: July 31, 2002.

Public Housing Development Cost limits Year 2001;
Notice: PIH 2001-22 (HA) (July 12, 2001)

Summary: The purpose of this notice is to explain the procedures for establishing public housing development cost limits consistent with the *Quality Housing and Work Responsibility Act of 1998* and transmit the updated schedule of unit Total Development Cost (TDC) limits.

Expiration Date: July 31, 2002.

Reinstatement - Notice PIH 2000-10 (TDHEs), Providing Assistance to Non Low-Income Indian Families under the Native American Housing Assistance and Self-Determination Act of 1996;
Notice PIH 2001-23 (TDHEs) (July 13, 2001)

Summary: This notice reinstates Notice PIH 2000-10 (TDHEs) , same subject, which expired March 31, 2001, for another year until July 31, 2002.

Expiration Date: July 31, 2002.

Technical Corrections to PIH Notice 2001-13 (Fiscal Year 2001 and 2002 Renewal of Expiring Section 8 Moderate Rehabilitation (Mod Rehab) Housing Assistance Payments (HAP) Contracts;
Notice PIH 2001-24 (HA) (July 20, 2001)

Summary: This notice provides technical corrections to PIH Notice 2001-13.

Expiration Date: September 30, 2002.

Coordination of HUD Database Changes Due to Public Housing Agency Organizational Changes Or Change in Fiscal Year End;
Notice PIH 2001-25 (HA) (July 23, 2001)

Summary: This notice has the following two purposes: (1) to provide PHAs and HUD staff with procedural guidelines to assure that all HUD management information, accounting, and payment systems are updated in a timely and coordinated manner when database changes are required due to PHA organizational or Fiscal Year End (FYE) changes; and (2) to establish a new HUD requirement that a PHA must use a common fiscal year end for its public housing program, its housing choice voucher program, and its Section 8 moderate rehabilitation program.

Expiration Date: July 31, 2002.

RHS Regulations

Farm Labor Housing Technical Assistance; Proposed Rule
66 Fed. Reg. 29,739 (June 1, 2001)

Summary: The RHS proposes to amend its regulations for the Farm Labor Housing (FLH) program. The *Housing Act of 1949* authorizes the RHS to provide financial assistance to private and public nonprofit agencies to encourage the development of domestic and migrant farm labor housing projects. The nonprofit agencies that receive this financial assistance, in turn, provide "technical assistance" to other organizations to assist them in obtaining loans and grants for the construction of farm labor housing. The RHS has provided this assistance in prior years by awarding technical assistance contracts. In FY 2000 a Request for Proposals was published in the Federal Register requesting grant proposals fromprivate and public nonprofit agencies. The intended

effect of this action is to amend the regulations to establish the eligibility requirements that nonprofit agencies must meet to receive technical assistance grants and how the financial assistance will be made available by the RHS.

Comment Due Date: Written or e-mail comments were due on or before July 31, 2001.

RHS Administrative Notices

Eligibility of Self-Help Housing Applicants;
RD AN No. 3662 (1944-I) (June 22, 2001)

Summary: The purpose of this Administrative Notice (AN) is to clarify what is to be issued to self-help applicants who have been determined eligible for a rural housing loan. This AN replaces RD AN No. 3487 which expired September 30, 2000.

Expiration Date: May 31, 2002.

RHS Unnumbered Letters

Using Section 8 for Homeownership with
Section 502 Loans;
Unnumbered Letter (June 13, 2001)

Summary: The purpose of this unnumbered letter is to provide guidance to Agency staff on the implementation of the HUD Final Rule on Section 8 vouchers for Homeownership. This guidance is intended to simplify and expedite our efforts to work with this program.

Expiration Date: June 30, 2002.

Use of the Administrator's Reserve to Fund Innovative
Approaches to the Preservation of RRH Projects;
Unnumbered Letter (July 16, 2001)

Summary: This Unnumbered Letter replaces the Unnumbered Letter dated May 15, 2001, on the same subject. This Unnumbered Letter is being revised due to funds being returned to the National Office Reserve. As a result, $1,295,470 of the original $4.3 reserve has been returned thereby making it available for further distribution. Four additional states received funds from the returned funds and are highlighted. For FY 2001, an Administrator's reserve was established to help encourage the development of innovative approaches to preserve Rural Rental Housing (RRH) projects. The letter includes the listing of projects selected from proposals submitted in accordance with AN No. 3606 (1965-B) dated January 18, 2001. Funding was provided to projects with the highest per-unit contribution of non-Agency funds for repair and rehabilitation.

Expiration Date: September 30, 2001. ■

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