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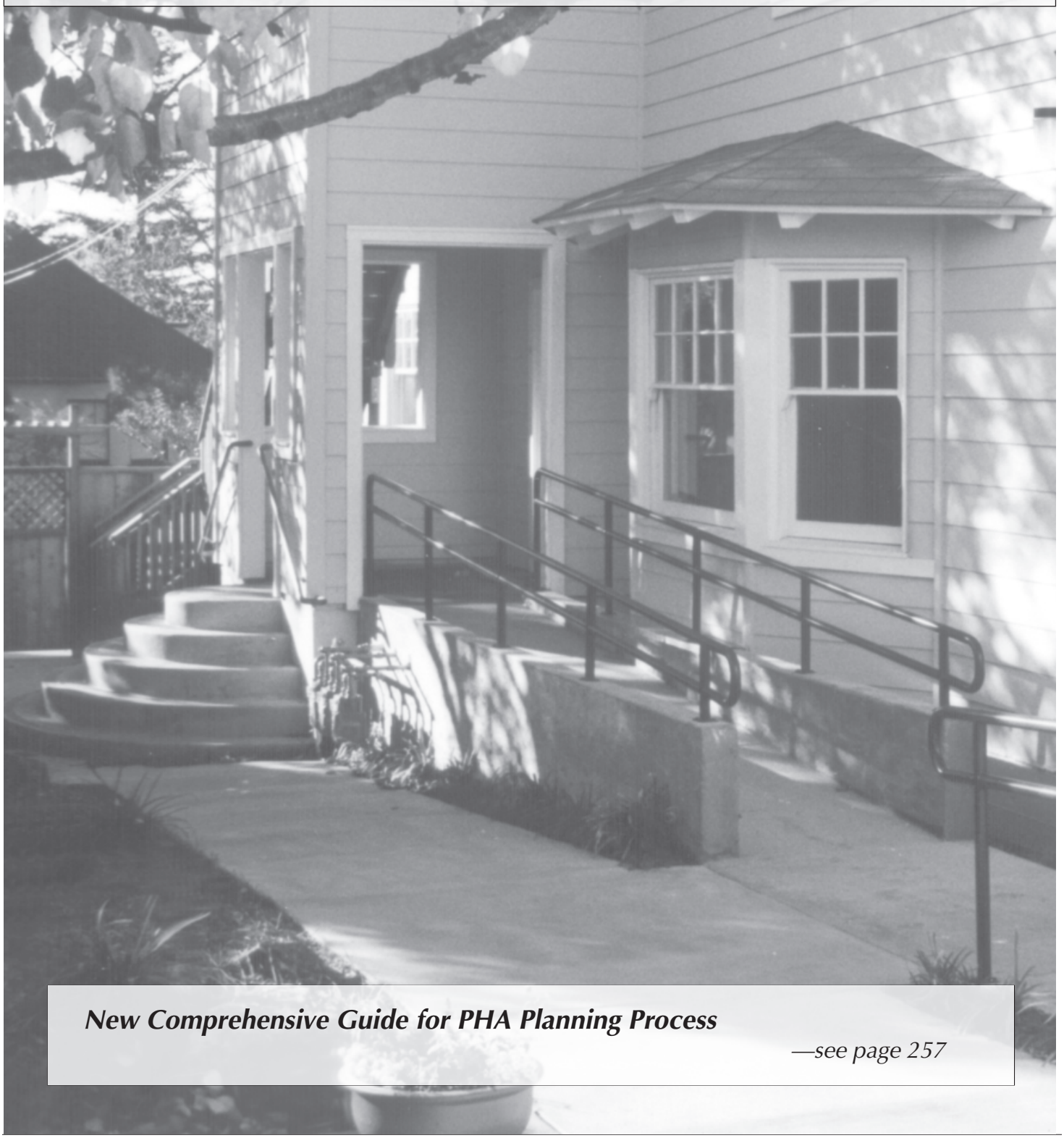

New Comprehensive Guide for PHA Planning Process

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Cover and inside back cover: The Rosevine Apartments provide 10 units of affordable housing for developmentally disabled adults in Berkeley, California. Renovated by nonprofit developer Resources for Community Development (RCD) with funding from HUD's Section 811 Program and the City of Berkeley. Photos courtesy RCD.

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HUD FY 2002 Appropriations Enacted[1]

Introduction

The House and Senate conferees on the committees responsible for the Department of Housing and Urban Development (HUD) appropriations concluded their negotiations and filed their Conference Report on November 6. Two days later, the fiscal year (FY) 2002 VA-HUD appropriations bill, H.R. 2620, passed both houses of Congress overwhelmingly and the President signed the bill into law on November 26, 2001.[2] Here is a snapshot of some of the details.[3]

The Bill

HUD's final FY 2002 budget authority level is set at $30 billion, which is $1.8 billion more than in FY 2001, but is still unlikely to fund fully current services much less adequately address growing needs. The largest single component, the Housing Certificate Fund, which provides Section 8 assistance, is funded at $15.641 billion—$1.7 billion over FY 2001 but slightly less than both earlier House and Senate bill levels. Allegedly, the funded amount is enough to fund fully Section 8 voucher and project-based renewals. These renewals are budgeted at $15.725 billion, more than the appropriated amount, but the balance is borne by existing carry-over funds. The bill includes $144 million to fund 26,000 new, or incremental, Section 8 vouchers, less than the Administration requested and the House approved but more than the Senate has approved. Of these vouchers, 18,000 are to be distributed on a "fair share" basis and 8,000 reserved for nonelderly disabled recipients. This incremental voucher level is only one-third the number of new vouchers funded in FY 2001.[4] The final bill also directs HUD to discretely identify Section 8 project-based renewal costs, presumably by the various types of Section 8 project-based programs, in its FY 2003 budget justifications.

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[1]With permission and appreciation, this article is based largely on that prepared by the National Low Income Housing Coalition in its November 9, 2001 edition of *Memo to Members* (Vol. 6, No. 45).

[2]Pub. L. No. 107-73, 115 Stat. 651 (Nov. 26, 2001).

[3]H.R. 2620 is formally titled the *Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act*, and is available online through the Library of Congress' THOMAS Web site at http://thomas.loc.gov. The full report of the Conference Committee, H. Rep. No. 107-272 (Nov. 6, 2001), which includes both the final text of the bill as amended and the Joint Explanatory Statement of the Conference Committee, is also available through THOMAS under that report number. The information cited in this article can all be found in pgs. 9-29 (the final bill), and pgs. 60-120 (Joint Explanatory Statement) of the Conference Report.

[4]For more details on the President's request, see *HUD FY 2002 Budget May Be Worse Than It Looks*, 31 HOUS. L. BULL. 59 (Mar. 2001).

The final bill does not include the worrisome Senate rescission language that would have transferred a portion of any recaptured Section 8 funds to the National Air and Space Administration and to the National Science Foundation. However, in order to reduce the level of new budget authority, it reduces allowable Section 8 voucher program reserve levels from two months' assistance to one month. This permits $640 million of the existing Section 8 carry over from FY 2001 to be used to offset the renewal costs in this year. At the same time, the Conference Committee report directs HUD to ensure that public housing agencies (PHAs) have enough money to administer their contracts normally—including vouchers that turn over—and that HUD provide PHAs with additional funds if needed for approved uses. It also requires HUD to submit quarterly reports on PHA Section 8 reserves to the appropriations committees of Congress. This language should provide some reassurance to advocates who had expressed concern to the conferees that PHAs would curtail services if they felt squeezed by inadequate reserves.

As proposed by Rep. Charles Rangel in an amendment to the original House appropriations bill, the community service requirement for public housing residents has been suspended for this fiscal year

The final bill funds Shelter Plus Care Section 8 renewals as part of the Homeless Assistance Grant program, despite the earlier attempt by the House to provide no funds for the renewals based upon the supposed "forward-funding" of FY 2002 renewals in the FY 2001 budget and the House's belief that FY 2003 funds should be provided as part of the FY 2003 budget process. Advocates successfully made the case that the failure to include additional renewal funds in the FY 2002 bill would hamper the uninterrupted delivery of assistance. Homeless Assistance Grants are funded at $1.123 billion, reflecting the inclusion of Shelter Plus Care. The bill also makes $500,000 available to fund the Interagency Council on Homelessness.

The bill provides $2.843 billion to the Public Housing Capital Fund for rehabilitation, which, while $157 million below the FY 2001 level, is $550 million above the President's request and higher than the House-approved amount. It is, however, slightly below the Senate-approved level.

The Public Housing Operating Fund received $3.495 billion, which is described in the Conference Report as an increase of more than 8 percent over FY 2001. In fact, the amount includes funding for the Public Housing Drug Elimination Program (PHDEP), which was funded separately in FY 2001. When current funding for the Public Housing capital, operating and PHDEP programs is compared to last year's funding, the public housing program is receiving $214 million less than it did in FY 2001—a 3 percent cut. PHAs are now authorized to use their operating and capital funds for activities that had been funded through PHDEP. This is problematic because some PHAs are likely to be forced to choose between expending their operating funds for traditional operating uses, like repairs and improvements, and PHDEP uses, such as drug counseling or other anti-drug efforts.

The HOPE VI program is level-funded at $574 million for FY 2002. However, new vouchers for residents displaced by HOPE VI projects are now funded through the HOPE VI budget, rather than through the Housing Certificate Fund, as was the case in previous years. Thus, the HOPE VI budget is, in reality, reduced by the voucher costs. With respect to the HOPE VI program, the conference report directs HUD to report to Congress by June 15, 2002 on the "lessons learned" from the program as well as on how the HOPE VI program could be a model for the replacement of the project-based Section 8 housing stock.

As proposed by Rep. Charles Rangel (D-NY) in an amendment to the original House appropriations bill, the community service requirement for public housing residents has been suspended for this fiscal year by prohibiting the expenditure of funds for its implementation or enforcement, although it remains in place for projects funded under the HOPE VI program.

The Community Development Fund received $5 billion, with $4.341 billion earmarked for Community Development Block Grants (CDBG). A full 40 pages of the conference committee manager's statement lists projects specified for funding, reflecting the particular local priorities of members of Congress. Carved out of the CDBG funding is $5 million for the National Housing Development Corporation for continuation of its program of acquisition, rehabilitation, and preservation of at-risk affordable housing. In addition, the appropriations bill permits the use of CDBG money for the distribution of emergency funds to New York City for economic recovery from the terrorist attacks and gives discretion to the HUD Secretary to provide a one-time waiver of CDBG program requirements in connection with this emergency funding.

The HOME program receives $1.846 billion, with a compromise of $50 million earmarked for the President's Downpayment Assistance Initiative. The President had requested $200 million for the initiative. The House supported the request while the Senate refused to provide any funding for the program. If the program is not authorized by separate authorizing legislation by June 30, 2002, the $50 million will become available for any other HOME program purposes.

The final bill funds the Section 202 program for elderly housing at $783 million, an increase of $4 million from FY 2001. The Section 811 program for housing for people with disabilities received $241 million, which is a $23 million increase over the President's request and $29 million more than last year. The bill also provides $25 million for the Rural Housing and Economic Development program, which had received no funding in the President's request and the House bill. The bill also includes a requirement proposed by the

Senate but not the House that, during FY 2002, the Secretary maintain project-based Section 8 rental assistance for any HUD-owned or HUD-held property occupied primarily by elderly or disabled residents.[5]

Significantly, the final bill does not include language from the Senate bill that would have required that the renewal of expiring Section 8 contracts on preservation properties subject to the *Emergency Low Income Housing Preservation Act of 1987* and the *Low-Income Housing Preservation and Resident Homeownership Act of 1990* be capped at current rent levels. Thus, the contract rents for these projects will be renewed only on a one-year basis consistent with the terms of their preservation plans. The conference report, reflecting the conferees' concern that many of these projects have been "over-subsidized," directs HUD to report to the Committee on Appropriations by June 15, 2002, on its review of all these preservation projects and its assessment of the possibility of restructuring the mortgages and contract requirements.

While the final HUD budget is insufficient to meet current needs, advocates fear that its funding level is likely to be higher than the requests that will be forthcoming in the future from this Administration or that are supported by the current House.

Funding for Housing Opportunities for Persons with AIDS (HOPWA) is increased to $277 million, meeting the President's request for a $19 million increase over last year's budget. Lastly, the Native American Block Grant program is funded at $649 million, the level of the President's request and the same funding level as last year.

Conclusion

While the final HUD budget is insufficient to meet current needs, advocates fear that its funding level is likely to be higher than the requests that will be forthcoming in the future from this Administration or that are supported by the current House. With a recessionary economy, shrinking budgetary resources, and competing spending priorities, it will be a challenge to sustain a priority for funding this country's housing needs because the costs of meeting those needs, even at the current levels, increase annually. The growing affordability needs of low-income people in a recessionary economy will only add to that challenge. Local advocacy that brings to the attention of legislators the existing and growing needs of low-income households will be essential to any future success. ■

[5]H.R. 2620, § 212, pg. 27.

HUD "Clarifies" PHAs' Ability to Convert Public Housing to Vouchers Without Regulations

In June 2001, the Department of Housing and Urban Development (HUD) issued a partial final rule[1] implementing Section 22 of the *U.S. Housing Act*,[2] as amended by the *Quality Housing and Work Responsibility Act of 1998* (QHWRA),[3] which governs the conversion of public housing developments to tenant-based assistance by public housing authorities (PHAs) on a voluntary basis.[4] The partial final rule directed PHAs to perform required initial assessments of developments eligible for conversion by October 1, 2001, but did not implement any other provisions of Section 22.[5] Nonetheless, HUD has published on its Web site an updated "clarification" of the partial final rule,[6] developed by the Office of Policy, Program and Legislative Initiatives (OPPLI),[7] stating that HUD will allow PHAs to carry out voluntary conversions pursuant to Section 18 of the *U.S. Housing Act*.[8]

HUD's Earlier Clarification of Its Partial Final Rule

The OPPLI clarification appears to be an update of a previous clarification of the June 2001 partial final rule that HUD published on its Web site.[9] This earlier clarification appears to have been removed from HUD's Web site and is not referred to in the OPPLI clarification.

The OPPLI Clarification

The OPPLI clarification differs from the previous clarification in two principal ways. One, the OPPLI clarification

[1]66 Fed. Reg. 33,616 (June 22, 2001)(*Voluntary Conversion of Developments from Public Housing Stock; Required Initial Assessments*).

[2]Codified at 42 U.S.C.A. § 1437t (West Supp. 2001); amended by Pub. L. No. 105-276, § 533 (Oct. 21, 1998).

[3]*Id.*

[4]*See HUD Issues Partial Final Rule on Conversion of Public Housing Developments to Vouchers*, 31 HOUS. L. BULL. 171 (July/Aug. 2001).

[5]*See id.*

[6]HUD, Office of Policy, Program and Legislative Initiatives (OPPLI), *Clarification of PHA Action Required by Voluntary Conversion of Developments From Public Housing Stock; Required Initial Assessments Final Rule* (Sept. 21, 2001), *available at:* www.hud.gov/offices/pih/centers/sac/vc/index.cfm.

[7]The text of the clarification does not include an attribution to OPPLI, but the HUD Office of Public and Indian Housing's *Public Housing Reform: Related Rules and Notices* page does. *See* www.hud.gov/offices/pih/phr/regs/index.cfm.

[8]42 U.S.C.A. § 1437v (West Supp. 2001), as amended Pub. L No. 105-276, Tit. V., Sec. 531(Oct. 21, 1998).

[9]*Formerly available at* www.hud.gov/pih/pha/plans/fr4476_ clarification.html. *See generally* 31 HOUS. L. BULL. 157, 173 (July/Aug. 2001).

makes reference to an August 2001 HUD notice providing PHA Plan guidance[10] and incorporates a section of this notice on required initial assessments for the voluntary conversion of public housing developments.[11] Two, as an "interim alternative," the OPPLI clarification allows for the voluntary conversion of public housing developments under the disposition[12] provisions of Section 18 of the *U.S. Housing Act*.[13]

HUD's Description of Voluntary Conversion Under Section 18

The OPPLI clarification explains that HUD has decided to permit voluntary conversion under Section 18 to accommodate unnamed "individuals in the [PHA] industry" who are said to need to be able to engage in the voluntary conversion of public housing developments in order "to effectively carry out their portfolio management responsibilities."[14] According to the OPPLI clarification, in order to pursue voluntary conversion of a public housing development under Section 18, a PHA must complete an assessment of reasonable revitalization potential, as described in the appendix to 24 C.F.R. § 971 (2001)[15] and complete all other requirements of a Section 18 application for disposition.[16] Once the PHA's submissions are approved, the PHA can "relocate the residents with vouchers and sell the public housing development."[17]

Even though the process described in the OPPLI clarification is referred to as "conversion," it is not clear that a PHA would receive additional voucher authority to replace the public housing units it seeks to "convert." The clarification seems to suggest that HUD will provide vouchers,[18] but also states that "a PHA will need to demonstrate that it has sufficient voucher and relocation resources on-hand to obtain a Section 18 approval."[19] If a PHA relies on its "on-hand" voucher resources, it is difficult to see how a public housing development is being converted. The development would simply be lost and the PHA's existing voucher resources would be subject to an additional burden as families in the targeted development are accommodated.

HUD cannot rely on Section 18 for voluntary conversion authority. Section 22 of the U.S. Housing Act is the exclusive authority for the voluntary conversion of public housing developments.

HUD's Lack of Adequate Legal Authority for Its Section 18 Conversion Scheme

HUD's Section 18 conversion scheme conflicts with the requirements of the QHWRA, is not supported by any valid agency rulemaking and does not comply with the department's affirmative fair housing duties.

Section 22: The Exclusive Authority for Voluntary Conversion

HUD cannot rely on Section 18 for voluntary conversion authority. Section 22 of the *U.S. Housing Act* is the exclusive authority for the voluntary conversion of public housing developments. The statute states that public housing authorities may convert their public housing developments to tenant-based assistance, "*but only in accordance with the requirements of [Section 22].*"[20]

In addition, Section 18 disposition requirements are not adequate substitutes for the requirements of Section 22. In particular, Section 22 requires a PHA seeking to convert a development to "demonstrat[e] that the conversion … will not adversely affect the supply of affordable housing in [its] community."[21] Section 18[22] includes no such requirement and neither does the appendix to 24 C.F.R. § 971.

HUD's Haphazard Implementation of QHWRA Amendments

HUD's implementation of the QHWRA amendments on demolition, disposition and conversion has been haphazard and inconsistent with the department's own published guidance. Section 22 was amended in its entirety by Section 533 of the QHWRA. An informal clarification published on

[10]PIH 2001-26 (HA) (Aug. 2, 2001) *available at* www.hud.gov/offices/pih/publications/notices/01/pih2001-26.pdf.

[11]*See id* at II.D (setting forth Component 10 (B) of the HUD PHA Plan template).

[12]*I.e.*, sale or transfer, *see* 42 U.S.C.A. § 1437p(a)(2)(West Supp. 2001), as amended Pub. L No. 105-276, Tit. V., Sec. 537.

[13]*See* OPPLI clarification, *supra* at n. 6.

[14]*Id.*

[15]This is a financial analysis intended to weigh the estimated cost of continuing to operate a development against the cost of providing voucher assistance to the development's residents. This analysis was quite superficial and, among other things, did not include an assessment of voucher mobility costs. *See also* n. 24 and accompanying text, *infra.*

[16]*See id.* Presumably, the assessment and application are to be sent to the HUD Special Applications Center for review, but the OPPLI clarification is silent on this issue.

[17]*Id.* This passage suggests that only units occupied at the time a PHA commences its relocation activities will be converted and that unoccupied units will be lost from the PHA's inventory without any vouchers to take their place. *But, see* n. 18-19 and accompanying text, *infra.*

[18]*See id.* ("As always, the availability of vouchers will be dependent on the levels of funding provided to [HUD]…").

[19]*Id.*

[20]*See* 42 U.S.C.A. § 1437t(a)(West Supp. 2001)(emphasis added).

[21]*See id.* at § 1437t(c)(3).

[22]*See id.* at § 1437p(a)(2).

HUD's Web site is not sufficient to implement this amendment. HUD has previously determined that Section 533 is not self-implementing and requires rulemaking.[23]

In addition, 24 C.F.R. Part 970, relied on in the OPPLI clarification, is no longer valid legal authority. This rule was promulgated pursuant to Section 202 of the *Omnibus Consolidated Rescissions and Appropriations Act of 1996* (OCRA),[24] which provided for mandatory conversion of public housing developments of more than 300 units with vacancy rates of 10 percent or higher. The OCRA was repealed by Section 537(b) of the QHWRA.

HUD's Unsatisfied Affirmative Fair Housing Duties

None of the procedures HUD sets forth in its voluntary conversion scheme satisfy the department's long-neglected affirmative fair housing duties. The *Fair Housing Act*[25] and Executive Order 11063 (1962) require HUD to prevent discrimination and administer its programs in a manner that furthers fair housing.[26] The QHWRA imposes similar affirmative fair housing duties on PHAs.[27] At minimum, these affirmative duties require HUD to gather information and to assess the fair housing impacts, such as racial and socioeconomic effects, of its decisions before it acts.[28] The OPPLI clarification, HUD's Section 18 disposition procedures, and the appendix to 24 C.F.R. § 971 all fail to provide for any analysis of the racial and socioeconomic effects of the conversion of public housing developments on the part of HUD or PHAs. HUD has simply ignored its affirmative fair housing obligations.

Conclusion

Presumably, the PHA industry officials that persuaded HUD to adopt its Section 18 conversion scheme intend to pursue voluntary conversions of public housing developments. Should these conversions pose harm to residents, they may be challenged with a strong likelihood of success. ■

[23]*See* 64 Fed. Reg. 8,192, 8,207 (Feb. 18, 1999)(*QHWRA; Initial Guidance*).

[24]Pub. L. No. 104-134 (Apr. 26, 1996).

[25]42 U.S.C.A. § 3608(e)(West Supp. 2001).

[26]*See generally HUD's Fair Housing Duties and the Loss of Public and Assisted Units*, 30 HOUS. L. BULL. 1 (Jan. 1999), available at *www.nhlp.org/hlb/199/199fairhsg.htm*.

[27]*See* 42 U.S.C.A. § 1437c-1(d)(15)(West Supp. 2001).

[28]*See generally HUD's Fair Housing Duties and the Loss of Public and Assisted Units*, 30 HOUS. L. BULL. 1 (Jan. 1999).

Public Housing Deconcentration Policy Delayed and Weakened Again

Introduction

The Department of Housing and Urban Development's (HUD) policy of public housing deconcentration of poverty continues to generate controversy and its implementation has been delayed once again.[1] The policy has its origins in two provisions of the *Quality Housing and Work Responsibility Act of 1998* (QHWRA).[2] The first provision prohibits public housing authorities (PHAs) from meeting their very low-income targeting obligations by concentrating very low-income applicants in particular projects.[3] The second provision requires each PHA to submit to HUD, as part of its public housing plan, an admission policy that will provide for the deconcentration of poverty in existing developments by encouraging higher-income applicants to move into lower-income projects and admitting lower-income applicants into higher-income projects.[4]

Background and the Current Rule

HUD first published rules on deconcentration as part of the PHA Plan regulations and provided guidance for implementing them in the PHA Plan Template in 2000.[5] "[B]ecause the [Template] questions did not fully reflect the requirements of the final rule,"[6] HUD subsequently advised PHAs not to fill out the PHA Plan Template provisions on deconcentration and stated that it would disregard any responses that had already been submitted.[7] In April 2000, HUD published a revised deconcentration rule which it finalized in December to become effective as of January 22, 2001 for PHAs with fiscal years (FYs) beginning on or after July 1, 2001.[8] Shortly

[1]*See HUD Proposed Rule on Deconcentration of Public Housing*, 30 HOUS. L. BULL. 75 (June 2000); *Deconcentration Final Regulations Are Published*, 31 HOUS. L. BULL. 10 (Jan. 2001); *HUD Issues Additional Guidance for Second Year PHA Plans*, 31 HOUS. L. BULL. 34 (Feb. 2001).

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

[3]42 U.S.C.A. § 1437n(a)((3)(A)(West Supp. 2001).

[4]*Id.* §§ 1437c–1((d)(3)(B) and1437n(a)(3)(B).

[5]24 C.F.R. § 903.2 (2001); PHA Plans, HUD 50075, Template. *Available at* www.hud.gov/offices/pih/pha/.

[6]HUD Notice PIH 99-51 (HA), *Additional Instructions for Submitting First PHA Plans under the Final Rule and Extension of Due Date for Submission of PHA Plans for PHAs with Fiscal Years Beginning January 1, 2000 and April 1, 2000*, etc., (Dec. 14, 1999).

[7]*Id.*

[8]*Id.* PIH 2001-4 (HA), *Instructions for Submitting Second Public Housing Agency (PHA) Plans for PHAs with Fiscal Years beginning on July 1, 2001*, etc., (Jan. 19, 2001)(contains revised PHA Plan Template, questions about an agency's deconcentration policies and the average incomes of its covered developments); *HUD Issues Additional Guidance for Second Year PHA Plans*, 31 HOUS. L. BULL. 34 (Feb. 2001).

thereafter, HUD postponed the effective date for the final rule and made the rule applicable first to PHAs with FYs beginning October 2001 and thereafter.[9] However, before the rule took effect, HUD notified PHAs that it planned to publish another proposed amendment to the deconcentration rule and that "during review of the PHA Plan, HUD field offices will accept as a reasonable explanation, cases where the average income for such developments is above the [Established Income Range] but is and will remain (given current admission policies, waiting lists and turnover rates) below 30 percent of the area median income."[10] HUD published the proposed amendment on August 15, 2001.[11] Thus, there currently is a final deconcentration rule and there are new PHA Plan Template questions, but HUD is encouraging PHAs to seek an exception—which will be granted—to the remediation aspects of the rule.

The Proposed Policy

The currently final deconcentration rule provides that any general occupancy family developments with an average family income within an Established Income Range (EIR)—15 percent above and below the PHA-wide average income for family developments—are excluded from the requirement of remediating income disparity.[12] However, if the average family income in a development is above 115 percent of the average income for all family developments, families with incomes below the EIR will be given an admission preference to that development.[13] The proposed amendment would modify this rule. It will classify any general occupancy family development in which the average family income level is at or below 30 percent of the area median income (AMI) as within the EIR. As a result, PHAs would not be obligated to give an admission preference to these developments to families whose incomes are below the EIR.[14] HUD justifies the change by contending that developments with an average family income of 30 percent or less of the AMI should not be classified as higher-income developments for purposes of income-mixing because the admission of lower-income families into these developments will not result in income deconcentration as contemplated by the statute. If adopted, the change would exempt the vast majority of public housing developments nationwide from all deconcentration obligations.

In proposing this latest change, HUD recognizes that the current final regulation allows PHAs to seek an exemption from the remediation aspects of the rule.[15] Notwithstanding, because the number of developments where the average income is below 30 percent of AMI yet outside the EIR is very large, HUD contends that the change is necessary in order to avoid its having to grant exemptions on a case-by-case basis.

If the proposed policy is adopted, the change would exempt the vast majority of public housing developments nationwide from all deconcentration obligations.

Limited review of a few jurisdictions by several advocates confirms that there are many developments with average incomes at or below 30 percent of AMI that are outside the EIR. However, such a review also demonstrates that the HUD-proposed change will have an adverse impact on housing opportunities for very low-income households who live in higher-income areas, such as Connecticut and parts of California, as well as those who live in areas where there is a central city with a much lower-median income than the surrounding area, such as Buffalo and Rochester, New York.

In certain high-income parts of Connecticut, for example, families with annual incomes as high as $30,000 are within 30 percent of the AMI. Moreover, in some Connecticut cities, there is a disparity in the average family income among public housing developments in excess of 60 percent. The HUD-proposed rule would ignore these facts and allow PHAs to maintain developments with concentrations of higher-income families by not providing a preference for lower-income families.

Adoption of the proposed rule would also mean that often more desirable "scattered site" developments may be exempted from the deconcentration requirements based on the income of the particular "development" even though the neighborhood itself may have a desirable income mix.[16] Nationwide, between 17 and 23 percent of family public housing units are located in census tracts in which less than 20 percent of the population is below the poverty level.[17] A recent article in *Cityscape*, a HUD journal, characterized these types

[9]66 Fed. Reg. 8,897 (Feb. 5, 2001).

[10]HUD Notice PIH 2001-26(HA), *PHA Plan Guidance; Further Streamlining of Small PHA Plans*; etc. (Aug. 2, 2001).

[11]66 Fed. Reg. 42,926.

[12]24 C.F.R. § 903.2(c)(1)(iii)(2001).

[13]*Id.* § 903.2(c)(1)(v)(A).

[14]*Id.*

[15]*Id.* § 903.2(c)(1)(iv).

[16]For example, according to HUD data from the *1998 Picture of Subsidized Households*, in Oakland, CA, there are 15 "scattered site" developments with an average income in excess of 115 percent of the average income of the PHAs families and six of these developments are located in census tracts of 20 percent of poverty or below. *See Letter to HUD Regulations Division from NHLP*, October 15, 2001.

[17]Jill Khadduri, Mark Shroder and Barry Steffen, *How Large a Role Can Subsidized Housing Programs Play in Welfare Reform? Measuring the Extent of Needs and Opportunities*. Paper presented at the conference *Managing Affordable Housing Under Welfare Reform: Reconciling Competing Demands* sponsored by the Fannie Mae Foundation and the Center on Budget and Policy Priorities. Washington, D.C., June 26, 1998.

of tracts as "low poverty" areas that "are essentially middle income areas in which families usually have access to good schools and public services."[18] Census tracts with relatively low poverty concentrations are obviously also highly desirable areas due to the very high proportion of working households. This is confirmed by the fact that the percentage of families that are employed is significantly higher in developments located in neighborhoods that have less than 20 percent poverty rate than in the majority of family public housing units that are located in high-poverty census tracts in which more than 40 percent of the population is below the poverty level.[19]

The proposed policy is ill-conceived because it would also more than likely exempt desirable HOPE VI housing developments. Most HOPE VI developments combine public housing units with rental and homeownership units financed through other sources and typically serve mixed-income households. These developments present the best opportunity to achieve true deconcentration of poverty in the public housing program. These developments have the added advantage that they are newer and have higher-quality construction and amenities than existing public housing developments and typically provide a range and depth of work-promoting services that are rarely present in other public housing developments. It would be logical that the lowest-income families, those who would most benefit from the services provided in HOPE VI developments, should receive admission preferences to these developments. Unfortunately, the proposed deconcentration regulation does not appear to recognize this interrelationship with what should be the objective of a HOPE VI development.

Conclusion

The HUD-proposed changes notwithstanding, residents, resident advisory board (RAB) members and the public should use the PHA Plan process to insist that their local PHA make public any information on the average income of the residents in each of its developments. Advocates should then persuade their PHA to adopt a policy that gives the lowest-income families an opportunity to reside in what is perhaps the best public housing in the jurisdiction. The lowest-income families should not be relegated exclusively to the housing that is in poverty-concentrated census tracts or has the greatest concentration of the lowest-income families. Low-income families should be offered housing in locations that may be near to better schools and job opportunities. ■

[18]Jill Khadduri and Marge Martin, *Mixed Income Housing in the HUD Multifamily Stock*, *Cityscape* 3(2), 1997, at 40.

[19]Khadduri, Shroder and Steffen, *supra* note 17.

HUD Issues Comprehensive Guide for the PHA Planning Process

Introduction

Section 511 of the *Quality Housing and Work Responsibility Act of 1998* (QHWRA)[1] created the requirement that each public housing agency (PHA) submit Five-Year and Annual Plans to the Department of Housing and Urban Development (HUD). The Five-Year Plan is supposed to describe the mission of the agency, focusing on its long-term goals and its overall approach to managing its program. The Annual Plan is supposed to address more specific program management issues for the upcoming year B ranging from rent determination policies to pet policies. The Annual Plan is also the PHA's application for grants to support capital expenditures to improve public housing buildings.

On September 20, 2001, HUD published the *Public Housing Agency (PHA) Plan Desk Guide* (hereinafter "Guide"),[2] which compiles all the instructions regarding the development of a PHA Plan. Overall, the Guide provides welcome instructions about the PHA Plan process, detailing its requirements, listing the necessary attachments, and exploring optional aspects of the Plan. Cites to notices, statutes, regulations and other guidance are sprinkled throughout the Guide, making the document a good source for advocates to identify the laws governing PHA Plans. While the Guide is designed to assist PHAs with plan development, it is also a useful tool for tenants and their advocates to understand the PHA planning process and learn how and when they can participate. This article will provide a brief overview of the Guide's key points and note some changes, new emphases, and problems with the document. This article will not discuss every aspect of the PHA Plan process.[3]

The Guide

The Guide is comprised of seven sections, each dealing with different aspects of the Plan process. From the perspective of residents and advocates, the most significant sections are: Section Three B Review of the PHA Plan Template; Section Four B The Resident Advisory Board; and Section Five B Submitting the PHA Plan. Each of these sections offers

[1]42 U.S.C.A. § 1437c-1 (West Supp. 2000).

[2]Available online at www.hud.gov/offices/pih/pha/policy/pha-planguide.pdf.

[3]For additional discussions of the PHA Plan process *see PHA Plan Update*, 29 HOUS. L. BULL. 208 (Nov./Dec. 1999); *PHA Plans Posted on the Web*, 30 HOUS. L. BULL. 129 (Sept. 2000); *Successful Advocacy in the PHA Plan Process*, 30 HOUS. L. BULL. 149 (Oct. 2000); *Resident Advisory Board and Public Participation in the PHA Plan Adoption Process*, 30 HOUS. L. BULL. 173 (Nov./Dec. 2000); and *HUD Issues Additional Guidance for Second Year PHA Plans*, 31 HOUS. L. BULL. 34 (Feb. 2001).

particularly detailed instructions on information that must be included in the Plan, how tenants can and must be permitted to participate in the plan process, what supplemental documents must be submitted to HUD with the Plan, and when a PHA must begin and complete work on its Plan.

The introductory chapter places welcome new emphases on two issues. In Section 1.2, HUD encourages PHAs to make the Plan and its attachments available at locations other than the PHA office, such as libraries and community centers. Such wider distribution should make the Plan more accessible to residents throughout a community and lead to greater tenant participation opportunities. Section 1.3 discusses the concept of the PHA Plan as a strategic planning tool and notes that when creating the Plan, a PHA must assess the community's housing needs, identify its financial and other resources, and establish goals. This characterization should motivate PHAs to take the planning process seriously and to view it as a useful device for improving program management as opposed to a burden on their administrative resources.

Section Two of the Guide discusses in detail the various types of Plans and the differences between them. It contains a chart comparing Standard Plans to Streamlined Plans to Plans for troubled PHAs and to those of small PHAs. Section 2.3 points out that Moving to Work (MTW) Demonstration Sites may have distinct requirements in lieu of the normal PHA Plan process.[4] PHAs operating MTW demonstration program block grants are exempt from submitting the PHA Plan, but must submit an equally comprehensive MTW Annual Plan that addresses many of the same issues. Section 2.4 makes clear that PHAs that do not submit their Plans in a timely manner will not receive funding until the Plan is approved.

Also encouraging are the contents of Section 2.5, which discusses the PHA Plan development process and time line. It contains a number of new or previously under-emphasized provisions that should aid tenants in becoming involved in the plan process and give them more than adequate time to respond to a PHA-proposed plan. Part One of Section 2.5 stresses that PHAs should begin their planning process well in advance of the date that the Plan is due to HUD, which is 75 days prior to the commencement of the PHA's fiscal year. A chart included in the Guide suggests that preparations for developing the PHA plan should begin as early as eight months prior to the beginning of the PHA's fiscal year, perhaps the first time HUD has suggested such a long development time line. Part Seven of Section 2.5 notes that the PHA must publish a notice about the required public Plan meeting at least 45 days prior to the date of the meeting. The Guide requires that the notice be published in a newspaper of general circulation, another concept either previously ignored or at least rarely mentioned by HUD.

Unfortunately, Section 2.5 also misrepresents the PHA's obligation to make the Plan public. The Guide text states that HUD "encourages" PHAs to make the Plan available at their principal offices. The law, however, requires such action.[5] Part Eight of that section continues the focus on the time frame for Plan development, suggesting that the required public hearing be held at least one week before the Plan is due to HUD in order to give the PHA enough time to incorporate and/or respond to concerns raised by tenants at the hearing.

The Guide suggests that preparations for developing the PHA plan should begin as early as eight months prior to the beginning of the PHA's fiscal year.

Section 2.6 of the Guide reviews federal regulations and other guidance regarding the Plan process and ends with a chart that lists all regulations, notices, templates and certifications affecting PHA Plans as of the date of the Guide. This chart is a good quick reference tool for tenants and advocates looking for the law on these issues.

Section Three, devoted to the PHA Plan template, also contains some encouraging elements. Section 3.2.2 emphasizes that Consolidated Plan agencies, with whom PHAs must consult before submitting their plan to HUD, may also benefit from exchanging information with PHAs regarding such issues as how best to address the public housing needs of a particular jurisdiction. Stressing the "two-way street" nature of this relationship is a positive step toward making the PHA Plans more responsive to the needs of communities. The section also encourages PHAs to use 2000 Census data whenever possible,[6] noting that many initial Plans were based on 1990 Census data.

Section Three proceeds step-by-step through the process of completing the PHA Plan Template. Advocates should review this section carefully to ascertain areas where HUD's guidance to PHAs might contrast with tenants' views of good policy. For example, Section 3.2.3 discusses "accessibility" to units only for persons with mobility impairments, leaving out any discussion of access problems encountered by those with hearing or sight impairments. And Section 3.4.2 notes that admissions preferences are the primary method for PHAs to achieve the income-targeting and income-mixing goals of QHWRA. It ignores other possible methods for achieving these goals, such as increasing tenant income. Section 3.4.2 also seems to treat the proposed definition of Established Income Range (EIR) as having been adopted as a final rule.[7]

[4]For a more detailed description of the Moving-To-Work Demonstration Program, *see Moving-To-Work Demonstration: What Housing Programs Can Do to Help Welfare Recipients Make the Transition to Work*, 28 HOUS. L. BULL. 49 (Apr. 1998).

[5]24 C.F.R. § 903.17(b)(2001).

[6]*See* http://www.census.gov.

[7]*See* 66 Fed. Reg. 42,926 (Aug. 15, 2001).

Section 3.22 gives a comprehensive list of attachments to the PHA Plan and advises that some of the requirements listed in the Guide are new, implemented after the PHA Plan Template was first introduced in July 1999.[8] The section also discusses optional attachments, which consist of documents that the PHA can, at its discretion, include in its Plan, such as the PHA Management Organization Chart, or documents that are required only if the PHA includes optional elements in its program. For example, if the PHA opts to administer a Section 8 Homeownership Program, it must attach a "capacity statement," showing its ability to run such a program. Another important point brought out in the Guide, but not previously stressed by HUD, is that PHAs must not only make available for public review all the supporting documents listed in Section 3.23, they must alert readers to any policies described in the PHA Plan that are not reflected in the supporting documents.

Section Four of the Guide deals with resident advisory boards (RABs), and should be of particular importance to tenants and their advocates. Section 4.2 is particularly noteworthy because it addresses measures that encourage resident participation in the RAB. It describes outreach strategies, such as making personal requests to tenants, providing stipends for RAB members, providing child care during RAB meetings, and explaining that service on a RAB meets the public housing Community Service requirements. The Guide also requires that the names of RAB members be attached to the PHA Plan. This is particularly important because, to date, many PHAs have refused to disclose the names of their RAB members.

Section 4.7 places new emphasis on the fact that PHAs are required to provide RABs with a copy of the HUD award letter (identifying formula share allocations for Capital Fund and Drug Elimination Programs), the Plan approval letter, and at least one copy of the approved Plan. These outreach and information strategies should assist and encourage tenants in becoming more involved in their own tenant leadership, and ultimately lead to PHA Plans that are more responsive to tenant needs.

Section Five of the Guide discusses the mechanics of submitting the Plan to HUD and lists, in Section 5.1, everything that must be included in a complete Plan. Again, while this information is directed to PHAs, it should prove useful to tenants who wish to know everything that must be included in a PHA Plan submission.

Section Six addresses HUD's review of the PHA Plan. Of note are Section 6.5, which explains that the Troubled Agency Recovery Center (TARC) conducts reviews of "troubled" PHAs and can request additional documents, and Section 6.6, which again explains that MTW jurisdictions have distinct requirements determined by their MTW Demonstration Agreements. PHAs operating under the MTW demonstration program block grants are exempt from submitting a PHA Plan, but those that do not operate such grants are still required to submit a PHA Plan and include an additional section describing the activities and uses of the funding the PHA is undertaking under the MTW program.

Lastly, Section Seven discusses Plan amendments and modifications. In Section 7.2, it stresses that for any significant amendment, the PHA must first consult with the RAB, ensure consistency with the jurisdiction's Consolidated Plan, and gain HUD approval. The Appendices to the Guide include a list of resources and a glossary of terms both of which should prove useful to residents and advocates who may not be familiar with the plan process and with HUD and public housing terminology.

Conclusion

Overall, the PHA Plan Desk Guide should serve as a valuable tool for PHAs and tenants alike. It places all the relevant information in one accessible place and answers many of the questions that PHAs and tenants have raised since the PHA Plan process was first implemented. While the document is not perfect—there are still many policy issues, both large and small, that need to be altered or addressed—it should give all parties participating in the Plan process the information that they need to improve the process, the PHA Plan, and ultimately the operation of the local programs. ■

From 1979 to 1997, the average after-tax income of the wealthiest one percent of Americans increased by $414,200.

For those in the middle of the income spectrum, after-tax incomes increased by $3,400 during this period.

For the poorest 20 percent, incomes during this period fell by $100.

—Study by the Congressional Budget Office, May 2001

[8] *See, e.g.,* Notice PIH 99-51 (Dec. 14, 1999), Notice PIH 00-43 (Sept. 18, 2000), Notice PIH 01-04 (Jan. 19, 2001), and Notice PIH 01-26 (Aug. 2, 2001).

Stamford Adopts a One-for-One Replacement Ordinance

Introduction

The city of Stamford, Connecticut has adopted a one-for-one replacement ordinance in recognition of the need to preserve existing subsidized housing units "as a long-term resource."[1] The ordinance requires the owner of public or subsidized housing to provide replacement units when any existing units are subject to demolition, a change in use, or a material change in subsidy or unit size. The Stamford Ordinance apparently is the first local restriction of this nature passed nationwide since the 1995 repeal of federal laws requiring such replacement for public housing.[2]

Sparking the campaign for the law was the threatened loss of several subsidized complexes. Since 1999, the Stamford Housing Authority has proposed the demolition of four larger public housing developments in the city, one of which would result from a planned HOPE VI application. Over a two-year period, Stamford community organizations mounted repeated campaigns to preserve these state and federally funded public housing projects. Although each of these preservation efforts was successful, the housing authority persisted in making demolition plans. In response, an organization of labor unions, tenants, and clergy—with the assistance of local legal services advocates—drafted a proposed, permanent one-for-one replacement ordinance for the city.

The community group launched a concerted effort to develop broad support for the ordinance, with a number of organizers devoted to the project. Perhaps owing to the strength of the organizing effort, the Stamford Housing Authority did not oppose the ordinance and advocates were able to craft a measure with sufficient appeal to pass by a unanimous vote of the City Council. The Mayor's opposition came late in the process, and was expressed as support for homeownership rather than the preservation of rental housing. The measure became law without his signature.

General Provisions of the Ordinance

The reach of the ordinance is broad. The operative language provides simply that: "Any owner of an Assisted Housing Unit shall be required to provide a Replacement Unit in the case of Conversion of the assisted unit."[3] An "Assisted Housing Unit" includes any "housing units that receive site-specific, ongoing state, federal, or local operating subsidy in order to make such units affordable to households with gross incomes below 50 percent of the area median income."[4] "Affordability" is further defined as a monthly rent level which is equal to or less than 30 percent of monthly income. "Conversion" is any of the following actions affecting an assisted housing unit:

- demolition or construction work which renders the unit uninhabitable;
- a change in use from assisted housing, including when an occupied unit is emptied in preparation for a change in use; or
- a material change in the "Affordability" or the size of the unit.

"Replacement Units" must have the following characteristics:

- be located in the city, preferably in the same neighborhood as the converted unit;
- meet the affordability requirements of the units replaced; and
- be decent, safe, and sanitary, including being in compliance with health and building codes.[5]

The City Director of Public Safety, Health and Welfare (the Director) is charged with the administration of the ordinance. Tenants must be notified in writing by registered or certified mail and a posting at the project at least 120 days prior to an owner's application for any demolition or building permit.[6] As a condition of receiving a demolition or building permit affecting assisted housing, an owner must submit an Assisted Housing Replacement Plan which specifies the replacement units and identifies sources of "available subsidy and financing sufficient to produce and operate" the new units. The Director must publish a notice of intent in a newspaper of general circulation to approve the replacement plan 30 days before approving the plan.[7]

Replacement units must be provided prior to conversion, absent a hardship showing by the owner, in which case the Director may allow completion of replacement units up to 24 months after conversion.[8] As described in the replacement plan, temporary relocation assistance and replacement

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[1]Stamford, Conn., Ordinance No. 966 Supplemental (Oct. 1, 2001). Stamford municipal ordinances are generally available online at www.fws.municode.com, by clicking on "Online Codes," then "Connecticut," and "Stamford." There is a table included for new ordinances at the link for "Code Comparative Table Ordinances." However, as of this writing, the one-for-one ordinance has not yet been included.

[2]For public housing, the initial repeal of federal one-for-one replacement requirements resulted from the *1995 Recission Act*, Pub. L. 104-19 (July 27, 1995), amending 42 U.S.C.A. § 1437(c) note. Connecticut's one-for-one replacement rule was repealed in 1996. *See* Conn. Gen. Stat. 8-64a (3). For a review of other state and local initiatives to preserve federally assisted housing, *see Preserving Federally Assisted Housing at the State and Local Level: A Legislative Tool Kit*, 29 HOUS. L. BULL. 183 (Oct. 1999).

[3]Stamford, Conn., Ordinance No. 966 Supplemental (Oct. 1, 2001), § 4.

[4]*Id.* § 2. As discussed below, a second part of this definition also covers some projects with a capital subsidy, rather than an operating subsidy.

[5]*Id.*

[6]*Id.* § 6. Note that a conversion action that does not require a demolition or building permit does not appear to trigger the notice provision.

[7]*Id.* § 3.

[8]*Id.* § 4.

affordable housing must be provided during production of any permanent replacement units, including moving, packing, insurance, and utility connections, consistent with the *Uniform Relocation Act*.[9]

The ordinance prescribes penalties of up to $90 per incident, per day, in addition to the appeal rights of owners and tenants who are not satisfied with the decision of the Director.[10]

Applicability to Federally Subsidized Developments

The ordinance purports to address the needs of both publicly assisted housing as well as privately owned rental housing serving low-income persons and households.[11] First, all federal public housing units meet the definition of an assisted housing unit, quoted above, as they receive an operating subsidy that makes the units affordable to families earning less than 50 percent of area median income (AMI). State public housing meets the definition to the extent that it receives a qualifying operating subsidy. Therefore, it appears that even though some public housing residents may actually earn more than 50 percent of AMI, all of the units will be covered by the ordinance because the nature of the operating subsidy permits all of the units to be rented at a level of subsidy which meets the affordability restriction. For the same reason, units actually receiving any other project-based operating subsidy, such as project-based Section 8, are covered where the rents meet the affordability restriction. However, it should be noted that some project-based Section 8 buildings do not receive operating subsidies for all units in the project.

Provision is also made for projects or units which receive a capital subsidy, which could take the form of low-cost financing or a grant. The ordinance covers "rental housing units that received development or rehabilitation subsidy sufficient to make such units affordable to households with gross incomes below 50 percent of area median income, provided that such units were deed-restricted with regard to rent levels or Affordability at the time of development, and the deed restriction remains in effect."[12] Thus, the ordinance's coverage will obviously be dependent on facts regarding the specific recorded restrictions for a particular development. The income restrictions of common HUD mortgage subsidy programs, such as the Section 221(d)(3) BMIR and 236 programs, are at 95 percent and 80 percent of AMI, respectively, and do not alone guarantee coverage. Arguably the rent levels, not just the income limits in the affordability restrictions, could determine coverage. A Section 236 project without a deep subsidy like Section 8, where the budget-based rents are below 30 percent of 50 percent of AMI, appears to satisfy the definition of "Assisted housing." In addition, projects financed with low-income housing tax credits often include some units affordable to tenants at 50 percent of AMI, so those units may be covered as well.

For these reasons, coverage of subsidized multifamily rental projects will vary. For example, in a development with a project-based Section 8 contract for half of the units and unsubsidized financing, if the owner seeks to demolish or change the use of the building, half of the units in the project must be replaced. If the same development had a Section 236-subsidized mortgage such that units without Section 8 had rents affordable to families below 50 percent of AMI, then all the units must be replaced. However, if the owner instead proposes to opt-out of the Section 8 Housing Assistance Payment (HAP) contract and prepay the Section 236 mortgage, then the coverage of the ordinance is uncertain. At issue is whether these actions constitute a "change in use or Affordability," given that the availability of replacement vouchers[13] preserves the units' affordability for the current residents, who continue to pay 30 percent of their income as rent. While it is debatable whether the conversion of assistance to vouchers triggers coverage, issuance of vouchers will eventually lead to a change in use or "Affordability" once the voucher-holder vacates the unit. Furthermore, where coverage is dependent on the residency of voucher-holders, the date that replacement units must be provided cannot be predicted. Accordingly, the Stamford Ordinance does not conclusively resolve situations where the form of assistance is converted from project-based to tenant-based assistance.

Conclusion

With the repeal of federal one-for-one replacement obligations and the advent of conversion threats across the subsidized housing stock, Stamford's local response may prove useful to other communities.[14] Both the experience of the organizing effort and the text of the ordinance could serve as models for similar efforts in other states or municipalities. ■

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[9] *Id.* § 7.

[10] *Id.* § 9-11.

[11] *Id.* at Preamble. Efforts to adopt state or local legislation affecting former federally subsidized units often encounter an allegation of federal preemption. Any such preemption claim would be difficult to sustain. *See Kenneth Arms Tenants' Association v. Martinez*, No. Civ. S-01-832 LKK/JFM (E.D.Ca. Order July 3, 2001)(preemption provision of federal preservation program (LIHPRHA) does not preempt state law regulating former federally subsidized projects) (the case is posted on the NHLP Web site at www.nhlp.org/html/pres/cases.cfm), *Commission on Human Rights & Opportunities v. Sullivan Assoc.*, 739 A.2d 238, 245 (Conn. 1999)(Connecticut Supreme Court rejected preemption challenge to state source of income discrimination law, which requires landlords to accept Section 8 vouchers).

[12] *Id.*

[13] Enhanced vouchers are available to tenants upon prepayment of a federally insured mortgage or the termination or expiration of a Section 8 contract, among other things. *See* Pub. L. 106-74, §531 revising Sec. 524(a) of the *Multifamily Assisted Housing Reform and Affordability Act of 1997* (MAHRAA), 42 U.S.C.A. §1437f(t)(2)(West Supp. 2001).

[14] Note that state law limitations on municipal power will affect the scope of local initiatives.

Protections for Military Renter Households Under the Soldiers' and Sailors' Civil Relief Act[1]

The terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001 have affected many Americans, including military personnel. The U.S. Department of Defense has authorized the activation of up to 50,000 National Guard and Reserve troops, many of whom are renters. This national service extends many benefits and burdens to soldiers. Specifically, reservists are protected from certain legal proceedings while serving on active duty under the *Soldiers' and Sailors' Civil Relief Act*.[2] The Act has been in place since 1940, but was amended and expanded in 1991 during the Persian Gulf War. The Act temporarily suspends legal proceedings and transactions that may prejudice the civil rights of persons called into active military duty.[3] Military personnel protected under the Act include all persons on active duty in the armed services, beginning upon induction and ending upon death or discharge. The following are the six major points that advocates should know about residents who are on active military service.

1. No Eviction From Primary Residence Where the Rent Is $1,200 or Less

A military person cannot be evicted during their period of active military service from any premises with an agreed-upon rent of $1,200 or less per month, where the premises are the primary dwelling for the wife,[4] children or other dependents of the military person.[5]

2. Owner Affidavit Required for Entry of Judgment

An owner seeking eviction at any time is required to submit an affidavit stating that the absent tenant is not a member of the armed services before a judgment can be filed and entered. It is not necessary, though, for the complainant to obtain certificates from the appropriate armed forces authorities stating that the named tenant is not in such armed services since the Act makes no such requirement. However, the owner's affidavit must state sufficient facts upon which a reasonably trustworthy conclusion that the tenant is not in the military service could be based, and such certificates from the armed forces stating that the named tenant is not in active military service would be prima facie evidence. Any person who knowingly submits a false affidavit under the penalty of perjury is guilty of a misdemeanor that is punishable by imprisonment not to exceed one year or by a fine not to exceed $1,000, or both.[6]

3. Legal Proceeding Are Only Suspended During Period of Active Military Service

Legal proceedings against military personnel on active duty are only suspended for the duration of the active military service and three months thereafter. No fine or penalty can accrue against the military person for not complying with the terms of any lease during the period the obligations under the lease are stayed by the Act. If a default judgment is entered against a military person on active duty away from home, that military person may apply to have such judgment reopened. The burden is on the military person to prove that he or she was actually in active military service at the time the judgment was taken and that he or she has a meritorious or legal defense which he or she was prevented from making because of his or her active military service. Additionally, if a tenant who is a military person protected under the Act does not personally appear or is not represented by an authorized attorney, the court may appoint an attorney to represent the military person and may require the owner to post a suitable bond to protect the absent military person.

4. Military Persons Must Be "Materially Affected" by Reason of Military Service

The Act protects only those military persons "materially affected by reason of [active] military service."[7] Thus, the Act does not protect those military persons whose service does not affect their ability to participate in otherwise protected proceedings.

Dependents of military personnel on active duty are entitled to the same benefits that the military person has under the Act upon such dependents' application to the court. However, a court can remove that protection if, in the opinion of the court, the ability of such dependents to comply with the terms of a lease obligation has not been materially impaired by the military person's active duty.[8]

5. The Act Applies Only to Contracts Made Before Military Service

The Act does not prevent an agreed-upon modification, termination or cancellation of any contract or lease pursuant to a written agreement with the military person executed during or after the period of active military service. Additionally, the Act does not prevent an owner's repossession

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[1]The original version of this article, which has been edited lightly and footnoted, was written by Richard Michael Price and Ray A. Johnson of the Washington, D.C., office of Nixon Peabody, LLP. The article first appeared in CARH News, a publication of the Council For Affordable And Rural Housing, under the title *Understanding The Soldiers' And Sailors' Civil Relief Act*. It is reprinted here with permission.

[2]50 U.S.C.A. App. §§ 501-591 (West 1990 and Supp. 2001).

[3]The Act extends to actions other than evictions (e.g. foreclosres). *See Id.* § 533.

[4]The Act specifies "wife." Presumably, if the military person is a woman, the spouse was be covered by the provision extending coverage to "other dependents of the military person."

[5]50 U.S.C.A § 530(a)(West 1990 and Supp 2001).

[6]*Id.* § 520.

[7]*Id.* § 530(b).

of property which has been received under a lease executed during or after the period of active military service. Consequently, the Act applies only to contracts entered into prior to active military service.

A tenant who has signed a lease prior to entering military service may terminate that lease by delivering written notice to the owner at any time after the military person's active military service period has begun.

6. A Military Person May Terminate the Lease During the Period of Active Military Service

A tenant who has signed a lease prior to entering military service may terminate that lease by delivering written notice to the owner at any time after the military person's active military service period has begun. Termination is effective on the last day of the month following the month in which the military person's notice is delivered to the owner. Any prepaid rent from the military person for the period after the effective termination date must be refunded.[9]

An owner may apply to a court for relief before the termination date. Any owner who knowingly seizes, holds, or detains the personal effects, clothing, furniture, or other personal property of any military person who has lawfully terminated a lease; or any owner who in any manner interferes with the removal of such personal property from the premises covered by such lease—for the purpose of subjecting any such personal property to a claim for rent accruing after the termination date may be fined $1,000 or imprisoned for a period not to exceed one year, or both.[10]

In sum, the Act makes evictions and lease terminations more complicated for owners and active military personnel. However, it allows military personnel to serve without the worry of eviction, and thereby promotes military service. ■

[8]*Id.* § 536.

[9]*Id.* § 534(2).

[10]*Id.* § 534(3).

Determining Housing Affordability Is a Crucial Responsibility for PHAs Administering Section 8 Homeownership Vouchers

Introduction

The Department of Housing and Urban Development's (HUD) Section 8 Homeownership Program affords Public Housing Authorities (PHAs) substantial discretion to design a program that meets the needs of their local community. PHAs must use this discretion wisely to implement a Section 8 homeownership program that complies with HUD regulations[1] while ensuring that the affordable housing needs of Section 8 homeowners are considered and preserved.

It is not uncommon for a PHA as well as low-income housing advocates to jump to the conclusion that the Section 8 homeownership option is not feasible in their program area. This may be due to the erroneous belief that financial institutions are not interested in making loans to low-income purchasers or due to a misunderstanding about the extent to which the Section 8 Housing Assistance Payment (HAP) can leverage the purchasing power of a low-income household. In fact, the Section 8 homeownership program is financially feasible for low and very low-income households in most jursidictions including those with extremely high housing costs. Indeed, the Section 8 homeownership voucher may be the only means by which very low-income families in these areas can achieve a stable home environment, build family assets and fulfill lifelong dreams of self-sufficiency and homeownership.

Designing a Section 8 Homeownership Program

When designing their local Section 8 homeownership program, PHAs must include policies and procedures that safeguard against the home-purchaser overextending himself or herself by assuming more mortgage, maintenance, repair or other housing costs than the family cannot legitimately afford. PHAs should also put in place a process that will ensure that each purchase and financing contract is reviewed to protect the Section 8 participant from falling prey to predatory lending and other abusive loan practices. Among others things, PHAs or their partners should help protect purchasers from:

[1]*See* 24 C.F.R. Part 982 (2001). For an in-depth discussion regarding the HUD regulatory requirements of the Section 8 Homeownership Program, *see HUD Issues Final Rule Implementing the Section 8 Homeownership Program*, 30 HOUS. L. BULL. 127 (Sept. 2000) *at* www.nhlp.org/html/sec8/sec8home/homeownership.htm.

- inflated or fraudulent appraisals and purchase prices;
- unreasonable and abusive loan terms and costs, including but not limited to exorbitant and unjustified interest rates, prepayment penalties, unnecessary insurance coverages, and excessive closing or other financing costs such as points and broker fees; and
- the steering of borrowers to certain lenders, mortgage brokers, real estate practitioners and/or title and escrow companies.

Without these protections, Section 8 homeownership voucher-holders who are unfamiliar with and unaccustomed to real estate practices are likely to fall prey to unscrupulous practitioners and practices that will increase the likelihood that participants will default on their loans, which will undermine the Section 8 Homeownership Program and ultimately lead to its failure.[2]

PHAs that are not familiar with homeownership programs and practices should seek assistance from housing counseling agencies and other local organizations in reviewing purchase and financing documents. However, it is imperative that PHAs also educate and familiarize their staff about the entire home purchase process, including how to identify and avoid potential problems and abuses that commonly victimize low-income home purchasers. Even if a PHA has delegated or contracted various functions, such as eligibility determinations, to other entities, it should not seek to avoid its ultimate responsibility for reviewing all the details of the home-purchase transaction. After all, the PHA has final authority to review and approve the details of the various agreements that the Section 8 participant is entering into and the PHA should take that role seriously by carefully and objectively reviewing all the documents that the purchaser executes.

HUD regulations require the Section 8 participant to participate in pre-purchase homeownership counseling as a prerequisite for participating in the Section 8 homeownership program.[3] PHAs should not assume that all counseling programs are adequate or that they will fully educate the participant about all the pitfalls of home financing and ownership. Accelerated counseling programs, for example, may not provide the depth of information that first-time home-purchasers require. Therefore, PHAs should familiarize themselves with the counseling programs that are available to their voucher-holders and assume responsibility for their quality by either seeking to modify them where necessary or by augmenting them with other programs or services. Again, it is the PHA that bears ultimate responsibility for approving the final eligibility requirements for each Section 8 participant and for the entire program within its jurisdiction.

In addition to protecting the participant from excessive or improper charges, it is equally important that the PHA ensure that the family is aware of and can afford the entire cost of homeownership. In determining the housing assistance payment for the homeownership voucher, the PHA is required to consider the entire homeownership expense that is to be assumed by the Section 8 participant.[4] Unlike the traditional rental program, the first-time Section 8 homeowner is not prohibited from paying more than 40 percent of its income toward his or her total homeownership costs. As a result, the PHA has complete discretion in limiting the percentage of the participant's income that may be paid for homeownership expenses. While the underwriting requirements of lenders participating in the Section 8 homeownership program are likely to limit the total housing costs for qualifying families, PHAs should establish their own standards and in instances where the PHAs do not, advocates should encourage them to do so.[5] It is important that PHAs calculate the financing costs as well as all the other actual housing costs to ensure that the home purchase is initially, and will remain, affordable for the family.

It is important that the PHA ensure that the family is aware of and can afford the entire cost of homeownership.

The homeownership expenses to be considered by the PHA are specified in the HUD regulations[6] and are equally applicable to homeowners and cooperative and condominium owners. They include mortgage debt (principal and interest), taxes and homeowner's insurance, as well as any premium for mortgage insurance or public assessment costs. Homeownership expenses may also include condominium or cooperative homeowners' association fees and the cost of financing to make a home accessible for a family member with a disability.

The costs of utilities, maintenance, and major repairs and replacements (including the principal and interest paid to finance repair, replacement or improvement costs on the home) are also important homeownership expenses that must be considered in determining the affordability of the purchase. The PHA may use the allowance schedule traditionally used

[2]NHLP will be providing an in-depth teleconference addressing these and other protections in early Spring 2002. For more information, check in periodically to the NHLP Web site *at* www.nhlp.org.

[3]24 C.F.R. § 982.630 (2001).

[4]*Id.* § 982.635(a).

[5]While some PHAs opt to leave this qualification to the participating lender, a better practice would be for the PHA to establish a uniform standard in determining this initial affordability standard. For example, the Montgomery County Housing Authority in Pennsylvania will not approve a home purchase in its program where the Section 8 participant will be paying more than 50 percent of her annual adjusted income toward homeownership expenses.

[6]*See* 24 C.F.R. § 982.635(b)(2001).

in its Section 8 rental program to determine the cost of utilities. The other costs must be estimated, but efforts should be made to set them as close as possible to the actual costs to be incurred by the family, taking into account the circumstances of each specific purchase.[7] For example, the PHA should consider the age of the home, since older homes typically require more repair. In addition, maintenance costs for condominium or cooperative units may be provided through a homeowners' association and the costs included in the monthly dues. In these cases, the PHA must consider the homeowners' dues in computing the family's homeownership costs. Obviously, in these cases the actual cost of maintenance and repair should be less. The individual circumstances of the homebuyer should also be considered—a disabled homeowner may incur more monthly maintenance costs than other homeowners because her disability may prevent her from performing maintenance tasks that most homeowners ordinarily perform.

Maintenance, repairs and replacement costs should take into consideration the cost of repainting the house, replacing the roof and other systems, such as electrical, plumbing, heating and air conditioning, as well as appliances, such as washers, dryers, refrigerators and stoves. The replacement costs should be amortized over the expected life of each item and the monthly amortization costs included in the participant's overall monthly housing costs.[8] Given the substantial cost of owning a home, it is likely that, without consideration of these allowances and actual expenses, lower-income families may not be able to afford to maintain and keep their homes.

Conclusion

PHA should adopt, or be encouraged to adopt, policies and procedures in their Administrative Plans that effectively will protect homeownership voucher participants. At a minimum, PHAs should determine the affordability of each proposed home purchase, routinely investigate participating lender qualifications, and scrutinize the contract-of- sale, financing instruments and other closing papers for abusive terms, conditions and charges. Aggressive PHA review policies and practices will discourage rapacious acts by unscrupulous participants in the home purchase and lending industries while, at the same time, help ensure that Section 8 voucher participants become and remain successful homeowners. Whenever PHAs do not initiate these practices on their own, low-income housing advocates should become involved in the process of drafting local Section 8 homeownership programs and ensure that these policies become included in the program. ■

[7]For an example of a standard schedule of homeownership expenses serving a local area, see the *Section 8 Homeownership Program - Benicia (California) Housing Authority* packet of materials *available at* www.nhlp.org.

[8]*See* Letter to Melinda Pacis, Vallejo Housing Authority from NHLP, detailing how to determine and amortize actual costs and the replacement value of household items in a Section 8 homeownership purchase (May 3, 2001)(on file at NHLP).

Domestic Abuse Victim Settles Discriminatory Eviction Claim Favorably

Introduction

In an important victory for victims of domestic violence, a property management company has agreed to stop applying its "zero-tolerance" policy to innocent victims of domestic violence in the five western states where it owns or operates housing facilities (Arizona, California, Hawaii, Nevada and Oregon). The agreement was made as part of a consent decree entered in *Alvera v. The C.B.M. Group, Inc.,* Civil No. 01-857-PA (D. Or., October 2001), a suit initiated by the federal government under the *Fair Housing Act* against the owners of the Creekside Village Apartments, located in Seaside, Oregon, for evicting an innocent victim of domestic violence and refusing to rent her another unit after she forced her abusive husband to vacate their apartment.[1]

The case originated out of an August 2, 1999 domestic violence incident, when Ms. Alvera's then-husband physically assaulted her in their two-bedroom apartment at Creekside Village, a 40-unit building financed and subsidized by the Rural Housing Service (RHS) (formerly Farmers Home Administration (FmHA)), an agency within the Department of Agriculture's Rural Development division. No incidents of violence had been reported at the Alvera residence nor were any complaints filed prior to August 2, 1999.

On the day of the assault, Ms. Alvera went to the hospital for treatment, obtained a temporary restraining order, and had her then husband, Mr. Mota, arrested. The restraining order required Mr. Mota to vacate the residence and refrain from all contact with Ms. Alvera. Also, on the same day, she provided a copy of the restraining order to her apartment manager. Two days later, she received a 24-hour notice to vacate her apartment from the manager of Creekside pursuant to the owners' zero-tolerance policy against violence. The notice to Ms. Alvera stated that she was being evicted because "You, someone in your control, or your pet, has seriously threatened immediately to inflict personal injury, or has inflicted personal injury upon the landlord or other tenants." The notice then cited the August 2, 1999 incident as the sole cause for the termination of her tenancy, with no acknowledgment that Ms. Alvera had been the innocent victim of the inflicted personal injury.

The day she received the eviction notice, Ms. Alvera applied for a smaller, vacant, one-bedroom apartment at Creekside. That application was denied one week later. Because the owner had not commenced an action to evict Ms. Alvera, she continued to live in the two-bedroom unit at Creekside even though her tenancy was terminated and her

[1]A press release about the case and links to the complaint and consent decree are available *at* www.nowldef.org/html/issues/vio/housing.htm.

tender of rent was refused on two separate occasions. Two months later, she applied for the one-bedroom again, and on October 26, 1999, she was offered and signed a new lease agreement for that unit. That new lease agreement was accompanied by a letter from management warning her that she would be evicted if another incident like that of August 2 occurred.

The consent decree is a significant acknowledgment that evicting or otherwise interfering with the tenancies of victims of domestic violence on the basis that they are victims is an unacceptable practice which is discriminatory against women and flies in the face of fair housing laws.

Ms. Alvera filed a discrimination complaint with the Department of Housing and Urban Development's (HUD) office of Fair Housing and Equal Opportunity (FHEO) regarding her treatment by C.B.M., the property's owners. After conducting an investigation, FHEO issued a Charge of Discrimination against the owners. In that charge, FHEO noted that women are approximately eight times more likely than men to be victims of domestic violence and that, nationally, 90 to 95 percent of victims of domestic violence are women. It concluded that C.B.M.'s "no tolerance" policy, which was the basis for her eviction, and its refusal to rent her a new apartment, had an adverse impact based on sex, that it was not justified by business necessity and that it violated the *Fair Housing Act*.[2]

The Suit and the Consent Decree

When reconciliation attempts failed, Ms. Alvera elected to resolve her claim through a federal civil action. The Department of Justice (DOJ) filed the case against the owners and Ms. Alvera joined the case on her own behalf, represented by attorneys from Legal Aid Services of Oregon, Oregon Law Center, NOW Legal Defense & Education Fund, and the American Civil Liberties Union. Ms. Alvera sued for an injunction, compensatory damages, punitive damages and attorney's fees. Her discrimination claim was predicated on the allegation that, since victims of domestic violence disproportionately are women, the "zero-tolerance" policy discriminated against her because of her gender and thus violated the *Fair Housing Act*.[3] She also relied on Rural Development regulations that are intended to prevent the eviction of innocent members of a household where illegal or violent activity has taken place[4] and Oregon state law for her other claims for relief.[5]

The Consent Decree, which was entered into approximately four months after the suit was filed, provides Ms. Alvera an undisclosed amount of compensatory damages and, for five years, enjoins Creekside's owners from taking any action leading to the eviction of any person on the basis that such person has been the victim of violence initiated by another person, whether or not the initiating person resides in the tenant's household. It also enjoins the owners from discriminating in any way in the terms, conditions or privileges of a tenancy on the basis that the tenant has been the victim of violence, including domestic violence. Additionally, the Consent Decree requires C.B.M. to notify all of its management-level employees within 30 days that C.B.M.'s policy has changed regarding victims of domestic violence and that no adverse action may be taken against them based on the fact that they have been victims of violence. Within that same 30 days, C.B.M. must review and revise all of its manuals, handbooks and other documents, and post notices of the policy change in each residential rental property it manages. The defendants and all other employees of Creekside Village must also attend a training regarding their responsibilities under federal, state and local fair housing laws, regulations and ordinances within 180 days of the Consent Decree. Finally, C.B.M. is required to maintain all documents pertaining to any eviction of any tenant, at any of its properties, for any reason other than nonpayment of rent.

Conclusion

While the consent decree is a significant acknowledgment that evicting or otherwise interfering with the tenancies of victims of domestic violence on the basis that they are victims is an unacceptable practice which is discriminatory against women and flies in the face of fair housing laws, the FHEO Charge of Discrimination should prove to be a more powerful weapon in similar future cases. Unlike lower court decisions that generally serve only as persuasive authority, the FHEO determination can be used in any court[6] as evidence that disparate impact on women in a domestic violence situation is a viable theory of discrimination because HUD, which is statutorily charged with enforcing the *Fair Housing Act*, has determined the owners' policy to be discriminatory.

We commend Ms. Alvera for her courage and her attorneys for their hard work in this matter. Additionally, Ellen Johnson of Legal Services of Oregon would like to publicly thank the advocates in the Housing Justice Network for their invaluable support and advice throughout the case. ■

[2]Specifically, the FHEO found the owners to be in violation of 42 U.S.C. § 3604(a), 24 C.F.R. §§ 100.50(b)(1), (b)(3), 100.60(a) - (b)(2) and (b)(5)(2001).

[3]42 U.S.C. §§ 3604(a) and (b).

[4]7 C.F.R. part 1930, Exhibit B to subpart C, Ch. XIV(A)(2)(c)(3)(2001).

[5]O.R.S. 659.033(1) and (2).

[6]See, *Chevron U.S.A. v. Natural Resources Defenses Council, Inc.*, 467 U.S. 837 (1984)(where the meaning of a statute is ambiguous and Congress' intent is unclear, courts must defer to the relevant administrative agencies' interpretations of the statutes).

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.

Burton v. Tampa Housing Authority, 271 F.3d 1274, (11th Cir. 2001). The Court of Appeals for the Eleventh Circuit refused to enjoin the eviction, pursuant to the Department of Housing and Urban Development's (HUD) "one-strike" policy, of Ms. Burton, a 16-year resident of public housing whose adult son, a member of the household, committed a drug-related crime on housing authority property. It was undisputed that Ms. Burton knew nothing of the alleged criminal activity and that it did not occur in her unit. The Tampa Housing Authority (Florida) sought to evict Ms. Burton pursuant to a lease provision, mandated by 42 U.S.C. § 1437d(l)(6), which permits termination of a tenancy when "a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control" engages in "drug-related activity on or near public housing premises." Ms. Burton commenced an action in federal court seeking to enjoin the eviction contending that an "innocent party" defense should be read into the statute and that, as applied, the statute violates the due process clause and her First Amendment free association rights. The district court, ruling on the housing authority and HUD's motion for summary judgment, ruled against Ms. Burton on all grounds.

The Eleventh Circuit affirmed, rejecting all of Ms. Burton's arguments. In doing so, the court cited favorably the dissenting opinion in *Rucker v. Davis*, 237 F.3d 1113, 1127 (9th Cir. 2001) (en banc), *cert. granted*, ___ U.S. ___, 122 S. Ct. 24, (2001); ___ U.S. ___, 122 S. Ct. 338 (2001) (consolidated), a case in which the Ninth Circuit upheld, on statutory grounds, an injunction against the Oakland Housing Authority's effort to evict four innocent residents under HUD's "one-strike" policy. Unlike the Ninth Circuit, the Eleventh Circuit found the language of the statute to be "unmistakably clear" in permitting the eviction of tenants for the illegal activity of others, even when the tenant had no knowledge of the activity. Moreover, it found HUD's interpretation of the statute reasonable in light of the goal of providing safe housing for its residents. It thus concluded that there was no need to further construe the statute. Nonetheless, it buttressed its conclusion with some statutory analysis. First, it pointed to another section of the "one-strike" legislation that provides that tenants who are evicted from public housing due to a drug-related criminal offense are not to be given a preference on the waiting list for the next three years except if the tenant was clearly innocent of any wrongdoing. Based on that provision, the court reasoned that Congress intended for "innocent" tenants to be evicted under the "one-strike" law; otherwise the waiver of the three-year ban would have no meaning. Second, the court found support for its conclusion in a civil forfeiture statute, 21 U.S.C. § 881(a)(7), which makes leasehold interests subject to forfeiture when used to commit drug-related crimes. That statute specifically includes a knowledge requirement. Thus, the court concluded, Congress had shown its ability to create an "innocent" tenant exception when it intended to adopt one. Further, the court noted that Congress had specifically considered the eviction of innocent tenants but made no exception for them either when it originally passed the "one-strike" provision or when it expanded its coverage from activities on or near the premises to all activity "on or off" the property.

The court also found significant that the statute does not mandate the eviction of innocent tenants but instead permits the housing authority to use its discretion in deciding whether or not to evict such tenants. Additionally, it credited HUD's argument that housing authorities would be greatly hindered in their ability to evict tenants if they were required to prove knowledge and control. It reasoned that such a standard would force housing authorities to rely on "hearsay, gossip, and rumor" as evidence. Lastly it took cognizance of and gave weight to the fact that a provision permitting the eviction of innocent tenants because of the wrongdoing of their household members or guests is a common and enforceable provision in private leases.

As to Ms. Burton's due process claims, the court noted that the Constitution does not require the government to provide decent and safe housing to its citizens. Therefore, the government could place reasonable conditions on the extension of housing benefits. Finding the "one-strike" rule to be reasonably calculated to eliminate drugs and violence from public housing, the court rejected Ms. Burton's due process argument. Finally, the court held that the statutes placed no burden on Ms. Burton's right of free association with her son. The statute need only be rationally related to Congress' legitimate objectives. Finding that it was so related, the court rejected Ms. Burton's First Amendment claim and affirmed the lower court's granting of defendant HUD's motion for summary judgment.[4]

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[1]www.westlaw.com

[2]www.lexis.com

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

[4]The United States Supreme Court will address the issues presented in this when it reviews *Rucker v. Davis*, 237 F.3d 1113, 1127 (9th Cir. 2001) (en banc), *cert. granted*, ___ U.S. ___, 122 S. Ct. 24, ___ L. Ed. 2d ___ (2001); ___ U.S. ___, 122 S. Ct. 338, ___ L. Ed. 2d ___ (2001) (consolidated). For a detailed discussion of *Rucker*, *see En Banc 9th Circuit Rules that "One-Strike" Law Does Not Permit Eviction of "Innocent" Tenants,* 31 HOUS. L. BULL. 29 (Feb. 2001).

Banks v. Dallas Housing Authority, 271 F.3d 605 (5th Cir. 2001). The Court of Appeals for the Fifth Circuit affirmed the district court's judgment that, as a matter of law, African-American tenants of a Section 8 Moderate Rehabilitation project do not have a Section 1983 or an implied private cause of action against a project owner or the Dallas Housing Authority (DHA), which channeled the HUD subsidies to the owner, for the project owner's alleged violations of Section 8 Housing Quality Standards (HQS). At a jury trial, the jury awarded the tenants modest damages against DHA for the diminished rental value of their units due to the housing code violations. It also concluded that the owners had purposefully operated the apartments in violations of the *Housing Act*, but awarded no damages under that theory. After trial, the judge granted the owners' renewed motion for judgment as a matter of law, concluding that violations of the *Housing Act* (42 U.S.C. § 1437f(e)) are not actionable under 42 U.S.C. § 1983 and that Section 1437f(e), establishing the HQS, does not provide tenants a private right of action.

In upholding the decision, the Fifth Circuit reasoned that Section 1437f(e) imposed a condition on owners to maintain the property in decent, safe and sanitary condition in order to receive government benefits. The benefits to the tenants, the court found, were only "indirect and attenuated." Thus, the court concluded that Congress did not intend Section 1437f(e) to create a right enforceable through Section 1983. Similarly, it reasoned that Section 1437f(e) was intended to govern the relationship between owners and the federal government, rather than that between owners and their tenants. Thus, the court also rejected the idea that the *Housing Act* conferred upon the tenants a private right of action. The court thus affirmed the district court's ruling.

In the Matter of the Application for a Rental Increase at Zion Towers Apartments (HMFA #2), 2001 WL 1,317,718 (N.J. Super. A.D., October 29, 2001). The Superior Court of New Jersey, appellate division, dismissed on jurisdictional grounds the appeal of a tenant's challenge to a recommendation by the New Jersey Housing and Mortgage Finance Agency (HMFA) to increase project-wide rents in the tenant's Section 236 project. HUD delegated administrative responsibility for the project, Zion Towers, to HMFA, which also holds the project's mortgage. The owners of the project requested a 2 percent rent increase from HMFA, which reviewed the request, and consistent with its authority, recommended that HUD approve it. HMFA then forwarded the request to HUD which gave it final approval. After notices of the rent increase were given to the tenants, the plaintiff appealed HMFA's decision to the Appellate Division of the New Jersey Superior Court on the grounds that it was arbitrary. The court declined to review the appeal on the grounds that HMFA's recommendation to HUD of the rent increase was not a final agency action and therefore not reviewable. Moreover, the court noted that because HUD had final authority over the rent increase, the decision to approve the rent increase is a federal decision that is appropriately reviewable by a federal court and not by a state court. The court thus dismissed the appeal.

City Line Joint Venture v. United States, 48 Fed. Cl. 837 (2001). The Court of Federal Claims held that HUD did not breach its mortgage contract with the plaintiff/owner of a Section 221(d)(3) project when, in accordance with the *Low-Income Housing Preservation and Resident Homeownership Act of 1990* (LIHPRHA), it refused to allow the plaintiff to prepay its mortgage. The mortgage instrument bound the plaintiff to maintain affordability restrictions on the property for the 40-year term of the mortgage. However, HUD regulations in effect at the time the plaintiffs entered into the mortgage agreement provided that the owners could prepay their mortgage after 20 years without HUD approval. Subsequently, Congress enacted first the *Emergency Low Income Housing Preservation Act of 1987* (ELIHPA) and LIHPRHA, which conditioned prepayment of Section 221 loans on HUD approval. After HUD denied the owners permission to prepay in accordance with the statutes, the owners sued for breach of contract. The Court of Federal Claims held that HUD could successfully defend against this claim by invoking the "impossibility defense" because subsequent government action—LIHPRHA—made it impracticable for HUD to fulfill its contract duties. In doing so, the court rejected the plaintiff's argument that LIHPRHA was intended to relieve the government of its own contractual obligations and thus precluded the government from raising the impossibility defense in a breach of contract action. It concluded that LIHPRHA is properly characterized as a public and general act that would have as much impact on privately held mortgages as it would on HUD-held mortgages. It thus denied the plaintiff's motion for partial summary judgment and granted the defendant's motion for partial summary judgment.

Benavides v. Housing Authority of the City of San Antonio, Texas, 238 F.3d 667 (5th Cir. 2001). The Court of Appeals dismissed as moot the complaint of former residents of a public housing development who sought a temporary restraining order (TRO) and a preliminary injunction to prevent the demolition of a public housing project. The district court had dismissed the complaint on the ground that the plaintiff had no substantial likelihood of success on the merits of their claim that the defendant had violated provisions of the *National Historic Preservation Act*. Plaintiffs had not sought a stay pending appeal and, by the time of the court of appeals rendered its opinion, more than 55 percent of the units had been demolished. The appeals court held that the complaint was moot because the plaintiffs had been voluntarily relocated and most apartments already demolished. Moreover, the court found that the injury to the plaintiffs was not of the type that was "capable of repetition yet evading review" because there was no demonstration that the particular plaintiffs were under any threat of being subject to a similar relocation at a later date. It thus dismissed the appeal.

Community Stabilization Project v. Cuomo, 199 F.R.D. 327 (D. Minn. 2001). The district court granted defendants' motion to dismiss a suit by a nonprofit organization dedicated

to fostering affordable rental housing for people of color that sought to prevent the sale and demolition of a Section 221(d)(3) rental development on the ground that the demolition of the property would disproportionally deprive persons of color of affordable housing in violation of the *Fair Housing Act*. The plaintiffs alleged that HUD should have prevented the demolition by extending the use restrictions on the property from 20 years to 40 at the time HUD sold the mortgage for the property to another lender.

The private owners of the property contracted to sell the 11-unit apartment project to the City of St. Paul, Minn., well after the expiration of the 20-year period during which HUD approval for the sale was required by the project's regulatory agreement. The City of St. Paul, which planned to use the real estate for the expansion of a recreation center, provided all of the project residents with moving expenses and relocation subsidies. In addition to the *Fair Housing Act* claim, the plaintiff, Community Stabilization Project (CSP), claimed that HUD should have prevented the owners from prepaying the mortgage. The court found that in order for CSP to show it had standing to sue in its own behalf under Article III of the United States Constitution, it must demonstrate injury in fact, causation, and redressability. The court held that CSP failed to show how it would be injured by the sale and demolition of the property in as much as it had not suffered any direct harm from the prepayment and demolition. The court also rejected, on two grounds, CSP's argument that it had associational standing. First, it concluded that none of the members of CSP would have standing to sue on their own because, having received moving expenses and subsidies, they had not suffered injury in fact. Second, the associational standing requirement that individual members' presence was not necessary to the suit was not met because, to prevail, individual members would have had to testify to their specific injuries. Thus, CSP could not sustain standing based purely on its associational status.

The court also ruled that CSP's complaint failed to state a claim upon which relief could be granted even if it had standing. It held that the *Housing and Community Development Act of 1987*, which provides that no mortgage sale should result in any subsidized project operating on terms less favorable to the existing and future tenants than it did prior to the sale, did not give HUD authority to alter the prepayment rights of the owner when HUD sold the project's mortgage to another lender. Hence, the court found there was no basis for CSP's claim that HUD should have restricted the owner's prepayment rights at the time of the mortgage sale. Thus, the court granted the defendants' motion to dismiss the suit.

SCHS Associates v. Cuomo, 139 F. Supp. 2d 238 (D. R.I. 2001). The court denied the parties' cross motions for summary judgment in a case brought by the owners of a Section 8 Substantial Rehabilitation project, challenging HUD's unilateral lowering of the Section 8 contract rents for the project after having approved a change in the rent-setting methodology from a rent adjustment formula using an annual adjustment factor to a budget-based rent calculation method. The owners alleged that the change violated Section 142(d) of the *Housing and Community Development Act of 1987* (CDA), which precludes HUD from unilaterally reducing contract rents, and the *Administrative Procedures Act* (APA).

In 1984, the owners had entered into a Housing Assistance Payment contract with the Providence Housing Authority and a Regulatory Agreement with HUD. Pursuant to these contracts, base rent for units was calculated then raised each year through an annual adjustment factor that established the maximum rent amounts the owners could receive. After 10 years, an officer of the state's HUD office requested HUD Headquarters to convert the method of adjusting rents to a budget-based system, at least in part because the property was extremely expensive to operate. This request was granted by memorandum from HUD's Director of the Office of Multifamily Housing Management, and the rents calculation method was thus changed. However, in 1997 HUD approved only a greatly reduced budget for the property and hence a reduction in the contract rents. The owners sued, alleging that the DCA precluded HUD from reducing contract rents for substantial rehabilitation properties. The owners sought and received a preliminary injunction preventing the rent reduction.

HUD argued that the original conversion to a budget-based system was not authorized by the statute and regulations applicable to Section 8 Substantial Rehabilitation projects and that the only way it could have been authorized is if a HUD official with authority granted a waiver of the regulations. It argued that the official who approved the conversion was not authorized to grant a waiver and thus contended that the CDA was not a bar to its unilaterally lowering of the contract rent. The owner, in response, argued that even if the initial conversion was illegal it was subsequently ratified by the appropriate HUD officials, a matter which HUD disputed. The court agreed with HUD that the CDA was not a bar to a unilateral reduction of an illegally approved rent change. However, it also concluded that the issue of whether the illegal rent change was subsequently ratified by a HUD official with proper authority was a disputed factual issue that could not be resolved on a motion for summary judgment. The court therefore denied both parties' motions.

In a related matter, the court dismissed as premature the owner's second complaint against HUD seeking declaratory relief that its expenditure of project funds to pay attorneys for their work in securing the injunction against HUD's lowering of the contract rent was a proper project expense. The court held that there had been no final government action on the issue and no hardship to the plaintiffs had been shown since they had transferred, without apparent penalty, $200,000 from the operating fund to their attorneys. The only action HUD had taken—the issuance of a letter stating that such fees were not appropriately considered project operating costs—did not constitute final agency action. The court thus granted HUD's motion to dismiss the complaint. ■

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 November 16, 2001. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

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

HUD Regulations

66 Fed. Reg. 50,004 (October 1, 2001)
Revisions to SEMAP Lease-Up Indicator; Interim Rule

Summary: This interim rule revises the way HUD measures and verifies performance under the lease-up indicator for the Section 8 Management Assessment Program (SEMAP). Specifically, the interim rule revises the lease-up standard to measure the number of units leased against the number of units reserved and under the Annual Contributions Contract (ACC), instead of against the number of units budgeted. This revised standard is consistent with the established HUD policy on voucher renewals and unit allocations as formulated during negotiated rulemaking pursuant to the *Quality Housing and Work Responsibility Act of 1998* (QHWRA). In addition, this interim rule also revises the SEMAP regulations to provide for automated signature of the required SEMAP certification.

Effective Date: October 31, 2001.

Comments Due Date: November 30, 2001.

66 Fed. Reg. 50,024 (October 1, 2001)
Fair Market Rents for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program—Fiscal Year 2002; Final Rule

Summary: Section 8(c)(1) of the *United States Housing Act of 1937* requires the Secretary to publish Fair Market Rents (FMRs) annually to be effective on October 1 of each year. FMRs are used for the Housing Choice Voucher program, the Moderate Rehabilitation Single Room Occupancy program, the project-based voucher program, and any other programs requiring their use. This notice provides final Fiscal Year (FY) 2002 FMRs for all areas that reflect the estimated 40th and 50th percentile rent levels trended to April 1, 2002.

Effective Date: October 1, 2001.

66 Fed. Reg. 52,675 (October 17, 2001)
Designation of Forty Renewal Communities; Technical Correction

Summary: On July 9, 2001, HUD published an interim rule to govern the designation of Renewal Communities nominated by state and local governments. This document corrects an error in the interim rule by removing arson from the list of offenses counted in determining the Crime Index and the Local Crime Index.

Effective Date: August 8, 2001.

HUD Federal Register Notices

In accordance with the *HUD Reform Act of 1989*, HUD published the names and addresses of various organizations that received funding awards under several HUD programs. A list of the programs for which announcements were published and the *Federal Register* cite for those announcements follows:

66 Fed. Reg. 56,695 (November 9, 2001)
Announcement of Funding Awards Fair Housing Initiatives Program Fiscal Years 1998, 1999, 2000

66 Fed. Reg. 55,691 (November 2, 2001)
Announcement of Funding Awards—Fiscal Year 2001, Office of Troubled Agency Recovery Cooperative Agreements

66 Fed. Reg. 53,241 (October 19, 2001)
Announcement of Funding Awards for Fiscal Year 2001 Community Outreach Partnership Centers

66 Fed. Reg. 52,242 (October 19, 2001)
Announcement of Funding Awards for the Indian Housing Drug Elimination Program for Fiscal Year 2001

66 Fed. Reg. 53,244 (October 19, 2001)
Announcement of Funding Awards for Fiscal Year 2001 Tribal Colleges and Universities Program

66 Fed. Reg. 56,398 (November 7, 2001)
Notice of Regulatory Waiver Requests Granted for the Second Quarter of Calendar Year 2001

Summary: Section 106 of the *HUD Reform Act of 1989* 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 April 1, 2001 and ending on June 30, 2001.

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

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

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

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

66 Fed. Reg. 56,334 (November 7, 2001)
The Performance Review Board

***Summary*:** HUD announced the appointments of Alphonso Jackson, Frank L. Davis, Marcella E. Belt, Paula O. Blunt, Nelson R. Bregon, Kathleen D. Koch, Floyd O. May, Michael J. Najjum Jr., Lawrence L. Thompson, Margaret E. White, and Margaret Young as members; and Sam E. Hutchinson and Pamela H. Patenaude as alternate members to the Departmental Performance Review Board.

66 Fed. Reg. 50,007 (October 1, 2001)
Tenant-Based Section 8 Program: Procedures for Determining Baseline Unit Allocations, Verifying Unit Allocations, Accessing, Using, Restoration of and Recapture of Program Reserves and Transfers of Baseline Unit Allocations; Amendment

Summary: On October 21, 1999, HUD published its final rule specifying the method it will use in allocating housing assistance available to renew expiring contracts with public housing agencies (PHAs) for Section 8 tenant-based housing assistance. As required by statute, the final rule was developed using negotiated rulemaking procedures. On April 19, 2000, HUD published a *Federal Register* notice, also developed during the negotiated rulemaking process, which provides guidance on several topics relating to the October 21, 1999 final rule, including the procedures for verifying unit allocations; the accessing, using, restoration of and recapture of program reserves in the Annual Contributions Contract (ACC) Reserve Account; and the transfer of baseline unit allocations. This notice amends the procedures described in the April 19, 2000 notice regarding the annual year-end assessment of a PHA's leasing rate and the use of budget authority to determine whether HUD should transfer unexpended budget authority to other PHAs.

HUD Notices

Notice PIH 2001-35 (HA) (October 10, 2001)
Technical Corrections to PIH Notice 2001-29, Fiscal Year 2001 Financial Management Requirements for Section 8 Moderate Rehabilitation (Mod Rehab) Housing Assistance Payments (HAP) Contract Expirations

Summary: This notice provides technical corrections to PIH Notice 2001-29.

Expires: December 31, 2002.

Notice PIH 2001-37 (HA) (October 29, 2001)
Extension - Notice PIH 2000-50 (HA), Resources Available to Assist Public Housing Agencies Promote Energy Conservation

Summary: This notice extends Notice PIH 2000-50 (HA), of the same subject, which expires November 30, 2001, for another year until October 31, 2002.

Notice PIH 2001-38 (HA) (November 1, 2001)
Reinstatement of Notice PIH 99-19 (HA), Demolition/ Disposition Processing Requirements under the New Law and Extension Notice PIH 2000-16 (HA)

Summary: This notice reinstates Notice PIH 99-19 (HA) which was extended by Notice PIH 2000-16 (HA) dated April 18, 2000. Notice PIH 2000-16 (HA) expired April 30, 2001. Notices PIH 99-19 (HA) and 2000-16 (HA) will expire October 31, 2002.

Notice H 2001-10 (HUD) (October 30, 2001)
Cost Not Attributable to Dwelling Use and Site Not Attributable to Dwelling Use in Underwriting FHA Multifamily Mortgages

Summary: HUD has revised the definitions of cost and site not attributable to dwelling use and set standards for field office approval. These revisions apply to all FHA multifamily mortgage insurance programs for new construction or substantial rehabilitation and have already been published in the Multifamily Accelerated Processing (MAP) Guide.

Expires: October 31, 2002.

Notice PIH 2001-39 (ONAP) (November 13, 2001)
Extension - Notice PIH 2000-44 (ONAP), Line of Credit Control System for the Indian Housing Block Grant Program and updates for Form HUD-272-I and Form HUD-27054

Summary: This notice extends Notice PIH 2000-44 (ONAP), on the same subject, which expired September 30, 2001, for another year until October 31, 2002.

Expires: October 31, 2002.

RHS Notices

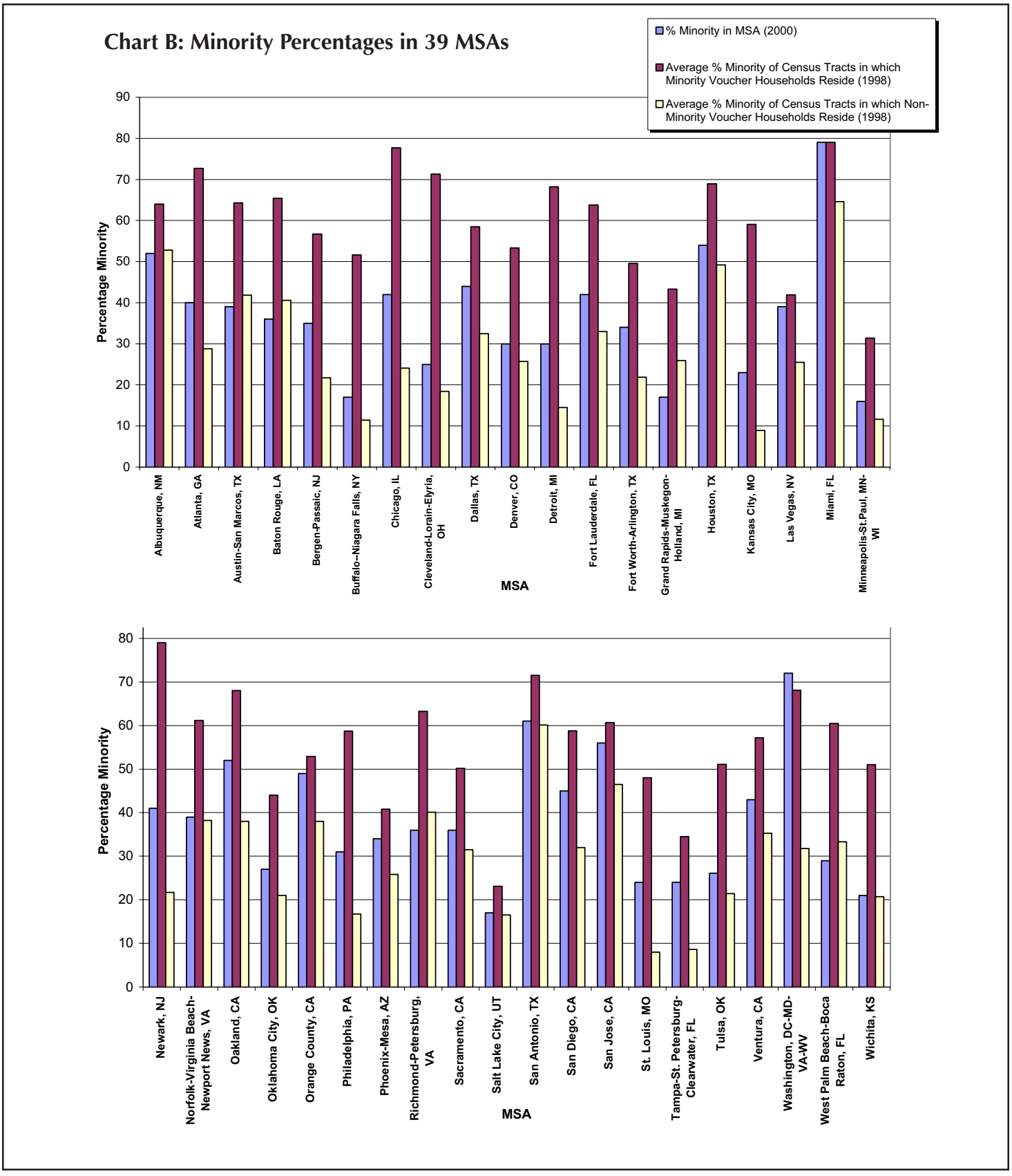
RD AN No. 3682 (1944-E) (November 14, 2001)
Processing Section 515 Loan Requests Project Designations and Bedroom Mix

Summary: The purpose of this Administrative Notice (AN) is to provide guidance and to clarify RD Instruction 1944-E as it pertains to the processing of section 515 loan requests.

Expires: September 30, 2002. ■

Errata

In the October issue of the Bulletin, there was an error in the charts on page 228. The top line of data in the key was not included. The charts are presented here in their entirety. NHLP regrets the error.



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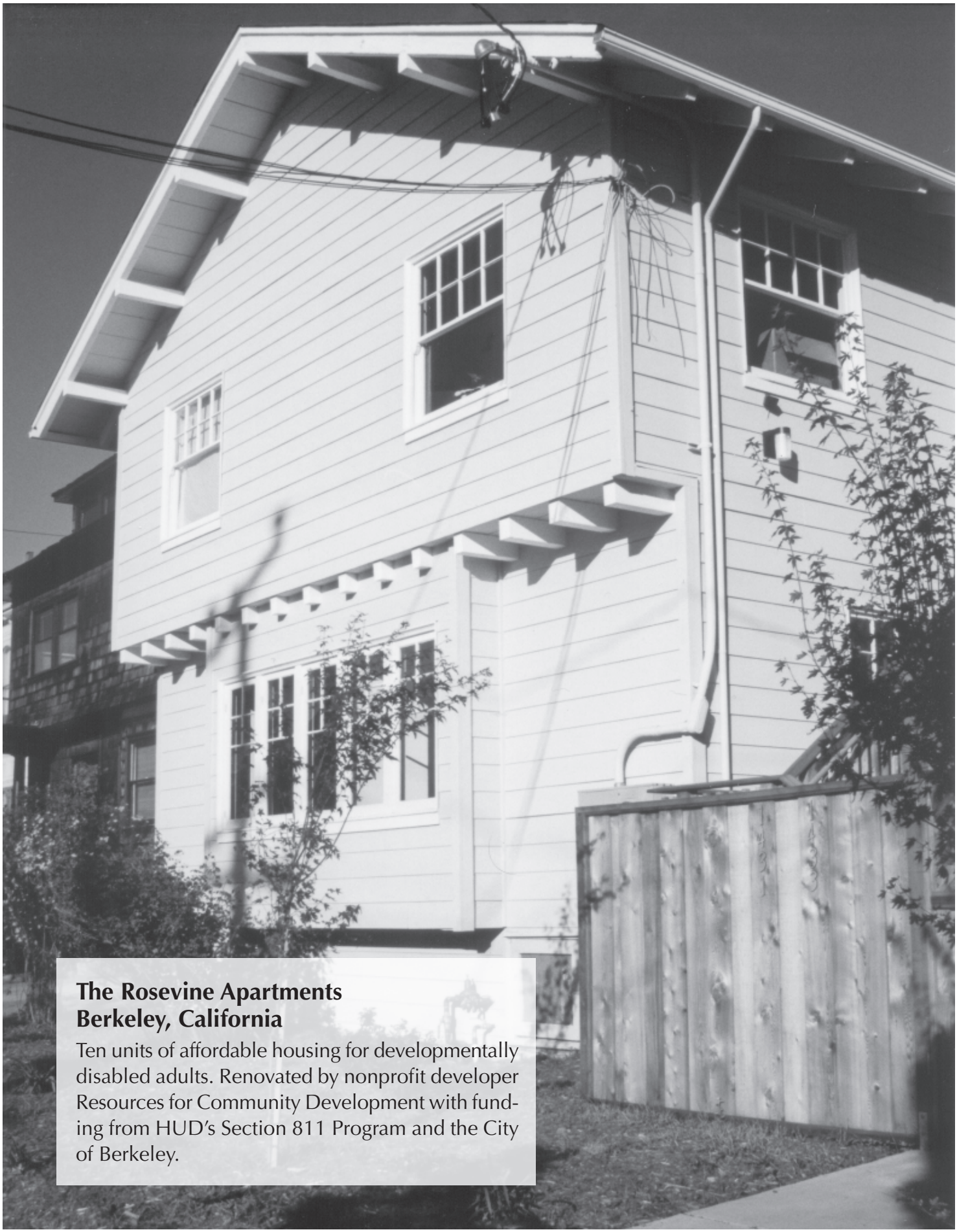

The Rosevine Apartments
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Ten units of affordable housing for developmentally disabled adults. Renovated by nonprofit developer Resources for Community Development with funding from HUD's Section 811 Program and the City of Berkeley.

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