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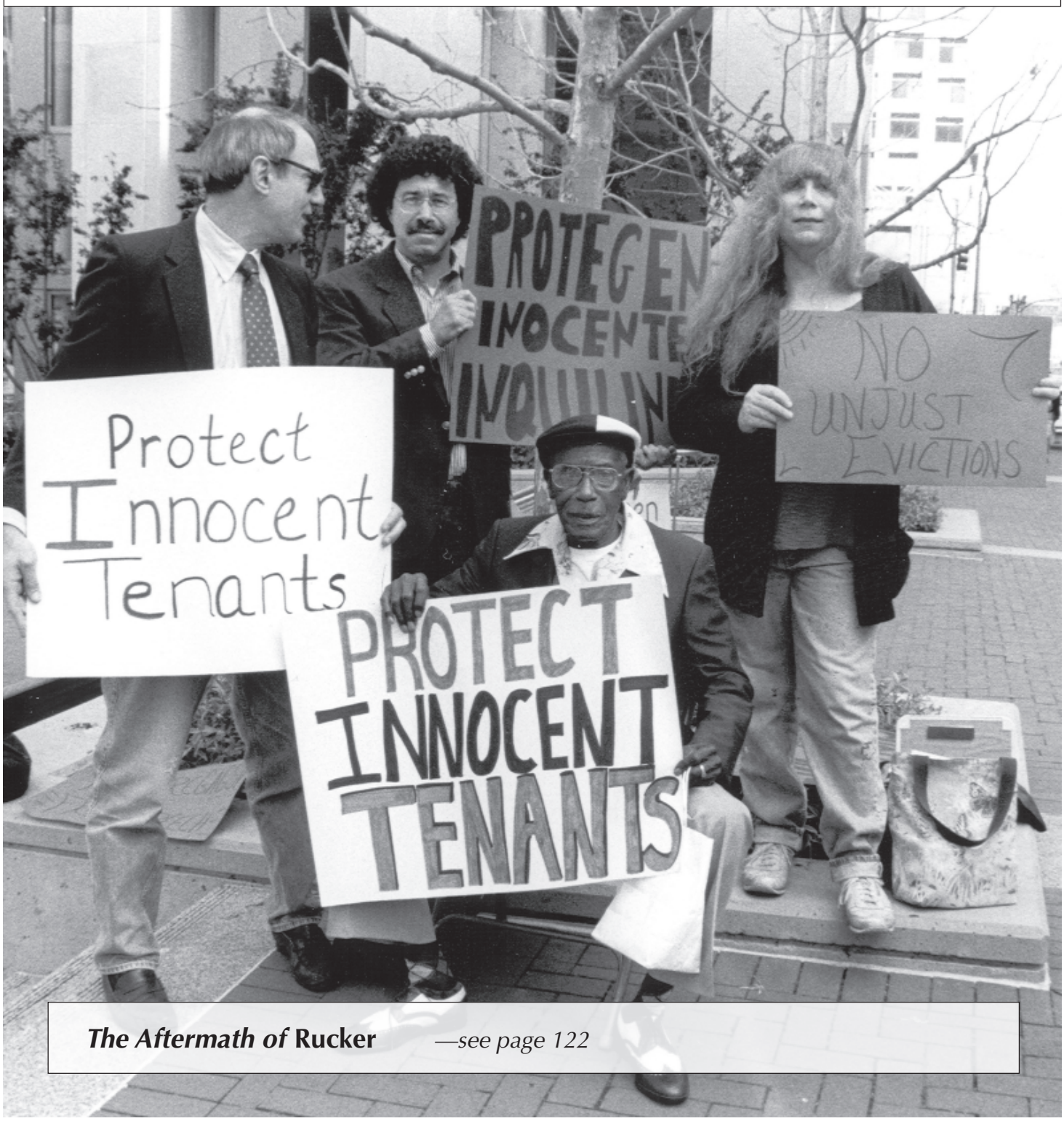

***The Aftermath of* Rucker** —*see page 122*

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Cover: *Rucker* plaintiff Herman Walker (sitting) joins protestors in front of the Federal Court Building, Oakland, CA. Photograph © Lydia Gans.

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False HOPE: A Critical Assessment of the HOPE VI Public Housing Revitalization Program[1]

Introduction

Few government programs have as unfavorable a reputation as the federal public housing program. The name "public housing" itself evokes images of bleak, crime-ridden projects.

In fact, the public housing program's reputation is greatly undeserved. Apart from a comparatively small number of visible and dramatic failures, public housing is a vital national resource that provides decent and affordable homes to over a million families across the country. Public housing is particularly valuable because rents are set at levels guaranteed to be affordable to the families residing in it, even families with the lowest incomes.

Nearly a decade ago, the HOPE VI program was launched to address the most troubled portion of the public housing stock: "severely distressed" public housing developments. HOPE VI is a competitive grant program, under which public housing authorities (PHAs) apply to the U.S. Department of Housing and Urban Development (HUD) for funding to redevelop or demolish public housing sites.

This report is being prepared on the occasion of the expiration of the HOPE VI program's appropriations authorization at the end of the current fiscal year and its possible reauthorization. In the course of preparing this report, the authors have been struck by the lack of hard data about HOPE VI results, by the misleading and contradictory statements HUD has made about HOPE VI, and by the lack of clear standards governing the administration of the program.

HUD's failure to provide comprehensive and accurate information about HOPE VI has created an environment in which misimpressions about the program and its basic purposes and outcomes have been permitted to flourish—often with encouragement from HUD. HOPE VI trades off of the public housing program's unfairly negative reputation and an exaggerated sense of crisis about the state of public housing in general to justify a drastic model of large-scale family displacement and housing redevelopment that increasingly appears to do more harm than good.

It is for these reasons that this report has been titled *False HOPE*. To the extent possible given the scarcity of data

[1]The following article is an introduction to and summary of *False HOPE: A Critical Assessment of the HOPE VI Public Housing Revitalization Program and the Need for Reform*. The report was drafted by the National Housing Law Project with Everywhere and Now Public Housing Residents Organizing Nationally Together (ENPHRONT), the Poverty & Race Research Action Council, and Sherwood Research Associates. The complete report is available on the National Housing Law Project's Web Site at www.nhlp.org.

available on the program, it tracks the shortcomings and inconsistencies of HUD's administration of HOPE VI and proposes specific reforms.

The Origins of the HOPE VI Program

In 1989, as part of the *Department of Housing and Urban Development Reform Act*, Congress created an independent national commission charged with assessing and formulating solutions to address the problem of severely distressed public housing. In its final report published in 1992, the commission determined that the extent of severe distress in the nation's public housing stock was very limited, estimating that only 6 percent of the total stock (86,000 units) fit into this category. The commission set forth a national action plan to address the human services and modernization needs of the severely distressed portion of the stock.

The HOPE VI program, also called the Urban Revitalization Demonstration program, was created by Congress in 1992 in response to the commission's report. Over the past nine years, HUD has awarded $4.8 billion to demolish or redevelop approximately 300 public housing developments in a competitive application process.

The Shortcomings and Inconsistencies of HUD's Administration of HOPE VI

As administered by HUD, HOPE VI is a program without a clear purpose or standards. Increasingly, it appears that the program is not addressing the problems identified by the National Commission on Severely Distressed Public Housing in 1992 or the goals set forth in the HOPE VI statue.

Loose Definition of "Severely Distressed Public Housing"

It is nearly impossible to determine whether HOPE VI is making progress towards solving the problem identified by the National Commission on Severely Distressed Public Housing. The blame for this lies entirely with HUD. HUD was required to publish a comprehensive list of severely distressed public housing developments in the first year of the program, but failed to do so. As actually administered, nearly any public housing development can meet the definition of "severe distress." All a PHA is required to do is to hire an architect to prepare a certification.

Since the early 1990s, 135,000 public housing units have been approved for demolition—70,000 of these under HOPE VI. If trends from previous years continue, by the end of the current fiscal year, HUD will be on pace to approve the demolition of nearly twice the number of units identified as "severely distressed" in 1992. Surprisingly, given commonly held perceptions, only seven of the first 34 HOPE VI redevelopment awards were for high-rise public housing developments.

In the mid-1990s, auditors from the General Accounting Office and HUD's Office of Inspector General noted that HOPE VI increasingly appeared to target not the most severely distressed public housing, but those sites that are most amenable to higher-income redevelopment. HUD responded that focusing on the most severely distressed developments would have been contrary to the intent of Congress in establishing the program. However, at the same time, HUD made statements directly contradicting this position in materials promoting the program to the public.

HOPE VI Worsens Acute Affordable Housing Needs

HOPE VI redevelopments reduce the supply of some of the only housing guaranteed to be affordable to very low and extremely low-income families. According to HUD data, families at these income levels, and essentially only families at these income levels, are experiencing a dramatic shortage of affordable housing.

According to HUD figures, for every 100 very low-income renter households in 1999, there were only 70 units affordable and actually available to them. The situation is even worse for extremely low-income renter households, with only 40 units affordable and available for every 100 households in this income group. Nationwide, 57 percent of public housing households are extremely low-income; 20 percent are very low-income.

Few Meaningful Opportunities for Resident Participation in HOPE VI

While HUD has emphasized the "crucial" importance of the involvement of public housing residents and other members of the community in HOPE VI redevelopments, HUD has deprived residents enforceable rights to participate in the HOPE VI process. HUD has never issued regulations for the HOPE VI program. Instead, HOPE VI redevelopments are governed by form grant agreements between HUD and PHAs receiving funds. These grant agreements expressly foreclose any rights of residents and others to enforce their terms.

Ongoing and meaningful rights of resident participation are important because PHAs' HOPE VI plans often change over time, sometimes drastically. In fact, HOPE VI grant agreements specifically encourage PHAs to adapt their revitalization plans over time. As actually implemented, a HOPE VI redevelopment may differ substantially from what was described in a PHA's initial application.

Exclusion of Public Housing Families from HOPE VI Opportunities

Despite impressions conveyed by HUD, only 11.4 percent of former residents overall have returned or are expected to return to HOPE VI sites; only about 30 percent of displaced residents are relocated with portable Housing Choice Vouchers. The bulk of residents, 49 percent, are merely transferred to other public housing developments. And, a disturbing number of residents are "lost," meaning that they no longer receive housing assistance.

HUD has suggested that residents who do not return to HOPE VI sites "choose" not to do so. Other reasons for this trend include harassment of residents, inadequate relocation services, the lack of affordable housing on redevelopment sites, and unreasonably stringent re-admission screening criteria. The exclusion of residents from redevelopment sites not only excludes them from high-quality housing, it impairs their

NHLP Job Announcement:

STAFF ATTORNEY/DIRECTOR OF GOVERNMENT RELATIONS

The National Housing Law Project (NHLP) is seeking to hire an experienced attorney to work as Staff Attorney/Director of Government Relations in NHLP's Washington D.C. office.

The Staff Attorney/Director of Government Relations is responsible for: providing substantive technical support to housing attorneys and other housing advocates on federally assisted public and rental housing issues; undertaking research; drafting and editing manuals, reports, articles and other materials on the operation of federal housing programs and residents' rights under those programs; training advocates and resident organizers; analyzing and responding to federal housing legislation and regulations; and assisting or engaging in litigation. The Staff Attorney/Director of Government Relations is also responsible for monitoring federal legislation and administrative developments, representing clients before Congress, federal and local administrative agencies, and assisting in responding to legislators' and administrators' requests for information on federal housing issues.

QUALIFICATIONS The applicant must have:

- at least five years of experience working on housing and related issues;
- prior experience working with legislative and administrative bodies, preferably in Washington, D.C.;
- working knowledge of federal public and multi-family assisted housing programs and/or issues relating to the preservation of federal affordable housing stock (including public housing and project-based Section 8 housing);
- excellent oral and written communication skills, including experience in training and legal writing;
- excellent analytical skills;
- a strong commitment to advancing the housing rights and interests of very low-income persons and households;
- a law degree and be admitted to practice in at least one state;
- a willingness to travel.

SALARY Salary for the position is based on experience; excellent benefits.

SUBMITTING AN APPLICATION Persons interested in the position should send a cover letter, resume, three professional references and writing sample to Gideon Anders, Executive Director, National Housing Law Project, 614 Grand Avenue, Suite 320, Oakland, CA 94610. Cover letter should indicate the position for which you are applying and include job qualifications, relevant work experience and salary history. No phone calls or faxes, please.

DEADLINE There is no application deadline. However, NHLP seeks to hire a qualified individual as soon as possible.

ABOUT NHLP NHLP is a national housing law and advocacy center and a California IOLTA back-up center that promotes housing justice on behalf of very low-income persons. NHLP has offices in Oakland, CA and Washington, D.C. NHLP is an affirmative action equal opportunity employer that does not discriminate on the basis of race, color, national origin, ethnic background, religion, sex, sexual orientation or disability. We encourage applications from people of color, women and others whose background may contribute to more effective representation of poor people.

ability to access HOPE VI community and supportive services, which tend to be site-based.

Lack of Data on HOPE VI Outcomes

HUD has called HOPE VI a "success," but has not published the data necessary to support this claim. The reports on HOPE VI outcomes that HUD's Office of Public and Indian Housing has made generally available to date have focused on case studies of hand-picked sites. Given the large amount of variation among PHAs' redevelopment plans that HUD itself has emphasized, such an approach cannot help but provide an incomplete and misleading impression of the program.

Other audit reports by the General Accounting Office and the HUD Office of Inspector General have provided a more general overview, but have neither provided a comprehensive picture about the program nor were intended to do so. A site profile database maintained by the Housing Research Foundation, an affiliate of the Council of Large Public Housing Authorities, provides only very basic information about HOPE VI sites, much of it drawn from HUD summaries and fact sheets.

HUD has a large amount of information about the HOPE VI program, including grant applications, revitalization plans and quarterly progress reports submitted by PHAs. Without access to the information contained in these documents, it is impossible to have a complete picture of how the HOPE VI program is being administered.

Summary of Policy Recommendations for HOPE VI Reform

If the HOPE VI program is to be reauthorized, a number of reforms to address the program's shortcomings and to provide greater clarity of purpose and outcomes must be made.

- HUD should be required to publish an updated list of public housing developments eligible for HOPE VI funds according to a new definition of "severe distress" created in collaboration with public housing residents, housing advocates, housing experts and others.
- All public housing units subject to demolition or redevelopment under HOPE VI should be replaced on a one-for-one basis.
- HUD should be required to issue regulations governing the administration of HOPE VI redevelopments, which should provide enforceable, ongoing rights of resident participation.
- Public housing residents should be guaranteed the right to occupy units redeveloped under HOPE VI and the relocation rights of displaced residents should be strengthened and clarified.
- HUD should be required to make HOPE VI program documents—including approved applications, revitalization plans and progress reports—publicly available on its Web site. ■

In Congress' Hands—The Aftermath of the *Rucker* Decision

Last month's *Bulletin* presented an analysis of the Supreme Court's decision in *Department of Housing and Urban Development v. Rucker*[1] (hereinafter *Rucker*). The Supreme Court ruled unanimously that federal law[2] permits eviction of "innocent tenants" from public housing.[3] Public Housing Agencies (PHAs) may evict tenants for drug-related activity or certain other criminal activity that threatens other tenants if perpetrated by a household member or guest, or any other person under the tenant's control. As a matter of federal law, neither the PHA nor the eviction court must consider the tenant's lack of knowledge about the activity.

This article examines some of the consequences of that decision, together with available advocacy steps to address this continuing injustice.

The Impact on Residents

Seniors at Risk

More than 400,000 households headed by seniors or with senior spouses live in public housing.[4] It is certain that many of them are caring for grandchildren. According to the U.S. Census, more than 2.3 million grandparents nationwide are raising their grandchildren. Almost two-thirds are single grandmothers, living in poverty.[5]

As a result of the *Rucker* decision, these seniors risk being evicted for the actions of their grandchildren, whether or not they had any knowledge. Two of the grandmothers facing eviction in *Rucker* were in that position because their grandsons were caught smoking marijuana in the apartment complex parking lot. These elderly tenants contended that they had no prior knowledge of any drug involvement of their grandchildren.[6] The Supreme Court has made clear that neither the tenants' innocence nor best efforts to investigate and address any illegal activity by others prohibits the PHA from evicting them.

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[1] *Department of Housing and Urban Development v. Rucker,* 122 S.Ct. 1230, 1236 (2002).

[2] 42 U.S.C. § 1437d(l)(6)(West Supp. 2001), and the U.S. Constitution.

[3] *See U.S. Supreme Court Finds No "Innocent Tenants" In Application of One-Strike Law,* 32 HOUS. L. BULL. 95 (Apr. 2002).

[4] HUD, *A Picture of Subsidized Households*, Summary of the United States (1998), available online *at*: www.huduser.org/datasets/assthsg/statedata98/descript.html. In 1998, 374,542 households (32 percent of a total of 1,170,444 occupied public housing units) were headed by a person who was 62 years or older or whose spouse was 62 or older, while 46,818 households (4 percent) had heads of household or spouses 85 years or older.

[5] Janelle Brown, *Evicting Grandma*, available *at* www.Salon.com (April 10, 2001).

[6] *Rucker,* 237 F.3d 1118 (9th Cir. 2001), *rev'd*, 122 S.Ct. 1230 (2002).

Residents with Disabilities at Risk

People with disabilities constitute 9 percent of all public housing residents.[7] Not all residents with disabilities require a caretaker. Those who do, however, may face the fate of Herman Walker, the elderly resident in the *Rucker* case who faces eviction for his caretaker's possession of rock cocaine.

Many public housing residents with disabilities are also elderly. In 1989, an estimated one-third of elderly, subsidized housing residents were frail to at least some degree.[8] How many of those residents also utilize the services of a caretaker is unknown. However, it is clear that seniors are doubly at risk after *Rucker* as they may be held responsible for criminal acts of their caretakers, as well as the activity of those for whom they are themselves the caretaker.

In defending residents with disabilities against eviction, it is important to note that one of the *Rucker* plaintiffs, Herman Walker, whose eviction has not yet been dropped by the Oakland Housing Authority (OHA), remains protected by the federal district court's preliminary injunction. The court found that his eviction, based upon the drug possession of his caregiver, had raised substantial questions under the *Americans with Disabilities Act* (ADA). This part of the injunction was affirmed by the *en banc* Ninth Circuit,[9] but was not part of the subsequent appeal addressed by the Supreme Court.[10] Thus, similar ADA or fair housing claims may still provide useful claims for residents protected by these other federal statutes.

Domestic Violence Victims at Risk

Since the facts in *Rucker* involved drug use, the Supreme Court Justices focused on the goal of drug elimination to support their interpretation of the statute as a one-strike, no-fault eviction law.[11] The term "no-fault" refers to the fact that the PHA does not need to consider whether the tenant was at fault for the activity that is the basis of the eviction. However, the Court's opinion utterly failed to analyze the full scope and impact of its no-fault interpretation on residents in other situations.

The Court's analysis did not in any way address the fact that women are being evicted from public housing under §1437d(l)(6) (as well as from other subsidized housing)

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[7]HUD, Office of Policy Development and Research, Recent Research Results (Dec. 1995), pp. 4-5.

[8]Robert Wilden, Donald L. Redfoot, AARP Public Policy Institute, *Adding Assisted Living Services to Subsidized Housing: Serving Frail Older Persons With Low Incomes* (Jan. 2002), *at* 16.

[9]*Rucker*, 237 F.3d 1113, 1127 (9th Cir. 2001).

[10]*Rucker*, 122 S.Ct. 1230, 1233, note 3 (2002).

[11]The Supreme Court stated:

> And, of course, there is an obvious reason why Congress would have permitted local public housing authorities to conduct no-fault evictions: Regardless of knowledge, a tenant who "cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project." 56 Fed. Reg. at 51,567. With drugs leading to "murders, muggings, and other forms of violence against tenants," and to the "deterioration of the physical environment that requires substantial governmental expenditures," 42 U. S. C. §11901(4) (1994 ed., Supp. V), it was reasonable for Congress to permit no-fault evictions in order to "provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs," §11901(1) (1994 ed.)

Rucker, 122 S.Ct. 1230, 1235 (2002).

SAVE THE DATES

2002 Housing Justice Meeting Set for December 8-9

Housing Training Set for December 7

The next meeting of the Housing Justice Network (formerly LALSHAC) is scheduled to take place on December 8-9 in Arlington, VA (Washington, D.C. area).

The 2002 HJN meeting will give the various HJN working groups an opportunity to meet in person and to continue to work on issues that are of concern to advocates and their clients.

HJN meetings are not training conferences and we encourage attendance by experienced housing advocates and clients who are familiar with the programs and are willing to participate actively in HJN's ongoing activities (exchanging information on local housing strategies, permissible legislative and administrative advocacy on low-income housing issues at the federal, state and local levels).

We are also planning a one-day training session on the recent judicial, legislative and administrative changes that have been made in the Public Housing and Section 8 and other programs. The training session will take place on Saturday, December 7, immediately preceding the HJN meeting. The training will also take place in Arlington and should benefit advocates who are not familiar with the changes in these programs. The training event will be separate from the HJN meeting, although advocates and clients are welcome to attend both.

A more detailed announcement about the 2002 HJN meeting as well as the training event will appear in a future issue of the *Housing Law Bulletin*, and a summary of the planned activities and registration requirements for both events will be sent to the HJN mailing list and to housing specialists at legal services and other programs. In the meantime, **reserve the dates on your calendar.** If you wish to be added to the HJN mailing list, contact Amy Siemens at the National Housing Law Project: by email at asiemens@nhlp.org, by calling her at (510) 251-9400 Ext. 111, or by writing to her at 614 Grand Ave., Suite 320, Oakland, CA 94610.

simply by virtue of the fact that they are being battered.[12] When 23-year-old Aaronica Warren, a Detroit public housing resident, contacted the police to stop her abuser from beating her again, she received an eviction notice.[13] Exactly how many women in public or assisted housing have experienced this same treatment is unknown.[14] What we do know is that women with incomes of $10,000 per year or less are the most likely to experience domestic violence and are over three times as likely to experience that violence as women with incomes between $35,000 and $49,999.[15] We also know that accessing and maintaining housing is a particularly critical problem confronting those who seek to end the cycle of violence.[16]

When one Western regional owner-manager of a Rural Housing Services (RHS) development sought to apply a "zero-tolerance" policy in seeking eviction of an innocent victim of domestic violence in Oregon, the tenant responded by filing a discrimination complaint with HUD. After investigation, HUD's Fair Housing Office issued a charge that the eviction had an adverse impact based on sex, based on the disproportionate number of female victims of domestic violence, and was not justified by business necessity, in violation of the *Fair Housing Act*.[17] After conciliation failed, the tenant sued in federal court, also claiming that the eviction violated RHS regulations that, in contrast to HUD's one-strike rule, extend protection to innocent family members.[18] The owners negotiated a consent decree, compensating the victim and reforming the policy.

Advocates may thus be able to employ the sex discrimination argument used successfully in Oregon to fight the eviction if negotiations with the PHA fail. For the women who will not be lucky enough to get counsel or achieve the same results in court, however, what the Supreme Court has so innocuously termed a "no-fault" eviction statute will in reality be a "your-fault" eviction statute. Implicit in an eviction under these circumstances is that it was the woman's fault for seeking the help of the police against her aggressor or that it was her fault that she was beaten in the first place.

What Advocates Are Doing

Negotiating with the Local PHA about Policies

Advocates may have success in working with local PHAs to create more clarity about how the PHA exercises its discretion. PHAs may already have informal, unwritten guidelines that shape their approach to evictions under the one-strike rule. In the interest of consistency and avoiding disputes, staff may be interested in working with advocates to create more formal policies for applying the one-strike rule, including alternatives to eviction.

Each agency's annual public housing authority plan process offers the ideal opportunity to develop such a formal policy. PHAs have an incentive to do so, as those that develop and implement one-strike policies receive higher scoring in the HUD management assessment process.[19] HUD's rules specify certain factors that PHAs may consider in administering one-strike policies, such as the seriousness of the offense, the extent of family member participation, the effects of eviction on innocent family members, and the extent of the tenant's reasonable actions to prevent or mitigate the offense.[20] Advocates should urge PHAs to incorporate these factors and others into their policy.

Advocates and PHAs may find additional common ground when it comes to applying the one-strike rule to grandparents functioning as second parents, to disabled tenants or to victims of domestic violence. The residents' association may have already engaged the PHA on these issues and should be included in these negotiations.

Because *Rucker* vests extremely broad discretion in the hands of local PHAs, it is imperative that advocates and residents reach out to their local PHA to negotiate for reasonable limits on that discretion. Without that effort, abuses in enforcement may continue and, quite possibly, increase.

Arguing the Facts and Applicable Law of Each Case with the PHA and in Court

Tenants and advocates alike should contest the facts or the rationality of eviction in specific cases with PHA staff even after an eviction notice has already been issued. Negotiating about the merits of good cases prior to judicial resolution may prove especially fruitful. The tenant's innocence or curative actions may help preserve the tenancy through settlement or via a probationary arrangement.

Whether in negotiation with the PHA or in pursuing a judicial defense, advocates can contest whether the facts of

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[12]PHAs have brought evictions against women suffering from domestic violence even before the one-strike law. *Moundsville Housing Authority v. Porter*, 370 S.E.2d 341, 179 W. Va. 506 (W.Va. 1988) (beating of tenant by boyfriend not good cause to evict even though tenant did not take steps to exclude him until after the incident). The increased discretion conferred by the Supreme Court's decision could increase the number of these types of evictions.

[13]Tom Schram, *Ruling on Housing Law a Blow to Battered Women*, available *at* www.womensenews.org (March 31, 2002).

[14]Re criminal assaults on tenants and family members by invitees or intruders, s*ee, e.g.,* Griffin, Laura, *Eviction Upheld for Woman Who Was Attacked in Home*, Dallas Morning News (May 26, 1999), at p. 1A, and *Crime Victim, Complex Settle Case*, Dallas Morning News (July 15, 1999), at p. 23A (criminal assault of female tenant); Griffin, Laura, *Tenant in Subsidized Apartment Avoids Eviction,* Dallas Morning News (Aug. 13, 1999), at p. 33A (sexual assault of teenage family member).

[15]*Violence Between Intimates: Domestic Violence* (U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, NCJ 167237, Revised 5/29/98), p.22.

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

[17]Tom Schram, *Ruling on Housing Law a Blow to Battered Women*, available at www.womensenews.org (March 31, 2002). *See also Domestic Abuse Victim Settles Discriminatory Eviction Claim Favorably*, 31 HOUS. L. BULL. 265 (Nov. 2001)(reviewing consent decree in *Alvera v. The C.B.M. Group, Inc.*, Civil No. 01-857-PA (Oct. 2001)). Note that *Alvera* concerned Rural Housing Service funded housing.

[18]7 C.F.R. Part 1930, Subpart C, Ex. B, para. XIV(A)(2)(c) (2001).

[19]24 C.F.R. §966.4(l)(5)(vii), 66 Fed. Reg. 28,776, 28,803 (May 24, 2001).

[20]*Id.*

their particular case fall within the language of the lease clause required by the one-strike statute or any narrower language actually used in the lease, or within any policy adopted by the PHA as part of the PHA Plan process. For example, PHAs will still need to show, at a minimum, that the activity upon which the eviction is based is criminal in nature, and that, at least for criminal activity that is not drug-related, it threatens the health, safety or right to peaceful enjoyment of the premises by other tenants. The PHA must also show that the acts were committed by the tenant, a household member or guest, or some other person under the tenant's control. Advocates can also challenge whether the PHA has carried its burden of proof. The PHA's evidence may be solely hearsay (*e.g.*, a neighbor tells staff that she/he has heard the tenant talk about doing drugs, or a uncorroborated police report), and thus insufficient to support an eviction judgment.

State law may provide additional protections. Many states have enacted their own substantive or procedural limitations on evictions for drug and criminal activity, such as providing protection for innocent family members.

Finally, state law may provide additional protections. Many states have enacted their own substantive or procedural limitations on evictions for drug and criminal activity, such as providing protection for innocent family members. Others have adopted such doctrines through interpretations of state law or development of the common law. Advocates in these jurisdictions can develop defenses based upon these additional legal requirements, for negotiation with the PHA or presentation in court. There is nothing in the Supreme Court's ruling interpreting the federal law that directly addresses whether such state laws are preempted. Moreover, HUD's published position, announced as part of the current one-strike rule, is that state law is not preempted.[21] Where the facts are especially compelling and the law permits, post-judgment motions for relief from forfeiture may also be available.

None of these arguments concerning the facts or the applicable law is expressly foreclosed by the Supreme Court's ruling.

Challenging How the PHA Exercises its Discretion

The Supreme Court did not find that PHA discretion to enforce the mandatory one-strike lease clause was boundless. Rather, citing to HUD's regulations authorizing PHAs to consider specific factors prior to pursuing eviction,[22] the opinion indicates that the local PHA would be in the best position to evaluate the totality of the circumstances in a case, including:

> …the degree to which the housing project suffers from "rampant drug-related or violent crime," 42 U. S. C. §11901(2) (1994 ed. and Supp. V), "the seriousness of the offending action," 66 Fed. Reg., at 28803, and "the extent to which the leaseholder has… taken all reasonable steps to prevent or mitigate the offending action".[23]

Absent any express statement to the contrary by the Supreme Court, advocates may still be able to raise concerns in the state court eviction process regarding whether the PHA has abused its discretion in deciding to take action or in failing to consider any mitigating circumstances.

Should the PHA decide to exercise its discretion, then, at a minimum, it should consider the individual circumstances specified in HUD's regulation.[24] If the PHA considers other factors, or fails to consider these, it may have abused its discretion. Depending on the existence of equitable or statutory opportunities under state law, an abuse of discretion claim may be available as defense to the eviction itself, as support for a post-judgment motion for relief from forfeiture, or possibly as grounds for an administrative writ of mandate.

Substantive Due Process Arguments Appear Foreclosed

Substantive due process issues were raised but not decided by the Ninth Circuit because of the doctrine of constitutional avoidance. Still, the Ninth Circuit noted significant due process concerns for tenants based on principles of individual responsibility and forfeiture law regarding deprivation of property used in commission of a crime of which the property owner had no knowledge.[25] While it is true that in the forfeiture context, if the property in question was not an instrumentality of the crime, Supreme Court Justices have various opinions about whether an innocent owner would have a substantive due process claim,[26] it appears from the Supreme Court's decision that innocent tenants will not be afforded that same protection.

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[21] 66 Fed. Reg. 28,776, 28,791 (May 24, 2001).

[22] 24 C.F.R. §966.4(l)(5)(vii), 66 Fed. Reg. 28,776, 28,803 (May 24, 2001).

[23] *Rucker*, 122 S.Ct. 1230, 1235 (2002).

[24] *See* Robert Hornstein, *Mean Things Happening in This Land: Defending Third Party Criminal Activity Public Housing Evictions*, 23 S.U.L. Rev. 257, 269 (1996), discussing 24 C.F.R. § 966.4(1)(5), previously codifying the one-strike rule. The current rule states that PHAs adopting such eviction policies and practices will receive points in the HUD assessment process, and that:

> [i]n a manner consistent with such policies, procedures and practices, the PHA may consider all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action.

24 C.F.R. §966.4 (l)(5)(vii)(B) (to be codified 2002).

[25] *Rucker*, 237 F.3d 1113, 1124-1125, *rev'd*, 122 S.Ct. 1230 (2002).

[26] *Bennis v. Michigan*, 516 U.S. 442, 134 L.Ed. 2d 68, 116 S.Ct. 994 (1996).

With regard to the Ninth Circuit's substantive due process concern about the imperative of individual wrongdoing, the Supreme Court declared that the two cases cited by the lower court dealt with the acts of government as sovereign, while in *Rucker* the government was merely ". . . acting as a landlord of property that it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required."[27]

The Supreme Court volunteered that there were no procedural due process problems either, noting that it appeared that OHA had served notice on the tenants in *Rucker,* and that the state court eviction process would afford the tenants the opportunity of arguing whether the lease provision authorized by the statute was actually violated.[28]

It remains unclear whether application of the statute to tenants in particular outrageous circumstances raises any remaining colorable legal claim under due process or the statute, as informed by legislative intent. For example, where a PHA seeks to evict a victim of domestic violence, or the remaining family members where a first offense of criminal activity occurred many miles away from the premises and the offender has been incarcerated, advocates could argue that such eviction is beyond Congress' intent and wholly irrational.[29]

Post-Rucker Responses

HUD and Some Housing Authorities' Response

After the *Rucker* decision, HUD Secretary Mel Martinez encouraged public housing directors "…to be guided by compassion and common sense in responding to cases involving the use of illegal drugs," and urged them "…to consider the seriousness of the offense and how it might impact other family members."[30]

At the request of the Secretary, Assistant Secretary Liu issued another letter thereafter explaining that, in their view, not only does *Rucker* reaffirm that HUD's regulations authorize PHAs to evict for drug-related or certain other criminal activity, but that under those same regulations *"PHAs are not required to evict an entire household—or, for that matter, anyone—every time a violation of the lease clause occurs."*[31] [Emphasis added.]

In response to questioning by the media and advocacy groups, a number of PHAs have asserted that they intend to apply the one-strike rule in a manner that is consistent with the message in Secretary Martinez' letter. The reality of PHAs' practices post-*Rucker* thus far appears to span the range. A PHA in Richmond, Virginia promptly sought to have juvenile records unsealed in an effort to find grounds to evict those children and their families, contending that such evictions are mandatory. The Chicago Housing Authority, in contrast, is maintaining a lease provision that allows residents to raise as a defense that they did not know, nor should they have known, of the criminal activity that is the basis of the proposed eviction, and sustain this defense by a preponderance of the evidence.

Legislative Response

Because the Court was ostensibly interpreting the statute, Congress holds the last word about the parameters of a one-strike policy. Advocates and organizations around the country are meeting with congressional representatives to explore legislative solutions to *Rucker,* as consequences not intended by Congress in adopting the broad one-strike statute will undoubtedly flow from the Court's interpretation. Representative Barbara Lee has drafted language that would amend the statute to specifically protect tenants who did not know or could not have foreseen the criminal or drug-related activity that is the basis for the eviction. A broad-based coalition of advocates has formed to support legislative reform, seeking support from other members of Congress.

Conclusion

The *Rucker* decision is likely to have a ripple effect throughout all forms of federally subsidized housing. It is therefore important to advocate actively in whatever *fora* are available.[32] Ultimately, while the legislative front may be the most clear-cut resolution for thoroughly addressing the problems raised by the *Rucker* decision, advocates may pursue several other potentially fruitful approaches in the meantime. Continue your direct advocacy on one-strike cases that come your way. In addition, consider reaching out to other advocacy organizations or to associations that have a particular stake in the matter—residents' associations, seniors groups, disabled groups, groups advocating against domestic violence, and any others to whom your creativity leads you. The media may be an especially appropriate weapon in mounting an effective defense. Together you may be able to achieve a more humane and reasoned application of the one-strike rule. ■

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[27]*Rucker*, 122 S.Ct. 1230, 1236 (2002).

[28]*Id.*

[29]S. Rep. No. 316, 101st Cong., 2d Sess. 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941.

[30](Post-*Rucker*) Letter from Mel Martinez, Secretary of HUD, to Public Housing Directors, (April 16, 2002) (available on NHLP's Web site *at* www.nhlp.org).

[31](Post-*Rucker*) Letter from Michael Liu, Assistant Secretary of HUD, to Public Housing Directors, (June 9, 2002) (available on NHLP's Web site *at* www.nhlp.org).

[32]*See* Ben Winograd, *San Jose family facing eviction under "one strike, you're out" policy*, San Jose Mercury News, June 9, 2002, available *at* www.bayarea.com/mld/mercurynews/3435401.html.

NHLP Survey Reveals PHAs' Interest in Section 8 Homeownership

Nearly 20 months ago, the U.S. Department of Housing and Urban Development (HUD) published the final regulations governing the Section 8 Homeownership Program.[1] Under this program, public housing authorities (PHAs) may elect to permit lower-income participants in the Section 8 voucher program to convert their monthly rental assistance to monthly *mortgage* assistance. As a result of the Section 8 homeownership program, voucher applicants and participants now have an opportunity to choose between leasing or buying a home on the private market.

Whether used in addition to, or as an alternative to, existing first-time homebuyer programs, the Section 8 homeownership voucher undoubtedly increases the affordable homebuying options for low and very low-income families. Besides creating more options for families, the homeownership voucher is also viewed as a tool for maintaining, or even increasing, the available affordable housing stock in certain communities. The program promotes mobility and may alleviate voucher utilization and success rate problems. Most importantly, the homeownership option may be the only affordable possibility for many very low-income families and individuals to purchase their own home.

NHLP's Section 8 Homeownership Initiative and Survey

Two years ago, the National Housing Law Project (NHLP) implemented its Section 8 Homeownership Initiative. The Initiative is designed to promote successful implementation of Section 8 homeownership programs by providing education, training, legal and technical assistance to a variety of community partners engaged in developing local homeownership programs. Since beginning our Initiative in September of 2000, NHLP has assisted and/or trained over 4,000 entities and individuals across the country.[2]

Despite our involvement, however, we found it difficult to uniformly assess the strengths and weaknesses of the Section 8 homeownership program. We were aware that many PHAs were investigating, drafting or adopting Section 8 homeownership programs and that some PHAs had already closed escrows on new homes. We also knew that some PHAs had concluded that the Section 8 homeownership voucher would not work in their community or with their Section 8 participants. However, because PHAs that have adopted or considered the Section 8 homeownership programs were

[1] *See* the *Quality Housing and Work Responsibility Act* (QHWRA) of 1998, amending the *United States Housing Act of 1937* (42 U.S.C.A. §§ 1437 *et seq*.) Pub. L. 105-276, Title V, § 555, 112 Stat. 2518, 2611-2613 (approved Oct. 21, 1998). The homeownership option is specifically authorized under § 8(y) of the *United States Housing Act of 1937*, 42 U.S.C.A. § 1437f(y)(1)(B)(West Supp. 2002), as amended by QHWRA. The HUD regulations governing the Section 8 homeownership option were published on September 12, 2000, became effective on October 12, 2000, and are codified at 24 C.F.R. Parts 5, 903 and 982 (2001). *Housing Law Bulletin* articles and other information about the final HUD Section 8 homeownership regulations, the Section 8 demonstration programs, proposed HUD regulations and program implementation issues are available *at* www.nhlp.org/html/sec8/homeownership.

[2] Training participants and technical assistance recipients have included housing advocates, PHAs, lenders, realtors, homeownership counselors and potential homebuyers, among others. To date, NHLP's emphasis has been on the creation of programs designed to assist extremely low and very low-income families into homeownership. NHLP also focuses on developing internal and external program systems to help mitigate homebuyer default and overall failure of the program. Since the program is relatively new, NHLP continually engages in policy and administrative advocacy to address a variety of concerns, including fair housing and other exclusionary practices, to promote awareness of needs and to address potential problems encountered by lower-income purchasers.

Fred Fuchs Wins 2002 Kutak-Dodds Prize

Fred Fuchs of Legal Aid of Central Texas is one of two persons who won the highly prestigious annual Kutak-Dodds Prizes awarded by the National Legal Aid and Defender Association and the Kutak Foundation at NLADA's Exemplar Awards Dinner in Washington, D.C. on May 30, 2002. Fred, a long-time member of the Housing Justice Network, was recognized for dedicating 25 years of service to low-income individuals.

Fred is Texas' leading advocate for justice for the poor in the field of housing, community development and tenant rights. In addition, he is recognized by many as a member of a very small group of highly specialized and dedicated national housing experts on a variety of housing, community development, landlord-tenant and fair housing laws. He graciously shares his wisdom nearly daily in response to postings on the HJN list server. Among many accomplishments, Fred is credited with saving Austin's largest public housing site from demolition. He also served as a key expert in negotiations that required developers of Low Income House Tax Credits (LIHTC) to accept Section 8 vouchers. The negotiation results were used by the Internal Revenue Service as the model for developing a national standard for LIHTC.

The Kutak-Dodds Prizes award is named for the late Robert J. Kutak, a member of the first Legal Services Corporation board and the late Kenneth R. Dodds, former partner in the Omaha office of Kutak Rock. Kutak dedicated his career to public service and legal education, and Dodds was well known for his life-long interest in providing legal services to the disadvantaged.

The National Housing Law Project extends its congratulations to Fred and thanks him for his continuous and dedicated service to the housing rights of all low-income households.

scattered across the country, it was difficult to pinpoint uniform and/or regional practices and problems.

Accordingly, in an effort to collect data about awareness, support and implementation activities regarding the Section 8 homeownership program, NHLP surveyed selected PHAs through the United States. The purpose of the survey was to determine the interest in, and if applicable, the success of the Section 8 Homeownership Program. In the survey, we asked if the PHA was aware of the new HUD program and, if it was, whether it had enough knowledge to make a decision about adopting the program and whether it had exercised its discretion to actually adopt a local program. Alternatively, we queried whether the PHA had decided not to provide homeownership assistance to its Section 8 participants. For those that did not, we asked for reasons supporting the decision.

If a PHA was proceeding with the program, we wanted also to determine what stage of the process it was currently in. If it was still investigating the program to see if it would work locally, we asked if it also had begun to draft its Administrative Plan policies and procedures. We also inquired about when the PHA expected to complete drafting its program and/or have its Board of Commissioners or other controlling body formally adopt it.

For PHAs that had already formally adopted the program, we asked if the PHA was in the program implementation stage and if applicable, the number of home escrows that it had facilitated to closing. For PHAs that were either in the process of drafting or implementing a program, we asked the PHA to convey their views about the process and assessment of the program.[3] Finally, we gave respondents the opportunity to provide any other comments they desired.

The NHLP survey was targeted to PHAs that administer programs with at least 300 vouchers. This resulted in our sending surveys to 1,037 PHAs across the country. The return rate was surprisingly large. We received responses from 347 PHAs, a 33.5 percent response rate. Responses to the survey were received from PHAs or Section 8 administrators in all but two states (Delaware and Wyoming) as well as from the District of Columbia and Puerto Rico. The responding PHAs administer 616,393 Section 8 vouchers, representing nearly 35 percent of Section 8 participants nationwide.[4] Our survey analysis included all results received by NHLP through April 19, 2002.

Awareness of the Section 8 Homeownership Program

Only 34 of the responding PHAs (9.7 percent) were either unaware of HUD's new homeownership program or didn't know enough about the program to make a decision whether to promote it. These PHAs were, on average, smaller PHAs with 500 or less Section 8 vouchers and were spread evenly throughout the country. Only two of these PHAs administered a substantial number of Section 8 vouchers, one PHA from the Southwest with 1,800 vouchers and another PHA from the Midwest with 2,000 vouchers. Not surprisingly, each of these 34 PHAs expressed interest in the program and requested more information about it.

Investigating, Drafting and Adopting the Section 8 Homeownership Program

NHLP requested specific information about the stage that a PHA had reached toward actual adoption of a Section 8 homeownership program at the time of the survey. The requests were categorized into six major areas:

- the PHA is still learning about or investigating the program to determine if it will work in its jurisdiction;
- the PHA is drafting program policies and guidelines for inclusion in the Administrative Plan;
- the PHA has already drafted policies and guidelines and is in the process of formally adopting these amendments to the Administration Plan;
- the PHA has adopted a Section 8 homeownership program and is in the implementation stage, identifying and working with prospective homeowners;
- the PHA has adopted a program resulting in the actual purchase(s) of new homes by Section 8 participants; and
- the PHA has adopted a program but has not been successful in its implementation.

One hundred and thirteen of the responding PHAs (approximately 33 percent) were still learning about and investigating the program to determine whether it would work in their localities.[5] As with the PHAs that were uninformed or unaware of the program, most of these PHAs requested that NHLP send additional information about it. In addition, most of these PHAs were undecided about their ability to adopt a successful local program and therefore were unable to specify a target date for adoption.

Seventy-four of the responding PHAs (22 percent) are actually in the process of drafting program policies and guidelines. Another 21 PHAs (6 percent) had already drafted the new homeownership program and were in the process of formally adopting the program amendments to their Administrative Plan. Of these 95 PHAs, most targeted completion of the process by late spring or summer of this year. Only five anticipated finalizing the process during the last months of 2002 and only one PHA thought it would not be finished until some time in 2003. Most of the PHAs in the process of drafting or adopting a program also provided comments, both positive and negative, about their experience. These comments are discussed more fully below.

[3]These boxes included: (1) Successful; (2) Building Good Partnerships; (3) Strong Community Support; (4) Accessible Financial Support (*i.e.* downpayment assistance, grants); (5) Participant Credit Barriers; (6) Time-Consuming; (7) Lack of Expertise; (8) Lack of Staff; (9) Too Expensive; (10) Lack of Lender Interest; (11) Lack of Community Support; and (12) Insufficient Homebuyer Readiness.

[4]On average, there are currently 1.8 million Section 8 participants in the United States. (Conversation with Gerald Benoit, August 21, 2001.)

[5]A few PHAs failed to fully complete the survey, or at times, checked more than one applicable box. Accordingly, the approximate figures account for these discrepancies.

A total of 93 PHAs (27 percent of respondents), including 10 HUD-approved demonstration programs that responded to the survey, have formally adopted a Section 8 homeownership program.[6] Excluding the 10 Section 8 homeownership programs that were adopted after receiving demonstration approval in late 1999 or early 2000, the majority of these programs (45 responses) were adopted in 2001. Only seven responding PHAs were able to adopt programs in the last months of 2000 after the final regulations became effective in October 2000. Fourteen PHAs had adopted programs in the early months of 2002. Together, these responses support the belief that the process of drafting, adopting and initial implementation of local Section 8 homeownership programs can take 12 months or more.

Fifty-two of the 93 responding PHAs with adopted programs (15 percent of the total survey responses) are now in the implementation stage. These PHAs are in the process of identifying and working with prospective homeowners. None of these PHAs have finalized any home purchases. Thirty-three of the remaining 41 PHAs with adopted programs have closed at least one escrow. The remaining eight PHAs report that they have been unsuccessful in implementing the program.

The 33 active PHAs have finalized 199 purchases in 18 states. More than half of these purchases (120) were accomplished by the 10 responding demonstration programs that began the program in late 1999 or early 2000.[7] The Metropolitan Development and Housing Agency in Nashville, Tennessee, reported an impressive 32 closings since receiving demonstration approval in February 2000. The demonstration program in Burlington, Vermont, followed closely with 31 closings and the Colorado Department of Human Services reported 18 closings with three more scheduled to close by May 2002. The Burlington Housing Authority's program was approved in October 1999 and Colorado's demonstration program received HUD approval in January of 2000.

The remaining 79 purchases that were completed in compliance with the final HUD regulations were facilitated by 20 of the responding PHAs. Of these, the Bernalillo County Housing Department (BCHD) reported the most home closings, finalizing 13 purchases since launching its program in January 2001. In addition, the Housing Authorities of Lakewood, New Jersey, and Waco, Texas, each reported 10 closings under the final regulations. Eight of the non-demonstration program PHAs closed one loan each. Lastly, Florida had the most PHAs claiming finalized purchases: the Pinellas County, Orlando and Tallahassee Housing Authorities achieved three, one and four closings respectively.

Even though the number of participating households appears relatively small, these statistics are quite encouraging. Based on the fact that only one-third of the surveyed authorities responded and that the surveyed PHAs represent less than 50 percent of all authorities in the United States, it is possible that as many as 300 PHAs have already adopted a Section 8 homeownership program and that another 150 to 200 are in the process of adopting a program. If each of these authorities places as few as 10 voucher holders in homes, the program will reach 5,000 participants per year within a relatively short period of time. Encouragement from HUD, in the form of increased administrative fees, may significantly increase the number of program participants.

An overwhelming number of responding PHAs report that they have built good partnerships and strong community support in implementing their programs.

The Drafting and Implementation Process: Reported Benefits and Barriers

Community Partnerships

An overwhelming number of responding PHAs report that they have built good partnerships and strong community support in implementing their programs. As a general rule, successful programs are developed through a consortium of community partners. By using existing community organizations such as nonprofit organizations, housing counselors and first-time homeowner programs, the PHA avoids duplication of services and alleviates costs associated with administration of the Section 8 homeownership voucher. Only two of the responding PHAs reported that they could not successfully implement the program because necessary community partners were not ready.

Use of community partnerships also helps PHAs secure expertise in areas that they usually do not deal with and eases the demand for additional PHA staff time. Of the 188 PHAs currently drafting or implementing programs, 91 percent (171 PHAs) complained about a lack of expertise and staff time, as well as the time-consuming nature of the program.[8] It is not

[6]Demonstration authority was provided to HUD under QHWRA. Pub. L. 105-276, Title V, § 555(b), 112 Stat. 2613 (Oct. 21, 1998). Between August 25, 1999 and July 10, 2000, HUD approved 15 demonstration programs for certain PHAs and other administrators of Section 8 vouchers. Ten of these 15 PHAs responded to the NHLP survey. For more information about the Section 8 homeownership demonstration programs, *see* 31 HOUS. L. BULL. 1 (Jan. 2001), *at* www.nhlp.org/html/sec8/homeownership.

[7]The 10 demonstration programs that responded to our survey were Syracuse (NY) Housing Authority (10 closings); Burlington (VT) Housing Authority (31 closings); Montgomery County (PA) Housing Authority (nine closings); Colorado Department of Human Services (18 closings); Philadelphia (PA) Housing Authority (five closings); Metropolitan Development and Housing Agency in Nashville, TN (32 closings); Mississippi Regional Housing Authority in Jackson, MS (one closing); Vermont State Housing Authority (12 closings); Yonkers (NY) Housing Authority (no closings); and Las Vegas (NV) Housing Authority (two closings).

[8]Seventy-eight responding PHAs reported that the program was time-consuming, 54 cited lack of staff as a problem and 39 PHAs further cited lack of expertise as an issue. These responses do not include the 10 PHAs that cited lack of staff as the primary reason for not pursuing Section 8 homeownership at all.

uncommon for PHA staff to be inexperienced in home purchase financing, homeownership counseling topics or the title and escrow process, among other issues. PHAs can utilize community organizations with specialized areas of expertise to informally educate PHA staff about homeownership procedures at little or no cost. Diverse PHA partnerships are also extremely effective, especially in larger communities with many community-based organizations, because a variety of resources can be accessed to fit the individual needs and circumstances of the Section 8 homebuyer.[9] Significantly, in addition to partnering with commonly recognized first-time homeowner and homeownership counseling programs, at least three PHAs enlisted the assistance of local legal services programs to draft its initial program and supplemental documents, and to represent prospective homeowners through the purchasing process.[10]

The NHLP survey clearly indicates, however, that the role of nonprofit organizations and other community partners is limited in scope, demonstrating that PHAs often incorporate several different agencies to provide one-time, specialized services. Over 99 percent of the responding PHAs chose in-house management of their local Section 8 homeownership program. In fact, only two PHAs reported that a significant portion of the program execution is contracted to a nonprofit administrator. For example, in Berkeley, California, the PHA refers prospective homeownership participants directly to a local nonprofit agency, Affordable Housing Advocacy Project (AHAP). If necessary, AHAP will work with the family to ensure acceptable credit before the PHA qualifies the family for receipt of a homeownership voucher. After the voucher is issued, AHAP continues to assist with loan pre-qualification and the home search, guiding the family through the entire pre-closing process. Without the assistance of AHAP, the PHA would not be able to allocate necessary staff time and resources to ensure successful implementation of its program.

[9]In creating community partnerships, however, PHAs are prohibited under federal law from requiring participants to use particular lenders or mortgage companies. Accordingly, and although HUD encourages PHAs to develop supportive partnerships, Section 8 homeownership participants must be able to select among qualified realtors, lenders, mortgage brokers, attorneys, housing counselors, title/escrow companies and eligible housing units. The PHA may wish to provide participants with referral lists of its partners and other appropriate entities from which the family can choose. These lists can also assure the family that the referred entity is familiar with the Section 8 homeownership requirements and is willing to work with the PHA to utilize the Section 8 subsidy.

[10]The Housing Authorities in Benicia, California, and in Albany and Schenectady, New York, each utilized, in varying degrees, local legal services assistance. Legal Services of Northern California was instrumental in drafting the Administrative Plan amendments for the Benicia Housing Authority and further assisted by preparing PHA supporting documentation and representing potential homebuyers through the Section 8 financing process. The Legal Aid Society of Northeastern New York also participated in the drafting of the Schenectady Municipal Housing Authority (SMHA) Section 8 homeownership program and continues to provide *pro bono* legal assistance by assisting with closings and reviewing contracts before closing. SMHA also partners with the State Employees Federal Credit Union, a local real estate company, a nonprofit housing counseling agency and the Community Land Trust to identify available housing stock.

Lack of Administrative Funds

Many responding PHAs were disturbed about the lack of additional administrative funding available to them to support the homeownership program. PHAs complained about the fact that they did not have the staff time available that was necessary to commit to the program. While most of these PHAs had elected to continue cautiously with the drafting and/or adoption process, these difficulties were most often cited as the reason why PHAs were unwilling to pursue Section 8 homeownership.[11]

Some PHAs, such as the Bernalillo County Housing Department (BCHD), have a strong commitment to affordable homeownership. As a result, BCHD decided to commit significant employee staff time to administer the program despite the lack of additional administrative funding. In addition, BCHD reports that it incurred substantial expenses during initial program implementation, including making necessary Administrative Plan amendments, facilitating community meetings, preparing brochures and conducting outreach to banks and other organizations. BCHD also conducted extensive and costly outreach to current Section 8 participants, mailing nearly 500 letters to families that were deemed eligible based on initial income and employment reviews. BCHD anticipates that these expenses will subside as it gains experience and the program becomes easier to administer.

Only 7 percent of the responding PHAs cited lack of lender interest as a barrier to implementation of Section 8 homeownership programs.

Lender Participation

Lack of lender participation is one of the more commonly reported problems encountered when developing Section 8 homeownership programs. The NHLP survey indicates, however, that this problem is subsiding. In fact, only 7 percent of the responding PHAs cited lack of lender interest as a barrier to implementation of Section 8 homeownership programs. Although several PHAs described the unwillingness of lenders to participate as an initial obstacle, the pool of lenders and financial institutions willing to take part in the program increased as the local program progressed toward implementation. One obvious reason for this outcome is that lenders become more familiar and less critical of Section 8 homeownership options as more community-based organizations and local governments

[11]The three most common reasons PHAs decided not to adopt a Section 8 homeownership program were: (1) lack of available staff (10 responses); (2) the presence of an existing successful first-time homeownership program, either managed by the PHA or in the extended community (nine responses); and (3) the high cost of administration and/or no guarantee of extended funding for the Section 8 program (seven responses).

become involved in the program. These changes may also be the result of aggressive underwriting guidelines that were issued last year by the secondary market and government-subsidized lenders. Fannie Mae, Freddie Mac, FHA and USDA's Rural Housing Services have each developed financing models that are acceptable and, in several instances quite favorable, to Section 8 voucher holders.[12]

Participant Credit Barriers

Section 8 participant credit issues and insufficient homebuyer readiness was cited by 107 PHAs as a barrier to implementation of the Section 8 homeownership program. To mitigate these issues, community partnerships may be critically important to assist families in curing bad credit. To alleviate time-consuming administrative work, some PHAs have decided to refrain from issuing homeownership vouchers until a family can present an acceptable credit report. If necessary, the PHA will refer the participant to a participating nonprofit organization for assistance in resolving the prospective homebuyer's credit problem. Other PHAs, such as the Coventry Housing Authority in Rhode Island, work directly with the family to develop an action plan to mitigate credit barriers. Still other PHAs recognize that the participant's credit issues may stem from a more extensive, community-wide problem with predatory consumer practices. One Housing Authority in Texas reports continuous problems with small finance companies and "rent-to-own" appliance stores that target low-income families and embroil them in payments the families cannot afford. In these cases, it may be necessary to develop a larger attack on consumer abuses before successfully developing a Section 8 homeownership program.

Other Beliefs of PHAs and Section 8 Participants

Three PHAs maintained that the Family Self-Sufficiency (FSS) program is more important for its Section 8 participants than the homeownership program and therefore decided to give full attention to the FSS program. Just recently, however, HUD announced its eight Strategic Goals to be pursued over the next five years.[13] Two of these eight goals specifically promote homeownership opportunities for lower-income families. Consistent with these goals, HUD is now offering additional discretionary funds for PHAs that promote homeownership opportunities through FSS programs.[14] As a result, PHAs that are currently diverting Section 8 homeownership attention toward existing FSS programs may soon decide to alter these practices in an effort to become more competitive for additional funding.

Six PHAs involved in the development of local homeownership programs cite lack of interest by participants and low wages in the community as obstacles to program implementation. Although one PHA promoted the program through mailings and meetings, it is unknown what outreach efforts the remaining PHAs have made to advertise the program to potential participants and community organizations, or to increase participant wages.

Seven PHAs refused to develop Section 8 homeownership programs because of an assumption that the poverty level of families participating in the Section 8 program prevents homeownership opportunities. Another seven PHAs denounced the Section 8 homeownership program because they were "philosophically opposed" to using Section 8 assistance for homeownership and/or believe that the program would detract from the available rentals on the market. Unfortunately, these beliefs result in a failure to increase the amount of available affordable housing stock (by providing *more* units overall that can be used with Section 8 subsidies) and further serve to deny Section 8 participants a broader opportunity for housing choice. Alternatively, PHAs should focus on motivating families to increase wages and become more self-sufficient, and emphasize programs that support this type of motivation. Since the Section 8 homeownership voucher will terminate on a fixed date 10 or 15 years after receipt (unless the homeowner is a senior or is disabled), the program itself should encourage families to improve their incomes and become self-sufficient. Likely, most families will realize increased wages and move off the program prior to the termination of the voucher, thereby making more Section 8 vouchers available for other families in need.

Conclusion

Despite the many barriers raised by the program, the NHLP survey demonstrates that an increasing number of PHAs are interested in providing Section 8 homeownership opportunities to participants. A significant number of PHAs report the successful development of programs after receiving strong community support and building a foundation of solid partner relationships. As importantly, fewer PHAs are reporting difficulties in finding lenders and other financial institutions that are willing to participate in the program. It is clear that, as the Section 8 homeownership program grows in popularity, the positive aspects of the program should receive increased attention, resulting in more and more affordable homeownership opportunities for low-income people. ■

[12]Each of these underwriting guidelines and mortgage models, as well as other information about the Section 8 homeownership program, are available *at* www.nhlp.org. For a more detailed discussion of lending barriers commonly experienced by PHAs when establishing Section 8 Homeownership Programs, *see Section 8 Homeownership,* Journal of Housing and Community Development (National Association of Housing and Redevelopment Officials, March/April 2002).

[13]*See* Super Notice of Funding Availability (SuperNOFA) for HUD's Discretionary Grants Programs for Fiscal Year 2002, 67 Fed. Reg. 13,826, *et seq.* (March 26, 2002).

[14]In this year's SuperNOFA, HUD is providing increased funds if the PHA develops homeownership programs, including Section 8 homeownership. For example, HUD is providing funds, on a competitive basis, to PHAs to hire FSS Program Coordinators. PHAs that offer homeownership opportunities to FSS participants are also eligible to apply for additional funds to hire another coordinator to support its homeownership activities. *Id.* at 14,593.

Study Released on Voucher Success Rates

The Department of Housing and Urban Development (HUD) commissioned a study on Section 8 vouchers to determine what degree of success voucher holders are having in using the benefit. The results of that study were released in November 2001, showing that recipient success rates have, on average, fallen to 69 percent.[1] This article discusses key points raised in Volume I of the study, which focuses on the use of the Section 8 voucher in metropolitan areas.[2]

Additional goals of the study were to determine the factors affecting voucher success rates, including but not limited to examining the demographics of successful versus unsuccessful participants, and the role that local housing authority (PHA) policies play in that process. The study confirms what housing advocates know anecdotally—that successful families need a longer search time and that the poorest households and largest households have the greatest difficulty finding a landlord who will accept their voucher. It also shows that PHA outreach to landlords and anti-discrimination statutes (related to source of income) are somewhat helpful in improving success rates.

Declining Success Rate in Voucher Use

The study, which was conducted mostly in 2000, was based on a sample of more than 2,600 households in metropolitan areas with PHAs that administer programs with more than 800 voucher units.[3] Nationally, success rates plummeted from 81 percent in 1993 to 69 percent in 2000. In other words, in 2000, 12 percent fewer families who received a Section 8 voucher were able to find someone who would rent to them than in 1993. This contrasts sharply with the fact that utilization rates in studies conducted since the mid-1980s always increased.[4] The decline may be attributable to two factors: a tightening housing market and a 1995 decrease in the Fair Market Rents from the 45th percentile to the 40th percentile.

This is the first study of success rates after the complete merger of the Section 8 Certificate program into the Section 8 Voucher program.[5] Information was gathered from 48 PHAs in 48 states and from 2,609 voucher holders.[6] The study tracked the success of those participants from the time they were issued the voucher to the time when they either found a rental unit or lost the benefit because they could not find a landlord who would accept a Section 8 voucher.[7] Forty percent of the voucher holders surveyed required a two-bedroom unit. Twenty-nine percent needed a three-bedroom unit. Seven percent needed a four-bedroom unit or larger.[8]

Longer Search Time Required for Successful Families

Those Section 8 participants fortunate enough to find a landlord who accepted the benefit took, on average, 83 days longer than successful families in 1993. Almost 25 percent required more than 120 days to find their rental. Seventy percent of the time between issuance of the voucher and final approval of the unit was spent between initial issuance of the voucher and the family's request for lease approval. This would seem to indicate that most of that time was spent in searching for a unit.[9] Even for those leasing in place, an average of 59 days elapsed between the voucher issuance date and the effective date of their Section 8 lease.[10]

Most Participants Had to Find New Housing to Be Successful

Notably, Section 8 participants were not as successful in getting their existing landlord to accept the benefit. The vast majority of participants had to look for another place to live in order to use the Section 8 benefit. Sixteen percent fewer participants were able to lease in place in the 2000 study than were able to in 1993.[11]

Successful participants who leased a new unit were usually single parents with a female head of household.[12] Those households able to stay in their existing unit were usually elderly or disabled.[13]

Because over two-thirds of those who moved to new units were single parents and 22 percent were below the age of 25, the study hypothesized that to an increasing extent voucher holders have been living with their parents or other relatives and were using their vouchers to move out of the family home.[14] This, however, may not be the only reason for the increase in movers. As the study acknowledges, the number of participants who were single parents actually decreased between the 1993 study and this recent study, from

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[1]Abt Associates, *Study on Section 8 Voucher Success Rates, Volume I, Quantitative Study of Success Rates in Metropolitan Areas* (Nov., 2001) at 1-2, available *at* www.abtassoc.com/reports/housing/ 2001871779298_23544.pdf, or *at* www.huduser.org/publications/pubasst/sec8success.html.

[2]The study excluded the City of Los Angeles Housing Authority because it was not part of the 1993 study that was used as a baseline. New York City's Housing Authority was excluded due to the unique characteristics of its market. *See* Abt Associates, *Study on Section 8 Voucher Success Rates, Volume I, Quantitative Study of Success Rates in Metropolitan Areas, Executive Summary* (Nov., 2001), at ii.

[3]Id. at i.

[4]Id. at ii.

[5]Id.

[6]Id. at 1-6.

[7]Id. at 1-7 to 1-12.

[8]Id. at 1-8.

[9]Id. at 2-6.

[10]Id. at 2-8.

[11]Id.

[12]Id. at 1-8.

[13]Id.

[14]Id. at 2-11.

71 percent to 61 percent.[15] Thus, following the logic of the hypothesis, the rate at which participants had to find new housing should have dropped. It did not.

Another possible interpretation is that landlords who might not normally have rented to a Section 8 voucher holder rented in place to those who were elderly or disabled out of compassion but felt no such compassion for single parents. Perhaps the notion of a single person with kids and a Section 8 voucher conjured up stereotypical visions that made landlords decide to turn down their existing, presumably, good single-parent tenant. Yet another possible interpretation is that these families were living in overcrowded conditions per voucher standards and, thus, had to move in order to participate in the program. Again, it is unclear from the study how many participants wanted to lease in place, and with so many variables, it is impossible to draw a conclusion to that question based on this particular study.

The Poorest Households and Larger Households Have the Hardest Time

Households with the lowest income had the least success in finding a landlord who would accept their Section 8 voucher. These households were generally elderly, or non-elderly with no children, and more likely to be male headed. These households are likely to have been homeless recently.[16] Households with five or more family members also had a low rate of success.[17]

Given the fact that the voucher subsidy would have covered their rent, regardless of the household's overall income level, one has to question why such families were turned down in higher numbers than others. Since the denial was obviously not based on the probability of getting rent paid, one has to wonder whether or not bias of some sort was part of the equation in the landlord's mind in turning people down, despite the fact that the study states that success rates did not differ by race, ethnic background, gender or disability status of the head of household.[18] For larger households, it could also be that three- to four-bedroom units were simply harder to locate.

Income Level

The majority of the households successful in utilizing their voucher had incomes at or below 30 percent of Area Median Income (AMI). Notably, households with a higher income had a lower success rate.[19] Only 4 percent of participants had zero income, but their success rate was slightly higher than for the higher income group.[20] The study surmised that voucher holders who were employed may have had less time to search for housing and greater limitations on where they could search because of their need to stay close to work. These factors could have reduced their success rate.[21] However, the study does not indicate whether employed participants constituted the higher-income households, leaving unanswered why higher-income households had a harder time utilizing their vouchers.

Non-Discrimination Statutes Based On Source of Income Improve Utilization Rates

The study states that the participants' source of income did not vary their success rates in using their voucher.[22] In jurisdictions that prohibit discrimination based on source of income, success rates were at 76 percent among voucher holders as a whole. In jurisdictions with both source of income and Section 8 non-discrimination laws in place, the success rate was 62 percent. When neither was in place, the success rate was 69 percent.[23]

Statistically, these differences were not considered significant. However, through regression analysis, with all else being equal, the study found that participants in jurisdictions with non-discrimination laws based on source of income and/or Section 8 had a 12 percent higher chance of success in using their voucher.[24] It would appear, therefore, that either the participants' source of income or their participation in the Section 8 program may, ultimately, vary success rates by having a negative impact on participants' ability to utilize their Section 8 voucher in areas that lack such prohibitions.

Market Factors

Not surprisingly, success rates were greater in markets with a greater number of vacancies. The average rate of success in a loose market was 80 percent compared to 61 percent in a very tight market.[25] A very tight market was defined as having a vacancy rate of less than 2 percent, and a loose market as having a vacancy rate of 7 to 10 percent.[26] In tight and moderate markets, the success rates were 66 percent and 73 percent respectively.[27] A tight market was defined as having a vacancy rate of 2 to 4 percent while a moderate market was defined as having a vacancy rate of 4 to 7 percent.[28]

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[15]Id.

[16]Id. at 3-22.

[17]Id.

[18]Id. at iii.

[19]Id. at 3-2.

[20]Id. at 3-11.

[21]Id.

[22]Id. at 3-12.

[23]Id. at 3-17.

[24]Id.

[25]Id. at 3-16.

[26]Id. at 3-15.

[27]Id. at 3-16.

[28]Id. at 3-15.

Payment Standard

According to the study, success rates were at 70 percent in areas where the PHA set their payment standard at the Fair Market Rent (FMR) level. Success rates were slightly lower (66 percent and 62 percent) when PHAs set their payment standard above or below FMR.

In trying to make sense of these results, the study notes that payment standards were reduced from the 45th to the 40th percentile in 1995, but, starting in 1999, PHAs were allowed to set their payment standard between 90 and 110 percent of FMR without having to apply for exception rents from HUD. At 110 percent, those rents would have been above the 45th percentile.[29] However, it is not clear from the study how many of the jurisdictions surveyed had in fact set their payment standard at 110 percent of FMR. (PHAs in select markets are currently able to have their FMR set at the 50th percentile, but that regulatory change occurred in December of 2000, too late to affect this study.)[30]

Outreach to Landlords and Better Tenant Briefing of Some Help

In jurisdictions where PHAs conducted outreach to landlords every few months, utilization rates were **7 to 9 percent higher than in jurisdictions in which no or infrequent outreach took place.**[31] This outcome is consistent with the U.S. Census 2000 results which indicate that the vast majority of property owners surveyed were entirely unfamiliar or only somewhat familiar with the Section 8 program.[32] Yet results in jurisdictions with outreach every few months was also higher than in areas where outreach was done even more frequently—on a monthly basis. Thus, frequency of outreach alone does not explain these results. Unfortunately, the study did not examine the quality or content of the outreach, or other factors that could help us make more sense out of these figures.[33]

Individual tenant briefings as opposed to group briefings were another factor in improving success rates. Implicit in this information on tenant briefings is that participants leave individual briefings better prepared to conduct a better search or present themselves in the most advantageous fashion to potential landlords. However, those who conducted this study were uncertain about the proper interpretation of these statistics.[34] ■

[29]Id. at 2-3.

[30]Id.

[31]Id. at 3-21.

[32]U.S. Census 2000, *Property Owners and Managers Survey, Multifamily Properties: Familiarity with Section 8 Program, Table 51* (2000), *available at* www.census.gov/hhes/www/housing/poms/multifam/mfsect8/mftab51.html.

[33]Abt Associates, *Study on Section 8 Voucher Success Rates, Volume I, Quantitative Study of Success Rates in Metropolitan Areas* (Nov., 2001), at 3-21.

[34]Id. at 3-23.

Improve Voucher Utilization by Exercising Nondiscrimination Covenants

The success rate of Section 8 voucher holders in locating rental housing in large metropolitan areas has plummeted since 1993 from 81 percent to 69 percent.[1] Section 8 voucher participants are required to find a landlord who will accept the Section 8 benefit within a specified period of time, and, if they do not succeed in doing so, they lose the voucher.[2] As a consequence, households that have waited as long as 10 years to obtain the voucher in the first place are losing the benefit within months of receiving it. Families who have been participating in the program for some period of time are also frequently losing the benefit when they are forced to relocate.

Anti-discrimination laws can be a very powerful tool for improving the ability of a voucher participant to find housing. In jurisdictions where there are laws prohibiting discrimination against Section 8 participants specifically and/or in combination with laws prohibiting source of income discrimination, the success rate of Section 8 participants in utilizing their voucher is at least 12 percent higher than in other jurisdictions.[3] Massachusetts, California and San Francisco are examples of jurisdictions with such anti-discrimination provisions. Another source of anti-discrimination provisions may be public agencies that extend various funds to owners or developers of housing. Some may also include their own anti-discrimination clauses in documents extending the funds to owners or developers.

In addition, there are five different categories of federally assisted properties that have use restrictions prohibiting discrimination against Section 8 voucher holders. The largest and most important is the Low-Income Housing Tax Credit (LIHTC) program, the only federal housing program that significantly continues to expand the supply of housing affordable to some low- and typically more moderate-income households through new construction and/or rehabilitation of properties. This article provides a brief overview of these federal programs and properties, how to locate them in your community, and suggestions for how Public Housing Authorities (PHAs) and advocates can make the best use of them in an effort to increase and maintain high voucher utilization rates.

Federal Low-Income Housing Tax Credit Program

Owners of buildings that have received LIHTC are specifically prohibited from discriminating against households

[1]Abt Associates Inc., *Study on Section 8 Voucher Success Rates, Volume I: Quantitative Study of Success Rates in Metropolitan Areas, Executive Summary* (Aug. 9, 2001) at I. (Hereinafter Abt Study).

[2]The local Housing Authority designates the length of time the family has to lease a unit, which may include any allowable extension provided to the family. *See* 24 C.F.R., §982.201(b)(1)(2001).

[3]Abt Study at 3-17.

with vouchers. Since 1993, owners of such projects have been prohibited specifically from refusing to rent to a holder of a Section 8 voucher.[4]

The federal LIHTC is intended to promote the development of rental housing generally affordable to households with incomes between 40 and 60 percent of area median income (AMI).[5] The LIHTC is available for housing in which a minimum of 20 percent of its units are affordable for people who are at 50 percent of AMI, or, alternatively, in which 40 percent of the units are affordable to people at 60 percent of AMI. Because of the economics of development, it is often the case that 100 percent of the building's units have LIHTC applied to them.[6] Each state receives a LIHTC allocation annually on a per capita basis. Rents are kept at an affordable level by regulation.[7] The number of units produced by the program annually is uncertain because there is no one single database of such properties to which newly created units are added. However, it appears that since the program's inception, approximately 838,000 LIHTC units have been constructed or rehabilitated.[8] From 1995 to 1999, an estimated 86,000 units per year were developed through the program.[9]

Recipients of the LIHTC utilize either a 4 percent or 9 percent tax credit formula in calculating their benefit. These percentages correspond approximately to the percentage of the total qualified development costs that recipients may take as a tax credit against their income each year for the 10 years allowed under the program. For-profit as well as nonprofit development entities can participate in the program. Nonprofit developers participate by partnering with for-profit syndicates which can take advantage of the tax credit benefit. The for-profit syndicate, in turn, invests in the nonprofit's development project. In return for 10 years' worth of tax credit, the project must remain affordable for at least 15 years.[10]

To find properties that have received a tax credit allocation, go to www.huduser.org/datasets/lihtc.html. The directions are self-explanatory and allow you to delimit your search by such criteria as city, state, and types of funding. Please note that, according to the site, this information reflects buildings placed in service from 1987 through 1999 only.

Partnering with State Tax Credit Office

A number of states maintain their own database of tax credit properties as well. For example, in California, the California Tax Credit Allocation Committee (TCAC), which administers the tax credit program, maintains a list on its Web site of housing developments that received tax credits from 1987 to 2001.[11] To determine allowable rents for tax credit properties in California, go to www.treasurer.ca.gov/ctcac/ctcac.html.

LIHTC properties are usually required to be operational within two years of when the tax credit allocation is made.[12] Thus, when researching LIHTC properties in your area, you should also identify properties that have been funded within the past two years, so that you can make early contact with managers or owners or let voucher participants know ahead of time what will become available. You will need to contact the department in your state that is administering federal tax credits to obtain this information. California also maintains, and other states may too, a list of those buildings for which an LIHTC application has been made, which effectively provides even more advance notice of which buildings may be good candidates for voucher utilization.

Tax-exempt bonds are often combined with the 4 percent LIHTC program to help create affordable housing. To the extent that your state tracks housing projects for which tax-exempt bonds have been issued, your state may be, *de facto*, tracking buildings that also have the 4 percent LIHTC allocation. In California, a separate department, the California Debt Limit Allocation Committee (CDLAC), issues tax-exempt bonds. However, TCAC's database already lists both 4 percent and 9 percent LIHTC projects. In California, tax-exempt bond projects (which also receive 4 percent tax credits) have a reference number with an 800 or 900 after the year. All other projects listed are 9 percent tax credit projects.[13]

Departments issuing LIHTC and/or tax-exempt bonds can play an additional, helpful role by reminding owners of tax credit properties about the provisions prohibiting discrimination against voucher holders, and by encouraging

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[4]*See Prohibition of Discrimination Against Families with Housing Choice Vouchers by Owners of Low-Income Housing Tax Credit and HOME Developments*, HUD PIH Notice 2001-2 (HA)(Jan. 18, 2001). *See also* 26 C.F.R. §1.42-5(c)(1)(xi) and Internal Revenue Service Code, 26 U.S.C.A. §42(h)(6)(B)(4). Per 26 C.F.R. § 1.42-5(c)(1)(xi), all owners of housing tax credit projects subject to § 7108(c)(1) of the *Omnibus Budget Reconciliation Act of 1989* (mistakenly termed *Revenue Reconciliation Act of 1989*) must certify, at least annually, that they have in place an "extended low-income housing commitment." Section 7108(c)(1) first introduced the requirement of an "extended low-income housing commitment." The definition of an "extended low-income housing commitment" was amended by § 13142 of the *Omnibus Budget Reconciliation Act of 1993* to include prohibition of discrimination against Section 8 certificate or voucher holders.

[5]*Tax Reform Act of 1986*, Pub. L. 99-514, § 252, 100 Stat. 2085, 2189 et seq. as amended, 26 U.S.C. § 42. The federal program is administered by the Internal Revenue Service.

[6]Kirk McClure, *The Low-Income Housing Tax Credit as an Aid to Housing Finance: How Well Has It Worked?* Housing Policy Debate, Fannie Mae Foundation, v.11, Issue 1, 98 (2000).

[7]26 U.S.C., §42(g)(1)-(g)(8) (1994). The incomes are to be adjusted for family size.

[8]*See* http://huduser.org/datasets/lihtc.html. *See also* Florence Roisman, *Poverty, Discrimination and the Low Income Housing Tax Credit Program*, Prepared for the Meeting of "LALSHAC" (the Loose Association of Legal Services Housing Advocates and Clients) (Nov. 19-20, 2000) at 3.

[9]*See* http://huduser.org/datasets/lihtc.html. *See also* Abt Associates, *Updating the Low-Income Housing Tax Credit (LIHTC) Database, Final Report* (Nov. 10, 2000), at 3.1.

[10]*Id.* Some states, like California, have extended the period during which LIHTC properties must remain affordable to 30 years or more.

[11]California Health and Safety Code, §§ 50199.4 through 50199.22, and California Revenue and Taxation Code, §§12206, 17057.5, 17058, 23610.4 and 23610.5 (2001). www.treasurer.ca.gov/ctcac/projects.pdf.

[12]26 U.S.C., §42(e)(4)(a).

[13]*See State of California, California Tax Credit Allocation Committee, Frequently Asked Questions* (2002) *at* www.treasurer.ca.gov/ctcac/faq.pdf.

them to contact their local PHA when vacancies are imminent. Local PHAs can, in turn, provide that information to voucher participants. PHAs should be reminded to keep track themselves of LIHTC properties in order to direct Section 8 participants to them.

More Information Online in 2003—California Affordable Housing Connection

By July of 2003, California is slated to have a Web site showing the inventory of all publicly assisted and/or financed, multi-unit, low-income rental housing in the state. The site is intended to be accessible to the general public. The site will be bilingual in English and Spanish and will include information on HUD, United States Department of Agriculture's Rural Housing Service, the California Housing Finance Agency, the California Department of Housing and Community Development, tax credit properties, and properties funded with redevelopment funds.[14]

Mark-to-Market Projects

Thousands of privately owned multifamily properties with federally insured mortgages and subsidies are "expiring," meaning that the time limit on keeping the rents affordable in those projects is running out. When that time runs out, the rent on these units jumps, often significantly and sometimes above market rents in the community. "Mark-to-Market" refers to a federal program that allows the mortgage debt to be restructured and the rents reduced to market level.[15]

Federal statutes and regulations require that Mark-to-Market Restructuring Plans "prohibit any refusal of the owner to lease a unit solely because of the status of the prospective tenant as a section 8 certificate or voucher holder."[16] This obligation is relevant to those developments in which some or all of the units do not have a project-based subsidy. For a list of Mark-to-Market units, visit www.hud.gov/offices/omhar/readingrm/reports.cfm. Click on PAE (Participating Administrative Entity) and Assigned Property Status Report (available in either PDF or MS Excel formats). All those developments with a check in the column entitled "completed" have been finalized, and the mortgage has been written down. This list will not tell you, however, if the property has a Section 8 project based contract for all of the units. For that information, you must look at HUD's multifamily assistance and Section 8 contracts database. Go to www.hud.gov/offices/hsg/mfh/exp/mfhdiscl.cfm. That database will tell you the number of project-based Section 8 units that are in a particular development. If the development is not covered by a project-based contract for 100 percent of the units, the non-discrimination language of the federal regulations pertaining to Mark-to-Market program will benefit voucher holders seeking an apartment in the complex.

HOME Investment Partnerships Program (HOME) Projects

Owners of projects with HOME financing are similarly prohibited from refusing to rent to holders of Section 8 vouchers.[17] HOME is a federal block grant program to state and local governments for the purpose of creating affordable housing for low-income households and can be used for rehabilitation of properties or new construction. Maximum income limits for tenants in HOME-assisted rental housing units are set at 80 percent of AMI. Twenty percent of the units in developments with five HOME-funded units or more must be affordable to households at 50 percent of AMI.[18]

HUD's Integrated Disbursement and Information System (IDIS) includes data on all HOME-funded developments, all HOME-assisted units, and all HOME program beneficiaries, but IDIS is not accessible to the public. A better source of HOME-assisted units should be the local agency (city, county or state) that administers those funds. It should have its own list of HOME-funded projects. In California, the state's Department of Housing and Community Development administers these funds along with agencies in local jurisdictions. At the local level, for example, the Housing and Community Development Department of the City of Oakland, California, is launching an extensive Web site with detailed information on all subsidized housing in Oakland.

Multifamily Projects Purchased from HUD

A relatively small number of formerly subsidized and assisted multifamily projects have been sold by HUD to a variety of individuals or entities as part of HUD's effort to extricate itself from being an owner of affordable housing. Provisions governing those sales prohibit the unreasonable refusal "to lease a vacant dwelling unit in" a multifamily housing project purchased from HUD "to a holder of a [Section 8] certificate . . . solely because of such prospective tenant's status as a certificate holder".[19] To begin to identify

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[14]CAL. GOVT. CODE § 12019 (2001).

[15]The Office of Multifamily Housing Assistance Restructuring (OMHAR), established by the *Multifamily Assisted Housing Reform and Affordability Act of 1997* (MAHRA) to administer the Mark-to-Market program, was mandated to sunset September 30, 2001. OMHAR has been extended for three years to September 30, 2004 and the Mark-to-Market program will continue for two more years to September 30, 2006.

[16]*See* 42 U.S.C.A. §514(e)(9), §1437f note, and 24 C.F.R. §401.556 (2002).

[17]*See Prohibition of Discrimination Against Families with Housing Choice Vouchers by Owners of Low-Income Housing Tax Credit and HOME Developments*, HUD PIH Notice 2001-2 (HA) (Jan. 18, 2001). *See also* 42 U.S.C. §12745(a)(1)(D). 42 U.S.C. § 12745(a)(1)(D) specifies that rental units subsidized in whole or part with HOME funds may not be "refused for leasing to a holder of a voucher or certificate of eligibility under section 1437f of this title because of the status of the prospective tenant as a holder of such voucher or certificate of eligibility." By regulation, the Department has extended this protection to holders of HOME-funded tenant-based rental assistance certificates. 24 C.F.R., §92.252(d) (2002).

[18]Abt Associates, *Study of the Ongoing Affordability of Home Program Rents*, (Jun., 2001) at 5.

[19]12 U.S.C.A., §1701z-12 and 24 C.F.R. §§ 290.19 and 290.39 (2002). The definition of "multi-family housing project" is located at 12 U.S.C. §1701z-11(b)(1) and 24 C.F.R. §290.39 (2002).

these properties, go to www.dynaccsys.com/hudsales. Note that this lists includes hospitals, nursing homes, vacant land, and other HUD-owned properties including formerly unassisted and unsubsidized properties. Although the site indicates that it goes back only five years, it actually includes sales back to 1994.

Rental Rehab and Housing Development Action Grant (HODAG)

The *Housing and Urban-Rural Recovery Act of 1983* introduced the Housing Development Action Grant (HODAG) and Rental Rehabilitation programs. Grants under this program could be used for rehabilitation of rental property for the benefit of low-income families only.[20] Owners of rental rehabilitation projects and HODAG buildings are prohibited from "discriminat[ing] against prospective tenants on the basis of their receipt of, or eligibility for, housing assistance under any Federal, State or local housing assistance program . . ."[21] If your city, county or state administers a rental rehab program, it may be using funds authorized under the *Housing and Urban-Rural Recovery Act of 1983*. Inquire as to what kind of system is being used to track properties that have received this benefit. The minimum term for the use restriction was 10 years, and funding was delivered through the early 1990s. Some localities have continued to apply the affordability and non-discrimination requirements.

PHA Policy Choices

PHAs can improve utilization by locating the above-listed types of properties and disseminating that information to voucher participants. PHAs should also work on developing a working relationship with managers/lessors at such properties to ease the ability of voucher holders to rent there. Through that working relationship, PHAs could receive early notification of vacancies, and up-to-date information on leasing procedures and admissions policies that could be passed on to voucher holders. PHAs should track voucher holders who apply to these properties to make sure that voucher holders are, in fact, being allowed to rent there. As an additional utilization strategy, PHAs should advertise voucher wait-list openings to residents of these properties. Advocates and PHAs should use the PHA planning process to formalize and institutionalize the inclusion of these strategies. ■

[20]24 C.F.R., §§511.10 and 511.11 (2002).

[21]42 U.S.C.A. § 1437o note, §§1437o(c)(2)(G)(i) & (d)(4)(D)(i)), and 24 C.F.R § 511.11(d)(iii) & § 850.151(c) (2002).

Supreme Court Holds that a Temporary Regulatory Taking Is Not Compensable

The U.S. Supreme Court recently held that 24- and eight-month moratoria on development in the Lake Tahoe Basin do not constitute a *per se* taking of property requiring compensation under the takings clause of the United States' Constitution.[1] Justice Stevens, writing for a 6-3 majority, upheld the government's ability to regulate development activity and drew a limit on how far the Court will extend its Fifth Amendment takings jurisprudence.

The case before the Court involved an effort to protect the beauty and water clarity of Lake Tahoe through regulation of all land development in the Lake Tahoe basin. To accomplish this goal, cities, counties and federal agencies controlling land in the Lake Tahoe area took action through the states of California and Nevada, and with approval of Congress and the President, to enact a 1980 Tahoe Regional Planning Compact (the Compact) that authorized the Tahoe Regional Planning Agency (TRPA). The Compact imposed a moratorium on development in the Lake Tahoe basin while TRPA studied the impact of development on Lake Tahoe and designed a strategy for environmentally sound growth. The Compact directed TRPA to adopt regional standards for air quality, water quality, soil conservation, vegetation preservation and noise, and provided that these standards were to be adopted in an amended regional plan within 30 months of its creation. Although the Compact prohibited development of new subdivisions, condominiums or apartment buildings, TRPA adopted more extensive restrictions that banned construction of any residence or any other development, in certain zones. Moreover, because the agency was unable to complete its work within the specified time, it adopted two consecutive development moratoria that "effectively prohibited all construction on sensitive lands in California and on all [Stream Environment Zones (SEZs)] in the entire Basin for 32 months."[2] Plaintiff land-owners challenged the effects of the two consecutive moratoria adopted by TRPA, contending that they constituted an uncompensated taking under the Fifth Amendment.[3]

Lower Courts' Decisions

The Supreme Court began its analysis by reviewing the decisions below. The district court undertook a two-step

[1]*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. ___, 122 S. Ct. 1465 (April 23, 2002).

[2]Slip. op. at 7.

[3]On the same day the April 1984 plan was adopted, the State of California filed an action which successfully enjoined that plan until a new plan was adopted in 1987. The majority reviewed only the delay caused by the actions of TRPA, not the six-year combined delay caused by the moratoria and the injunction in the lower court actions, as urged by Chief Justice Rehnquist's dissent.

analysis of the takings issues, following the Court's opinion in *Agins v. City of Tiburon*,[4] which stated that a "regulation will constitute a taking when either: (1) it does not substantially advance a legitimate state interest; or (2) it denies the owner economically viable use of her land."[5] The court rejected the first theory since protection of the lake was a legitimate interest.[6] Under the second step, however, the district court decided that the moratoria constituted a "categorical" taking pursuant to the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*,[7] wherein the Court upheld the award of damages for a regulatory taking that denied "all economically beneficial or productive use of land."[8] It reasoned, in part, that neither moratorium contained an express termination date so that it could be construed to have denied all economically beneficial use of the property. Accordingly, the district court ordered TRPA to pay damages to property owners subject to the moratoria.[9]

Regulatory taking jurisprudence is characterized by essentially ad hoc *factual inquiries designed to allow careful examination and weighing of all relevant circumstances.*

On appeals by both parties, the Ninth Circuit noted that the property owners did not dispute the district court's findings, but rather placed only one question before the court: whether the moratoria adopted constituted a "categorical taking" under *Lucas.* Contrary to the district court, the Ninth Circuit found that the ordinances at issue had only a temporary impact on the owners' fee interest and that no categorical taking had occurred. It rejected the owners' invitation to sever each plaintiff's fee interest into discrete segments and to treat each segment as separate and distinct for purposes of conducting a takings analysis. It concluded that since only one "temporal slice" of the owners' interest would be subject to a taking, the moratoria at issue did not deprive the owners of all economically beneficial use of their property. For this reason, the Ninth Circuit rejected the application of *Lucas* and, instead, applied the *ad hoc* balancing approach set out by the Court in *Penn Central Transp. Co. v. New York City.*[10]

This led the Ninth Circuit to conclude that the moratoria were an appropriate means of securing the purpose of the Compact, an issue which plaintiffs did not dispute after the district court opinion.

The owners appealed this decision, and the Supreme Court granted certiorari to review only the question of whether the moratoria constituted a facial violation of the takings clause.

Supreme Court Opinion

The Court began its opinion by noting petitioner-owners' claim that the moratoria on their face deprived the owners of all viable economic use of their property and therefore entitled them to an unqualified constitutional obligation for compensation. It responded by noting that the owners "face an uphill battle"[11] that is made especially steep by their effectively seeking a categorical rule requiring compensation for any moratorium on development, even where temporary.

The Court began its analysis by reviewing the distinction between a physical taking and a regulatory taking of property. It found the distinction to be rooted in the text of the Fifth Amendment, which prohibits the physical taking of property by the government without compensation but does not extend it to regulatory provisions that prohibit a property owner from using her private property in certain ways. The Court's jurisprudence requiring compensation for a physical possession by the government "is as old as the Republic,"[12] even if the interest taken is merely a part of the property, such as when the government assumes a leasehold interest,[13] takes part of a rooftop for cable television access,[14] or uses airspace for a government airport.[15] Regulatory taking jurisprudence is, however, much more recent and is characterized by essentially *ad hoc* factual inquiries designed to allow careful examination and weighing of all relevant circumstances. Thus, there is no taking for government regulation that merely prohibits landlords from evicting tenants "unwilling" to pay higher rent,[16] that bans certain private uses of a portion of a property,[17] or that forbids the private use of certain air space, as in *Penn Central*. The acquisition of property for public use requires the application of *per se* rules. However, where regulations prohibit private uses, it requires *ad hoc* determinations of the purposes and economic effects

[4]447 U.S. 255 (1980).

[5]Slip. op. at 10, citing 34 F. Supp. 2d 1226, at 1239 (Nev. 1999).

[6]Slip op. at 10.

[7]505 U.S. 1003 (1993).

[8]Slip op. at 13, citing 216 F.3d 764, 773 (2000).

[9]Slip op. at 11-12.

[10]438 U.S. 104 (1978).

[11]Slip op. at 16, citing *Keystone Bituminous Coal Assn. v. Benedictis*, 480 U.S. 470, 495 (1987).

[12]Slip op. 17.

[13]*United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945), *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946).

[14]*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

[15]*United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946).

[16]*Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865 (1921).

[17]*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987).

of the government regulations. Land-use regulations are ubiquitous, so treating them all as *per se* taking would "transform government regulation into a luxury few governments could afford. . . . By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights."[18]

The Court rejected as incorrect the owner-petitioners' arguments that its *ad hoc* analysis set out in *Penn Central* is inapplicable to this case and that categorical rules set out in *Lucas* and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[19] two regulatory takings cases, should be followed instead. To fully reject this claim, the Court reviewed several of its regulatory takings decisions, starting with Justice Holmes' decision in *Pennsylvania Coal Co. v. Mahon*, which began the Court's regulatory takings jurisprudence by observing that "if a regulation goes too far it will be recognized as a taking."[20] Determining when a regulation "goes too far" has remained a factual inquiry, and the Court has "generally eschewed" any set formula, preferring to examine all relevant circumstances in the context of the regulation. Even though many factors must be considered in this *ad hoc* approach, the rule established since *Penn Central* directs courts to evaluate "the parcel as a whole," and not divide the analysis to discrete segments of the parcel to determine rights. "Where an owner possesses a full bundle of property rights, the destruction of one 'strand' of the bundles is not a taking."[21]

According to the Court, *First English* decided what compensation is an appropriate remedy once a temporary regulation has been found to constitute a taking. The Court insisted that the issue it decided in that case was only a "remedial question," not whether a taking has occurred by a temporary regulation.

While the Court agreed that *Lucas* imposed a categorical rule, that rule is different from the one at issue in this case. In *Lucas*, plaintiff purchased a parcel of land that was rendered valueless by a statute passed two years later which was unconditional and permanent. According to the Court, *Lucas* was limited to the "extraordinary circumstances when no productive or economically beneficial use of the land is permitted."[22] It buttressed its conclusion by pointing to an observation in *Lucas* that the categorical rule would not apply if the diminution in value were 95 percent instead of 100 percent, and that anything less than a total loss would require the kind of analysis applied in *Penn Central*.

Turning to the case at hand, the Court rejected the district court's temporal taking analysis of the land for a period of 32 months. It rejected as circular the court's decision to limit the interest which the court should consider to the 32 months during which the moratorium was in effect. "With property so divided, every delay would become a total ban."[23] The threshold question is whether the property was taken as a whole, if it was not then the *Penn Central* analysis is the proper framework for determining the scope of the taking. Here a fee simple interest cannot be rendered valueless by a temporary ban, since as soon as the ban is lifted the value of the property recovers. Only the extraordinary case, where the regulatory taking is a complete taking of the property, is consideration of compensation warranted.[24]

Only the extraordinary case, where the regulatory taking is a complete taking of the property, is consideration of compensation warranted.

As a last step, the Court reviewed whether the interest of protecting property owners from bearing public burdens which in all "fairness and justice" should be borne by the public as a whole would justify creating a new rule for the circumstances prescribed by this case. Under this approach the court listed seven theories by which it could decide that the moratoria constituted a compensable taking. However, it summarily rejected four of those theories as not being within the scope of the court's review, leaving three new *per se* rules for consideration which it also rejected.

The first possible new rule that the Court considered would provide compensation "whenever government temporarily deprives an owner of all economically viable use of her property."[25] The Court rejected the rule because it would require compensation for normal delays experienced while obtaining building permits, changes in zoning ordinances, variances and the like, causing substantial disruption to practices long considered permissible exercise of police power. The Court concluded that such an important change in the law should be accomplished by a legislative enactment rather than through judicial review.

The Court also rejected the adoption of narrower rules that could require compensation for all moratoria but exclude normal delays associated with permitting or that would require compensation if delays extended more than one year. Such rules, the Court concluded, are common and an essential tool of successful development. They would "impose serious financial constraints on the planning process"[26] and require compensation regardless of the good faith of planners,

[18]Slip op. 19.

[19]482 U.S. 304 (1987).

[20]*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

[21]Slip op. at 23, quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

[22]*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1993).

[23]Slip op. at 27.

[24]Slip op. at 28.

[25]Slip op. at 29.

[26]Slip op. at 33-34, 38.

the reasonable expectations of land owners, and the actual impact on property values. For all of these reasons, the Court concluded that the "familiar *Penn Central* approach" is superior to crafting a new rule, and affirmed the judgment of the court of appeals.

Conclusion

The Lake Tahoe case is important because it places a limit on the expansion of the Court's takings doctrine and allows governments to continue their exercise of traditional regulatory authority over development. Aside from its impact on development issues, it may be particularly significant in cases brought by owners of subsidized housing, such as owners of Rural Housing Service Section 515 housing, who claim that the relatively short prepayment restrictions placed on them by legislation or regulation is a compensable taking. This case suggests that it may not be. ■

Federal Preemption of State and Local Preservation Acts Rejected by Two Courts

Two recent federal district court decisions in California and Minnesota have significantly undermined owners' claims that state and local laws aimed at preservation of federally subsidized housing are preempted by federal law, specifically the *Low Income Housing Preservation and Resident Homeownership Act* (LIHPRHA)[1] and various provisions of the *National Housing Act* (NHA) and implementing regulations. In the first case, Los Angeles area owners challenged the applicability of the Los Angeles Rent Stabilization Ordinance (LARSO) to their formerly federally subsidized housing projects on the grounds that such rent regulation was preempted by federal law. In the second, a Minnesota owner brought suit to enjoin enforcement of a state notice law which requires a one-year advance notice of prepayment. In both cases, the federal district courts rejected the owners' preemption claims.

Topa Equities

In *Topa Equities v. City of Los Angeles*,[2] the plaintiff owners sought injunctive relief to prevent enforcement of LARSO to set base rents at their project after prepayment of their federally subsidized financing.[3] The plaintiff, Topa Equities (owner), developed Morton Gardens Apartments in 1971 with permanent financing through a 40-year HUD-subsidized mortgage under Section 236 of the *National Housing Act* (Section 236), which lowered the effective interest rate on the debt to 1 percent. HUD regulated rents charged at the building and the owner entered into a regulatory agreement which did not include a prepayment right. In 1994, the owner filed a plan of action under LIHPRHA to obtain rent increases and other HUD incentives to remain in the federal subsidy program, but this plan was never approved nor funded. Federal law was later amended to allow owners to prepay federally subsidized mortgages without a "plan of action." Accordingly, in 1998 the owner prepaid the Section 236 mortgage and raised rents to market rate without complying with limits on such rent increases imposed by LARSO. In 2000, the Housing Authority of Los Angeles informed the owner that it would have to roll back its rents to the Section 236 levels pursuant to LARSO.[4] The owner responded by filing a suit to challenge the rent controls, contending federal preemption by LIHPRHA.

The LIHPRHA "plan of action" process was enacted by Congress in 1990 to allow prepayment of federally subsidized mortgages, but only when HUD could make a finding that prepayment would have a minimal impact on the availability of affordable housing in the market area served.[5] LIHPRHA also permitted HUD to offer market-value-based incentives to encourage owners to remain in the program for the useful life of the project, avoiding prepayment. If HUD approved a plan of action but did not provide the needed funding within 15 months, the owner also had the right to prepay.

LARSO was amended in 1990 to provide that units otherwise exempt from rent stabilization due to their federal regulation become subject to LARSO immediately upon termination of the federal restrictions.[6] The owner of Topa sought injunctive relief from enforcement of this requirement as well as the vacancy decontrol portion of the ordinance, which was amended in 1990 to restrict rent increases where a vacancy is "a result of the termination of regulation of the rental unit under any local, state or federal program."[7] In its briefs, the City asserted that these amendments were not substantive in nature but a clarification of existing law. The owner, on the other hand, asserted that these 1990 amendments were intentionally designed to provide new authority to preserve federally assisted housing.

The district court issued its order based solely on the owner's preemption claim. In general, it found that federal law may preempt state or local law in one of three ways: express preemption through explicit statutory language; implied "field" preemption, where a federal regulation of the subject is so pervasive as to make a reasonable inference

[1] *Codified at* 12 U.S.C. § 4101 *et seq.*

[2] Civ. No.00-10455-GHK(RNBx)(C.D. Cal, April 8,2002); available online *at* www.nhlp.org/html/pres/cases.cfm.

[3] The owner did not dispute LARSO's application to their project after base rents have been set.

[4] Slip op. at 7.

[5] *Id.* at 3-4, citing 12 U.S.C. § 4108.

[6] Slip op. at 4-5, citing L.A.M.C. §§ 151.02, 151.06(c).

[7] Slip op. at 6, citing L.A.M.C. § 151.06(c)(5).

that Congress left no room for supplemental state regulation; and implied "conflict" preemption where an actual conflict renders it impossible to comply with both state and federal law.[8] At the outset, the court viewed the owner's argument as avoiding any express preemption claim. However, it found that because the owner never operated under an approved LIHPRHA plan of action, the express preemption provisions of LIHPRHA did not apply to the provisions of LARSO in this case, citing to *Kenneth Arms Tenant Association v. Martinez*.[9]

The court then turned to the central issue raised by the owner, whether there is an implied "conflict" preemption between LARSO and the purposes of the *National Housing Act* and LIHPRHA. Conflict preemption occurs when "it is impossible for a private party to comply with both state and federal requirements" or when state law "stands as an obstacle to the accomplishment" of Congressional goals.[10] The owner asserted that allowing owners to prepay their mortgages and exit the federal program was a Congressional goal, or, in the alternative, that it was an "important facet" of the program to induce private participation. The court found to the contrary. Citing a string of cases, the court found that Section 236 of the *National Housing Act* was primarily designed to benefit the residents, not owners, of low-income housing and that the text of Section 236 does not include any prepayment right, even by implication.

The court examined a second conflict preemption question, whether the federal regulations adopted by HUD in 1970 to allow prepayment functioned to preempt LARSO. The court found that a federal agency may preempt state law where it intentionally acts to preempt and such action is within the scope of the agency's delegated authority. The court concluded, however, that while the federal regulation in question, the former 24 C.F.R. § 221.524 (1970),[11] did allow prepayment, it did not further guarantee exemption from local ordinances.[12] In other words, the regulation allows prepayment but does not affirmatively guarantee a higher "market" rent level than might otherwise be allowed under local law after the federal rent controls are lifted.

While the owner stopped short of asserting an express preemption claim, it nevertheless claimed that the express preemption provision of LIHPRHA[13] demonstrates a Congressional intent to permit "unfettered prepayment within the overall statutory scheme" of the NHA. The owner argued that the LIHPRHA preemption language demonstrates an intent to compensate owners for participation in the federal program. The court held, however, that LIHPRHA does not guarantee owners "market level rents or the unfettered right to prepay," contrary to generally applicable rent control ordinances.[14] The court further found that LIHPRHA crafted a "delicate" balance between the rights of tenants and owners and narrowly preempted state and local laws that sought to reduce benefits provided under LIHPRHA.[15] Here the court significantly narrowed the scope of the express preemption, since prepayments are no longer accomplished pursuant to LIHPRHA's terms. They are now typically accomplished pursuant to general authorizations contained in Section 219 of the *FY 1999 Appropriations Act*,[16] which superceded LIHPRHA's restrictions and granted broad prepayment rights to owners.[17]

The court found that Congress halted HUD funding for incentives and "dismantled LIHPRHA's balance, thereby obviating the need for preemption."[18] It rejected the owner's argument that the *1996 Housing Opportunity Program Extension Act* (HOPE) somehow extended the balance created by LIHPRHA and its accompanying preemption provision, concluding:

> A review of LIHPRHA and its history indicates that prepayment was not a goal or even an essential incentive to the NHA as a whole. Rather, it was a short-term remedy to a then perceived need which was repudiated by HOPE. Therefore TOPA has failed to provide evidence of Congress' intent and has failed to meet its burden to show preemption.[19]

Lastly, the *Topa* court addressed the trial court's preemption ruling in *Cienega Gardens v. United States*.[20] In that case plaintiffs brought suit against the federal government, alleging breach of contract and taking of property because Congress restricted plaintiffs' prepayment rights through the passage of LIHPRHA. The *Cienega* trial court found that the plaintiffs entered into agreements that guaranteed the right to prepay the loans as part of the benefits exchanged for providing affordable housing and that the government breached those agreements by enactment of later laws restricting prepayment. The *Cienega* trial court, with no detailed analysis, also found that LARSO was preempted by LIHPRHA and,

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[8]*See English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990).

[9]2001 U.S. Dist. LEXIS 11470, at *25-26 (E.D. Cal. July 3, 2001); also available online *at* www.nhlp.org/html/pres/cases.cfm.

[10]Slip op. at 10, citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1997).

[11]This regulation cited by the owner has been superceded.

[12]Slip op. at 13.

[13]12 U.S.C. § 4122 (a), which provides in part: "No State or political subdivision of a State may establish, continue in effect, or enforce any law or regulation that (1) restricts or inhibits the prepayment of any mortgage… on eligible low income housing [as defined]."

[14]Slip op. at 16.

[15]*Id.* at 18-19.

[16]Pub. L. 105–276, §219, 112 Stat. 2487-88 (Oct. 21, 1998).

[17]Prior to 1999, prepayment authorization was included in annual appropriations acts. Indeed, the prepayment authority applicable in *Topa* was the *1996 Housing Opportunity Program Extension Act* (HOPE), Pub. L. 104-120, § 2(b)(1), 110 Stat. 834 (1996).

[18]Slip op. at 21.

[19]*Id.* at 23.

[20]38 Fed. Cl. 64 (1997), *vacated and remanded* 194 F.3d 1231 (Fed. Cir. 1998); *on remand*, 46 Fed.Cl. 506 (issuing summary judgment to government on takings claim due to failure to exhaust administrative remedies), *aff'd in part and rev'd in part and remanded*, 265 F.3d 1237 (Fed. Cir. 2001)(taking claims ripe despite failure to seek HUD approval due to futility exception; no per se taking under physical occupation theory).

therefore, that local law did not limit owners' recovery of damages for the actions taken by the federal government. However, the Court of Appeals for the Ninth Circuit overturned *Cienega* on other grounds, finding no privity of contract between the owner and the federal government and, consequently, neither affirmed nor reversed the trial court's ruling on preemption.[21]

The *Topa* court disagreed with the *Cienega* trial court's conclusion for two reasons. First, as noted by the court of appeals, HUD was not party to the riders to the deed of trust notes which the owners claimed were the basis for their prepayment rights and the contracts signed by HUD included no prepayment right. Therefore, the *Cienega* trial court's reliance on these deeds of trust as evidence of Congressional intent to permit prepayment is misplaced. Second, the *Topa* court pointed out that the *Cienega* decision "does not provide any support" for its conclusion that Congress intended to guarantee unfettered prepayment rights. Moreover, the *Topa* court referenced its more complete consideration of the legislative history to demonstrate that the *Cienega* court's conclusion is incorrect. This explicit criticism and more detailed analysis by the *Topa* court hopefully goes a long way to put to rest any future attempts to rely upon the *Cienega* trial court's cursory analysis on the preemption issue.

Forest Park II

Forest Park II apartments were also constructed in the early 1970s with Section 236 financing, which the owner sought to prepay. However, rather than a rent control ordinance, at issue in *Forest Park II v. Hadley*[22] is a Minnesota law which requires the owner to give at least one-year advance notice of prepayment to tenants and government agencies.[23] This state law, similar to others enacted in numerous jurisdictions,[24] varies from the federal law which only requires the owner to give notice to tenants and government officials no less than 150 days and no more than 270 days prior to prepayment.[25] The challenging owner had not yet prepaid the Section 236 financing, and brought its action against the Minnesota governmental entities and tenants to obtain declaratory relief that the state law is preempted by LIHPRHA and the *National Housing Act* regulations, described above.

The *Forest Park* court first considered the owner's argument that the express preemption provision of LIHPRHA affects state law. The court found, however, that the federal prepayment notice law contained in Section 219 of the *FY 1999 HUD Appropriations Act*, and not LIHPRHA, was at issue in this case.[26] The court held that the express preemption provisions of LIHPRHA only apply to state laws inconsistent with LIHPRHA itself. Following the decisions in *Kenneth Arms* and *Topa*, the court concluded that "[a]lthough Congress did not expressly repeal LIHPRHA, the Court agrees that its provisions apply only to a property in the LIHPRHA program prior to 1996."[27] Since the Forest Park project did not have an approved plan of action under LIHPRHA prior to 1996, the court found no express preemption.

The Forest Park II *court also found that the tenants would suffer irreparable harm if the prepayment is allowed to proceed due to the substantial rent increases and the threat of eviction.*

On the owner's conflict preemption claim, the court found that the owner can simultaneously comply with both state and federal law by giving Minnesota's one-year advance notice and impact statement, then later providing notice under federal law between 150 and 270 days prior to the anticipated prepayment. Furthermore, the court found that Forest Park provided no support for its claim that a state's placing additional requirements on prepayment frustrates a supposed Congressional purpose to "eradicate the 236 program" in favor of tenant-based vouchers. To the contrary, the court cited to a 1999 federal statute that provides incentives for Section 236 owners willing to extend their commitment to remain in the program.[28] Finding no frustration of Congressional purpose, the court held the Minnesota laws are not preempted by federal law.

Preservation advocates should be aware that the court also found that the tenants would suffer irreparable harm if the prepayment is allowed to proceed due to the substantial rent increases and the threat of eviction. (However, the court did not explicitly discuss the issuance of enhanced vouchers, which could address some or all of the harms for certain eligible tenants.) Furthermore, the court found the injunction was in the public interest since there is Congressional

[21]Slip op. at 25.

[22]Civ. No. 02-480 (MJD/SRN)(D. Minn. May 10, 2002).

[23]Minn. Stat. § 471.9997 (1998). This law also requires that the notice include the number of units which will no longer be subject to rent restrictions imposed by the federal program, the estimated rents that will be charged as compared to rents charged under the federal program, and actions the owner will take to assist displaced tenants.

[24]*See e.g.* Cal. Gov't. Code § 65863.10 and § 65863.11, Rhode Island Gen. Laws § 34-45-4 *et seq*, Maine Revised Statutes Annotated Title 30-A, § 4972 and § 4973, Texas Govt. Code Annotated § 2306.185(f), *et seq.*, Denver Mun. Code §12-106, *et seq.*, Portland City Code § 30.01.030, *et seq.* These and other state and local initiatives are available online at www.nhlp.org/html/pres/state/index.htm.

[25]Pub. L. 105-276 § 219(b)(3)(1999).

[26]*Id*.

[27]Slip op. at 8.

[28]*Id*. at 9, citing Pub. L. No. 106-74, §533, 113 Stat. 1110 (1999)(authorizing use of recaptured Section 236 interest reduction payments for grants and loan for rehabilitation of multifamily projects in exchange for continued use restrictions).

intent to preserve Section 236 housing and the Minnesota legislature has appropriated funds for such preservation.

The *Forrest Park* court granted judgment as a matter of law in favor of the defendant tenants and government agencies, and issued a permanent injunction against prepayment without the owner first providing the required notices.[29]

Conclusion

Taken together, these decisions substantially weaken any claim that federal law, whether LIHPRHA's express preemption provision or the *National Housing Act* generally, preempts state and local initiatives that preserve federally assisted housing. In an era where Congress has largely retreated from a federal mandate to preserve the federally assisted stock, these decisions send a green light to states or localities to considering local strategies for preservation. ■

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.

Marks v. Bldg. Management Co., Inc., 2002 WL 764,473 (S.D.N.Y. April 26, 2002). A federal magistrate judge in New York granted defendant building owner's motion for judgment as a matter of law in a Fair Housing Act (FHA) AIDS discrimination case, after a jury had found for plaintiff. The plaintiff had requested that she be allowed to vacate her rental unit as reasonable accommodation, leaving a roommate behind during cold months, so that she could, for health reasons, spend them in the warmer climate of Florida. Defendants sent a letter declining this request, citing the plaintiff's previous filing of a "frivolous" law suit against them as one reason for the denial. A year and a half later, after the plaintiff went to Florida, defendants sent plaintiff a notice to cure, informing her that she must remove any unauthorized occupants, *i.e.*, any roommate, because no roommate was listed on the lease. When the plaintiff did not cure, the owners informed her that they were terminating her tenancy. The tenant then filed suit alleging that: the owners had discriminated against her based on the fact that she had AIDS; failed to reasonably accommodate her disability; and that they were retaliating for the earlier law suit. Plaintiff withdrew her discrimination claim after trial, but the jury held that the letter stating that the owner would not permit plaintiff to leave a roommate in the unit while she was in Florida violated the FHA, both as a failure to accommodate and because the action was taken in retaliation for the earlier law suit. The jury awarded plaintiff $50,000 compensatory and $250,000 punitive damages.

The magistrate judge concluded that plaintiff's request was not for "accommodation," and thus could not be the basis for judgment. The court held that the duty to accommodate must be directly related to the nature of the disability. It concluded that the plaintiff's request was to leave a roommate in the unit while she was away, rather than to be able to spend months away from the unit without losing claim to her tenancy. Since leaving a roommate alleviated only financial hardship, it was not a necessary accommodation. Only permitting her to vacate the unit for months was required by her disability. That was not the plaintiff's request. Thus, there was no violation of the FHA, as there was no failure to accommodate. As to the retaliation claim, the court first concluded that the fact that the plaintiff failed to establish a failure to accommodate violation of the FHA did not preclude her claim for illegal retaliation. However, the court then concluded that the plaintiff had suffered no injury from the letter refusing her request to leave a roommate in the unit while she was away because after that refusal, she continued to go to Florida, leaving a roommate in her wake. Only a year and a half later, when the defendants issued the notice to cure—which the jury specifically found not to be retaliatory—did the defendant suffer any harm. Thus, the court reversed the jury's verdict and damage awards.

Oak Glen of Edina v. Brewington, 2002 WL 655,530 (Ct. App. Mn. April 23, 2002). The court reversed an order for restitution of a project-based Section 8 premises that had been based on the tenant's failure to timely pay rent 17 times, stating that the owners had not established material noncompliance with the lease and that they had waived their right to evict by accepting six months of rent after the last late payment. The tenant had made 17 late payments during her five-year tenancy, but had always paid within the month and always paid the dollar per day late charge. After the last late payment, the owners accepted timely payments for the next six months. They then filed an eviction action against the tenant based in part on the late payments. The trial court held in favor of the owners based solely on the late payments, without considering the other alleged breaches of the lease. The Court of Appeals held that the repeated late payments should be characterized as "minor violations" of the lease under federal regulations. In order to evict for repeated minor violations, according to the regulations, the owners had to show that the violations: "disrupted the livability of the project; adversely affected the health or safety of any person or the right of any tenant to the quiet enjoyment of the leased premises; interfered with the management of the project; or

[29]Slip op. at 9-12.

[1]www.westlaw.com.

[2]www.lexis.com.

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

had an adverse financial effect on the project." Concluding that the repeated late payments met none of these criteria, the court did not consider them to be material noncompliance of the lease. Alternatively, the court also concluded that the owners' acceptance of six timely payments after the last late payment constituted a waiver of their right to pursue an eviction based on the late payments. The court thus reversed and remanded the case for consideration of the other alleged lease violations.

United States v. Southland Management Corporation, 2002 WL 538,779 (5th Cir. April 11, 2002). The Fifth Circuit Court of Appeals reversed a lower court's granting of summary judgment for the owner in a False Claims Act (FCA) case brought against a subsidized housing owner. Over a period of years, the owner had 19 times certified to HUD that its units were in "decent, safe, and sanitary" condition pursuant to the HAP contract. Through much of this time, it is alleged that the property was not in such condition and, in fact, HUD had warned the owner that it needed to improve the condition of the property in order to be in compliance with HUD regulations and gave the owner a limited opportunity to correct the defects. Eventually, the owner stopped making mortgage payments and HUD foreclosed on the property. The government then filed an FCA claim against the owner based on the owner's allegedly false certifications that the property was in "decent, safe, and sanitary" condition between the time that the owner ceased to work with HUD to improve the property and the time of the foreclosure. The district court granted the owner's motion for summary judgment, finding no materiality—*i.e.*, that the alleged false claims did not influence HUD's decision-making process in renewing the HAP contracts. The district court also found that the certifications were not "knowingly" false because HUD knew of their falsity. The Fifth Circuit reversed.

The Court of Appeals first concluded that materiality is a required element of a cause of action under the FCA. It also concluded, however, that the false certifications were material to the HUD decision-making process as a matter of law. The court held that because HUD would not have remitted funds to the owner without the certification being present, the false certification was material. As to the government's alleged knowledge of the falsity of the claims, the court concluded that the owner's argument was essentially that the government waived any right to pursue an FCA claim. The court rejected the argument for a number of reasons. First, "fortuities in the government's subsequent decision making process have no effect" on the truth or falsity of the statements themselves; government knowledge of the falsity of the statements does nothing to make them true. Second, there cannot be estoppel against the government. Third, the owner's argument would essentially prevent the government from working with owners of deteriorating buildings without either immediately ceasing HAP payments or waiving any ability to pursue an FCA claim. Likewise, the government's alleged knowledge of the falsity of the certificates did nothing to alter the *mens rea* of "knowing" submission of a false claim.

Finally, the court also held that the "decent, safe, and sanitary" standard was not too vague to support a finding of liability under the FCA, especially in light of the fact that the phrase has been in common usage in this context since the 1930s. Finding a number of genuine issues of material fact in dispute, the court reversed the granting of summary judgment and remanded the case to the district court.

There was a lengthy dissent in the case, arguing, in short, that: HUD was complicit in any mismanagement of the property; the allegedly false claims were not material because HUD continued to pay the HAP contracts knowing the certifications to be false; the certifications were not knowingly false because the government knew them to be false; and that HUD never informed the owner specifically that the owner had violated the "decent, safe, and sanitary" standard.

Sanchez v. Martinez, 2002 WL 523,798 (N.Y.A.D. 1 Dept. April 9, 2002). A state court upheld the eviction of a public housing tenant based on her failure to comply with a stipulation in which she agreed to exclude a specifically named person from her apartment. In response to an incident in the hall, police arrested the tenant's friend, and the housing authority moved to evict the tenant. She then agreed to keep her friend out of her unit in a stipulation. Subsequently, the owner learned that the friend continued to frequent the unit, often spending the night. The tenant was thus evicted. The tenant attempted to vacate the stipulation and stave off eviction. Finding nothing onerous or contrary to public policy in the stipulation and finding eviction to be a fair penalty, the court denied the tenant's petition.

North Jefferson Square Associates v. Virginia Housing Development Authority, 2002 WL 506,406 (4th Cir. April 4, 2002) (*unpublished opinion*). The court upheld the district court's dismissal without prejudice of an owner's third-party complaint against HUD in a breach of contract action. The owner had sued the state housing agency in state court for breach of the HAP contract and the mortgage deed of trust because the agency had allegedly failed to reduce the rents and debt service after a bond refinancing pursuant to the contracts. The state housing agency removed the case to federal court and moved to join HUD as a necessary party defendant. The agency argued that HUD would claim an interest in any savings which would result from the bond refinancing. The court denied the motion, finding no actual case and controversy involving HUD because HUD was not a party to either the mortgage deed of trust or the HAP contract, had taken no position adverse to the state housing agency, and had, in fact, not taken any administrative position in the action. Accordingly, the court remanded the case to state court, finding it to be based entirely on state contract law.

Paige v. Philadelphia Housing Authority, 2002 WL 500,677 (E.D. Pa. March 28, 2002). The court denied the Philadelphia Housing Authority's (PHA) motion to dismiss a class-action complaint of victims of lead poisoning who were recipients of tenant-based Section 8 assistance. The plaintiffs sued the PHA, alleging that it failed to comply with Section

8 regulations requiring it to initially and annually inspect their homes for lead, which caused their children to have elevated blood lead levels. One plaintiff further alleged that, because the PHA passed the charge for the lead testing to landlords, she was unable to timely secure a unit, causing her Section 8 certificate to expire. She was then evicted from her unit and had to live in a shelter. The complaint, which was brought under Section 1983, the *Fair Housing Act* (FHA), the *Rehabilitation Act*, the *Americans with Disabilities Act* (ADA), the Equal Protection Clause of the Fourteenth Amendment, the *Lead-Based Paint Poisoning Prevention Act,* and HUD regulations that were in effect prior to September 2000 and regulations that superseded them, sought injunctive relief, a fund for medical monitoring, reimbursement for payments of unsubsidized rent levels, and attorney's fees.

PHA moved to dismiss, arguing that the plaintiffs lacked standing to request injunctive relief to enforce the pre-2000 regulations because they had been superseded; that plaintiffs did not allege harm from violation of the post-2000 regulations; and, that one plaintiff lacked standing because she was no longer a Section 8 tenant. The court found that all plaintiffs had alleged redressable injuries in fact because if the PHA had followed the regulations it would have provided plaintiffs with the opportunity to live in lead-free Section 8 housing. The court also noted that it was the PHA's alleged failure to follow the regulations that led to the one plaintiff no longer being a Section 8 tenant. It refused, therefore, to permit the PHA to take advantage of its own wrongful actions. Accordingly, the court denied the PHA's motion to dismiss for lack of standing.

The court held in abeyance a ruling on injunctive relief until a more detailed factual record could be developed. It also held that the plaintiffs had made sufficient allegations to survive a motion to dismiss their Section 1983, FHA, *Rehabilitation Act,* ADA and Equal Protection claims. Additionally, the court concluded that the Section 8 landlords were not necessary parties to the action. Finally, the court deferred ruling on the plaintiffs' requests for medical monitoring and for court-supervised funds.

***Housing Authority of Joliet v. Chapman*,** 2002 WL 1,033,123 (Ill. App. 3 Dist. May 17, 2002). The appellate court reversed a lower court's denial of a forcible entry and detainer action requested by the Joliet Housing Authority (JHA). JHA sought to evict a tenant after it discovered that a member of her household had engaged in a drug-related criminal act. The tenant contested her eviction on the grounds that she had no way of knowing that her 19-year-old son, who was listed on her lease, was engaging in any kind of criminal activity. A lower court found that because the son acted without the tenant's knowledge or consent, she could not be penalized for his actions. The Appellate court disagreed. Citing *Department of Housing and Urban Development v. Rucker*, 122 S.Ct. 1230 (2002), the Appellate Court ruled that the tenant could be evicted because public housing authorities had the right to evict tenants for the drug-related criminal activities of their household members and guests whether or not the tenants were aware, or should have been aware of their activities.

***Shaikh v. City of Chicago*,** 2002 WL 1,147,739 (N.D. Ill., May 28, 2002). The federal district court dismissed the three remaining counts of plaintiff's Sections 1981, 1982 and 1983 complaint against the City of Chicago and its Housing Department relating to a HUD foreclosure sale. HUD had informed the City that it was foreclosing on an apartment building. The City was interested in the possibility of acquiring the building through eminent domain and to use it to relocate a college. However, the City did nothing until after the HUD foreclosure sale, at which plaintiff was the highest bidder. The City then told HUD it might use its eminent domain powers and asked HUD to retain ownership of the property. HUD chose to go forward with the sale to plaintiff. The City then asked plaintiff to withdraw from purchasing the property and offered him $20,000 to do so. Plaintiff accepted. However, HUD then offered to sell the building to the next highest bidder and the City proceeded to threaten that bidder with eminent domain proceedings. The new bidder did not back off, and the City never attempted to purchase the property by any means, nor did it pay plaintiff the $20,000. Plaintiff, alleging discrimination based on his Indian/Muslim background, sued the City for discrimination in contractual relations (42 U.S.C. § 1981) and in the sale of rental or retail property (42 U.S.C. § 1982). The court held that the plaintiff failed to establish a *prima facie* case of discrimination, in part because the new owners were subjected to the same pressures as he was. The court also held that even if plaintiff had established a *prima facie* case, he failed to establish that the City's stated reason for its actions—that it wanted to use the property for a college—was pretextual. As to the 42 U.S.C. § 1983 claim, the court concluded that plaintiff provided no evidence that the City intentionally discriminated against the plaintiff due to his race or national origin. The court also found no evidence to support plaintiff's claim that the City treated him differently as an out-of-state resident (the eventual owners were also out-of-state residents), and thus found no violation of the plaintiff's right to travel under Article IV of the United States Constitution. Accordingly, the court dismissed the plaintiff's claims.

***Zoning Board of Appeals of Wellesley v. Ardemore Apartments Limited Partnership*,** 767 N.E. 2d 584 (May 15, 2002). The Supreme Judicial Court of Massachusetts granted the plaintiff, the Town of Wellesley (the town), a declaratory judgement and an injunction against the Ardemore Apartments Limited Partnership (Ardemore). The town brought this action to forestall Ardemore's efforts to extricate itself from its commitment to maintain part of one of its apartment buildings as a residence for low- and moderate-income tenants. Originally, Ardemore was granted permission to build the 36-unit apartment building in a neighborhood zoned for single-family residences on the strength of a permit issued under the Massachusetts comprehensive permit statute. That statute allowed the state's Housing Appeals Committee to waive zoning restrictions in localities where there is a shortage of affordable housing for developments dedicated to serving low- and moderate-income tenants. Ardemore had benefitted from a subsidized mortgage, secured from the

Massachusetts Housing Finance Agency (MHFA), in exchange for a commitment to rent at least 25 percent of its units to low-income persons. Ardemore argued that its commitment to rent to low-income tenants ended after full repayment of its MHFA mortgage. The Court disagreed and ruled that because the comprehensive permit itself did not specify for how long the housing units were to remain below market, the act required an owner to maintain its units as affordable for as long as the housing is not in compliance with local zoning requirements. ■

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD) and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued through May 31, 2002. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

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

HUD Federal Register Notices

67 Fed. Reg. 18,402 (April 15, 2002)
Notice of Annual Factors for Determining Public Housing Agency Ongoing Administrative Fees for the Housing Choice Voucher Program and Moderate Rehabilitation Programs

***Summary*:** This notice announces the Federal Fiscal Year (FY) 2002 monthly ongoing administrative fee amount paid to public housing agencies (PHAs) administering tenant-based assistance under the Housing Choice Voucher Program, and project-based assistance under the Project-based Certificate Program, the Project-based Voucher Program, and the Moderate Rehabilitation Programs (including Moderate Rehabilitation Single Room Occupancy). The notice also describes other fees, in addition to the ongoing administrative fees, that may be approved by HUD for PHA costs of program administration.

***Effective Date*:** April 15, 2002.

67 Fed. Reg. 19,956 (April 23, 2002)
Notice of Regulatory Waiver Requests Granted for the Fourth Quarter of Calendar Year 2001

***Summary*:** Section 106 of the *Department of Housing and Urban Development Reform Act of 1989* (the *HUD Reform Act*) requires HUD to publish quarterly *Federal Register* notices of all regulatory waivers that HUD has approved. Each notice must cover the quarterly period since the most recent *Federal Register* notice. The purpose of this notice is to comply with the requirements of Section 106 of the *HUD Reform Act*. This notice contains a list of regulatory waivers granted by HUD during the quarter beginning on October 1, 2001, and ending on December 31, 2001.

67 Fed. Reg. 20,986 (April 29, 2002)
***Privacy Act of 1974;* Establishment of a New System of Records**

***Summary*:** Pursuant to the provision of the *Privacy Act of 1974*, as amended (5 U.S.C. 552a), HUD developed the Public and Indian Housing (PIH) Information Center (PIC). This system combines several individual PIH business systems into one integrated system. The PIH systems now exist in one environment, enabling users access to a wealth of data without signing onto multiple systems. PIC incorporates the former Integrated Business System (IBS); Multifamily Tenant Characteristics System (MTCS), previously released on October 1, 1999; and Capital Fund Verification System (FOCVS). It also incorporates new functionality such as the Building and Unit Inventory; Section 8 Management Assessment Program (SEMAP); and Risk Assessment. PIH developed a state-of-the-art system to improve the submission of information to HUD from the Office of Public and Indian Housing program participants. PIC facilitates more timely and accurate exchanges of data between public housing agencies (PHAs) and HUD offices. PIC contains building and unit details, PHA program information, financial and budgetary data, and family records with demographic, rent and income details. This system of records also supports the administration of programs for families receiving housing assistance from HUD by those entities that administer HUD's rental assistance programs. Entities that administer HUD's rental assistance programs include: PHAs, Indian Tribes, state agencies, and Tribally Designated Housing Entities participating in the Section 8 Program.

67 Fed. Reg. 34,949 (May 16, 2002)
FY 2002 Super Notice of Funding Availability (SuperNOFA) for HUD's Discretionary Grants Programs for Fiscal Year 2002; Technical Correction

Summary: On March 26, 2002, HUD published its Fiscal Year (FY) SuperNOFA for HUD's discretionary grant programs. This document extends the application due date for the Resident Management and Business Development, Capacity Building, and Public Housing Service Coordinator components of the ROSS program to June 25, 2002.

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

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

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

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

Application Due Date: The Application Due Date for the Resident Management and Business Development, Capacity Building, and Public Housing Service Coordinator components of the ROSS program has been extended to June 25, 2002. All other application due dates remain as published in the Federal Register of March 26, 2002.

67 Fed. Reg. 35,553 (May 20, 2002)
Super Notice of Funding Availability (SuperNOFA) for HUD's Discretionary Grant Programs; Technical Corrections

Summary: On March 26, 2002, HUD published its Fiscal Year (FY) SuperNOFA for HUD's discretionary grant programs. This document makes certain technical corrections to the following programs: Continuum of Care Homeless Assistance; Youthbuild; Resident Opportunities and Self Sufficiency (ROSS) Program; Section 202 Supportive Housing for the Elderly Program; Section 811 Supportive Housing for Persons with Disabilities Program; Community Outreach Partnership Centers; Historically Black Colleges and Universities; Alaska Native/Native Hawaiian Institutions Assisting Communities Program; Tribal Colleges and Universities Program; Rural Housing and Economic Development; Lead Hazard Control; Healthy Homes and Lead Technical Studies; Healthy Homes Demonstration Program; Brownfields Economic Development Initiative; and Community Development Block Grant (CDBG) Program for Indian Tribes and Alaska Native Villages.

Application Due Date: This document also extends the application due date for Alaska Native/Native Hawaiian Institutions Assisting Communities Program (AN/NHIAC) to July 20, 2002.

67 Fed. Reg. 35,699 (May 20, 2002)
Notice of Availability of Revised HUD Occupancy Handbook and Request for Comments

***Summary*:** HUD is revising HUD Handbook 4350.3, Occupancy Requirements of Subsidized Multifamily Housing Programs. This notice advises the public that HUD will make available a copy of its revised Occupancy Handbook on the HUD Web site and invites interested parties to comment on HUD's revised Occupancy Handbook.

Comment Due Date: June 4, 2002.

67 Fed. Reg. 36,017 (May 22, 2002)
Statutory and Regulatory Waivers Granted to New York State for Recovery from the September 11, 2001 Terrorist Attacks

***Summary*:** This notice advises the public of waivers of regulations and statutory provisions granted to the State of New York for the purpose of assisting in the recovery from the September 11, 2001, terrorist attacks on New York City. As described in the Supplementary Information section of this notice, HUD is authorized by statute to waive statutory and regulatory requirements and specify alternative requirements for this purpose. This notice lists the provisions being waived and alternative requirements specified.

Effective Date: May 28, 2002.

67 Fed. Reg. 37,851 (May 30, 2002)
Notice of Availability of HUD Information Quality Guidelines and Request for Public Comment

***Summary*:** Through this notice, HUD is advising the public that its draft for ensuring and maximizing the quality, objectivity, utility and integrity of information disseminated to the public by HUD ("Information Quality Guidelines") is available for review and comment on HUD's Web site at www.hud.gov.

Comment Due Date: July 1, 2002.

HUD Federal Register Proposed Rules

67 Fed. Reg. 36,305 (May 23, 2002)
Fair Market Rents (FMRs) for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program—Fiscal Year 2003

***Summary*:** Section 8(c)(1) of the *United States Housing Act of 1937* requires the Secretary to publish FMRs annually to be effective on October 1 of each year. FMRs are used to determine payment standard amounts for the Housing Choice Voucher program, to determine initial renewal rents for some expiring project-based Section 8 contracts, and to determine initial rents for housing assistance payments (HAP) contracts in the Moderate Rehabilitation Single Room Occupancy program. Other programs may require use of FMRs for other purposes. This notice proposes revised FMRs that reflect estimated 40th and 50th percentile rent levels trended to April 1, 2003.

***Comments Due Date*:** July 22, 2002.

HUD Public Housing Notices

Notice PIH 2002-8 (HA)(March 27, 2002)
Federal Fiscal Year (FFY) 2002 Proration Factor, Dwelling Rental Adjustment Factor, and Other Special Notes

***Summary*:** The purpose of this Notice is to provide Public Housing Agencies (PHAs) with information needed to complete and submit their FY 2002 operating subsidy eligibility requests to HUD. The information includes the proration and dwelling rental adjustment factors to be used in determining subsidy eligibility and other special notes related to the operating subsidy calculation.

***Expires*:** March 31, 2003

Notice PIH 2002-9 (HA)(March 29, 2002)
PIH 2001-8 (HA) Termination of Tenancy for Criminal Activity

***Summary*:** This notice cancels Notice PIH 2001-8 (HA). The notice reauthorizes PHAs in the Ninth Circuit to terminate tenancies in accordance with HUD's regulation (24 C.F.R. 966.4) published in the *Federal Register* at 66 Fed. Reg. 28,776 on May 24, 2001, based on the Supreme Court's decision in *Rucker v. Davis*.

***Expires*:** March 31, 2003

Notice PIH 2002-10 (HA) (May 20, 2002)
Extension - Notice PIH 2001-12 (HA)

Summary: This Notice extends Notice PIH 2001-12 (HA), same subject, which expired March 31, 2002, indefinitely, to allow for the continued reprogramming of funds.

Expires: Indefinite.

Notice PIH 2002-11 (May 24, 2002)
Extension – Notice PIH 2001-19 (TDHEs), Performance Reporting Requirements and Grant Close-Out Procedures for the Indian Housing Drug Elimination Program (IHDEP)

Summary: This Notice extends Notice PIH 2001-19 (TDHEs), same subject, which expires June 30, 2002, for another year until May 31, 2003.

Expires: May 31, 2003.

Notice PIH 2002-12 (HA) (May 30, 2002)
Extension – Notice PIH 2001-17 (HA) Requirements for Designation of Public Housing Projects

Summary: This Notice extends Notice PIH 2001-17 (HA), same subject, which expires May 31, 2002, for another year until May 31, 2003.

Expires: May 31, 2003.

HUD Housing Notices

Notice H 02-03 (HUD) (May 3, 2002)
Reinstatement and Extension of Notice H 01-02, Compliance with Section 504 of the *Rehabilitation Act of 1973* and the Disability/Accessibility Provisions of the *Fair Housing Act of 1988*

Summary: Notice H 01-02, which was issued February 4, 2001 and expired on February 28, 2002, is being reinstated and extended to May 31, 2003.

Expires: May 31, 2003.

Notice H 2002-4 (HUD) (May 9, 2002)
Extension of Notice H 01-4 Section 221(d)(3) Nonprofit Transactions

Summary: Notice H 01-4 (HUD), issued May 30, 2001, which will expire May 31, 2002, is extended to May 31, 2003.

***Expires*:** May 31, 2003.

Notice H 2002-5 (HUD) (May 13, 2002)
Reinstatement/Extension of Notice H 96-102 Redesigned Section 202 Supportive Housing for the Elderly and Section 811 Supportive Housing for Persons with Disabilities Programs

Summary: Notice H 96-102 (HUD), issued November 26, 1996, which was previously extended by Notice H 00-23, is being reinstated and extended to May 31, 2003.

Expires: May 31, 2003.

Notice H 2002-6 (HUD) (May 17, 2002)
Reinstatement and Extension of Notice 00-26, Prepayment of Direct Loans on Section 202 and 202/8 Projects with Inclusion of FHA Mortgage Insurance Guidelines

Summary: Notice H 00-26 (HUD), which was issued on December 11, 2000, and expired on December 31, 2001, is being reinstated and extended to May 31, 2003.

Expires: May 31, 2003.

Notice H 2002-7 (HUD) (May 17, 2002)
Reinstatement and Extension of Notice H 95-7, Summary of HUD Policies on Multifamily Housing Bond Refinancing Transactions and Announcement of Certain Changes and Clarifications

Summary: Notice H 95-7, which was issued on January 18, 1995, and expired on January 31, 1996, is being reinstated and extended to May 31, 2003.

Expires: May 31, 2003.

Notice: H 2002-10 (HUD) (May 17, 2002)
Description of Updated Procedures for Annual Adjustment of Pre-Renewal Contract Rent for Section 8

Summary: This Notice describes updated procedures for annual adjustment of pre-renewal contract rent for Section 8 projects where rent is adjusted using the HUD-published Annual Adjustment Factor. This Notice also describes the procedures for applying statutory comparability requirements in AAF adjustments for Section 8 new construction and substantial rehabilitation projects, including updated guidance concerning Rent Comparability Studies (RCS). The procedures implement statutory requirements and they will not be waived.

Expires: May 31, 2003.

Notice H-2002-11 (HUD) (May 29, 2002)

Summary: Reinstatement and Extension of Notice H 94-66 (HUD), Recapture of Section 235 Assistance Payment Guide.

Expires: May 31, 2005.

HUD Mortgagee Letters

Mortgagee Letter 2002-12 (May 23, 2002)
Reinstatement of the Housing Counseling Notification Requirement

Summary: The purpose of this Mortgagee Letter is to advise of the reinstatement of the housing counseling notification requirement in Section 106(c)(5) of the *Housing and Urban Development Act of 1968* (12 U.S.C. 1701x)(Act). Under this provision mortgagees must notify all eligible delinquent mortgagors of the availability of homeownership counseling provided both by the mortgagee and by nonprofit organizations which are approved by the Secretary and experienced in homeownership counseling. Section 106(c)(9) of the Act, which previously terminated the provisions of Section 106(c)(5) on September 30, 2000, was recently repealed by Section 205 of the Departments of Veterans Affairs and Housing and Urban Development, and *Independent Agencies Appropriations Act for 2002*. Thus, the requirement of Section 106(c)(5) has now been made permanent.

Federal Housing Finance Board Federal Register Rules

67 Fed. Reg. 18,796 (April 17, 2002)
Affordable Housing Program Amendments

***Summary*:** The Federal Housing Finance Board is amending its regulation governing the operation of the Affordable Housing Program (AHP) to improve the operation and effectiveness of the AHP. The changes include: making the requirements for approval of post-completion project modifications the same as the current requirements for pre-completion project modifications; allowing the Federal Home Loan Banks (Banks) to define "homeless household" for purposes of scoring applications for AHP subsidies to finance housing for such households; allowing the Banks to award scoring points to projects using Federal government properties, and to projects using non-Federal government properties conveyed for an amount significantly below their fair market value; permitting the Banks to allow members or project sponsors to re-use repaid AHP direct subsidy to assist another AHP-eligible household to purchase or rehabilitate an owner-occupied unit in the same project; permitting a Bank to allocate up to the greater of $3 million or 25 percent of its annual required AHP contribution for the subsequent year to the current year's AHP competitive application program; adding the Federal Financial Institutions Examination Council as a source of area median income data that may be used to determine household income eligibility; removing the requirement that the amount of AHP subsidies offered by a Bank in each funding period must be comparable; removing the requirement that the Banks must determine the feasibility of projects before their applications may be scored; and allowing the Banks up to one year and 120 days after completion of a rental project to review the documentation received from the project owner for project compliance.

***Effective Date*:** May 17, 2002.

RHS Federal Register Rules

67 Fed. Reg. 16,969 (April 9, 2002)
Guaranteed Rural Rental Housing Program

***Summary*:** The Rural Housing Service (RHS) is amending its regulations for the Guaranteed Rural Rental Housing Program (GRRHP). The *Housing Act of 1949*, which authorizes RHS to administer GRRHP, was amended on December 27, 2000. The intended effect of this final rule change is limited to the implementation of five statutory changes. The revisions range from adding a definition of an "Indian tribe" to authorizing loans to be made for 25 years with an amortization of 40 years (*i.e.*, balloon payments).

***Effective Date*:** May 9, 2002.

RHS Federal Register Notices

67 Fed. Reg. 15,777 (April 3, 2002)
Notice of Funds Availability (NOFA) Inviting Applications for the Rural Community Development Initiative (RCDI)

***Summary*:** This Notice announces the availability of $12 million of grant funds for the RCDI program through the Rural Housing Service (RHS), herein referred to as the Agency, USDA. Applicants must provide matching funds in an amount at least equal to the Federal grant. These grants will be made to qualified intermediary organizations that will provide financial and technical assistance to recipients to develop their capacity and ability to undertake projects related to housing, community facilities, or community and economic development. This Notice lists the information needed to submit an application for these funds.

***Dates*:** The deadline for receipt of an application is 4 p.m. EST on July 2, 2002.

67 Fed. Reg. 17,044 (April 9, 2002)
Announcement of Funding to Develop Essential Community Facilities in Rural Communities for Eligible Public Entities, Nonprofit Corporations, and Tribal Governments with Extreme High Unemployment and Severe Economic Depression

***Summary*:** The Rural Housing Service (RHS) announces the availability of $19 million in national competitive grant funds to be administered in accordance with this notice, 7 U.S.C. 1926(a)(20), and the Community Facilities grant program (7 C.F.R. part 3570, subpart B) to develop essential community facilities in rural communities with extreme high unemployment and severe economic depression.

***Dates*:** Applications may be submitted at any time until funds are exhausted.

RHS Administrative Notices

RD AN No. 3729 (1944-N)(March 29, 2002)
Housing Preservation Grant (HPG) Program Fiscal Year (FY) 2002 Preapplications

Summary: This Administrative Notice (AN) and the attached information provide guidance for handling FY 2002 preapplications for the Housing Preservation Grant (HPG) program.

RD AN No. 3747 (1942-A) (April 18, 2002)
Poverty Line Guidelines for Rural Housing Service

Summary: This Administrative Notice (AN) notifies Rural Development personnel managing the Rural Housing Service programs of a change in the poverty line income figures.

RD AN No. 3748 (1940-L) (April 18, 2002)
Section 502 Direct Funding Set-Aside

Summary: In accordance with Rural Development (RD) Instruction 1940-L, Exhibit A, Attachment 2, $1.5 million has been set aside for Fiscal Year (FY) 2002 Innovative

Demonstration Initiatives under the section 502 Direct Loan program. Due to the limited FY 2002 funding, states previously receiving National Office approval for their demonstration concepts in FY 2001 are required to resubmit their proposals for final acceptance and funding for this FY. RD cannot guarantee the availability of funds.

RD AN No. 3749 (2024-A) (April 24, 2002)
Protective Advance – Recoverable or Non-Recoverable Cost

Summary: The purpose of this Administrative Notice (AN) is to address protective advances, when to implement protective advances, recoverable cost or non-recoverable cost, and provide guidance to all the field offices operating the Multi-Family Housing program. Protective advances are necessary to protect the government's interest and security in the property. Please note, a protective advance is not a source of loan funds for properties needing rehabilitation or repair.

RD AN No. 3750 (1965-B) (April 24, 2002)
Preservation Proposals for Equity Funding

Summary: The purpose of this Administrative Notice (AN) is to provide guidance on how to access $4.3 million of the Section 515 reserve that is made available to fund innovative approaches to preserve rental housing. For example, providing equity at the time of transfer to a nonprofit or public body in exchange for a restrictive-use agreement that assures that the project will remain as affordable housing for its remaining useful life would be considered an innovative approach to preservation. This Administrative Notice (AN) announces that proposals to use funds should be submitted to the Office of Rental Housing Preservation (ORHP) by July 1, 2002. ■

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