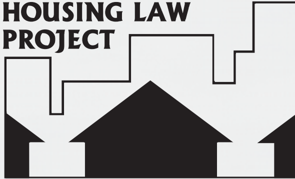

Housing Law Bulletin

Volume 37 • November-December 2007

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Early Efforts to Implement VAWA —*see page 193*

National Affordable Housing Trust Fund Bill Passes House —*see page 196*

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Cover: Simpson-Saticoy senior public housing development located in North Hollywood, California. The development is owned and operated by The Housing Authority of the City of Los Angeles.

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PHAs and Advocates Begin Early Efforts to Implement VAWA

Although HUD has still not issued implementing regulations, advocates and public housing agencies (PHAs) across the nation are taking steps to implement the Violence Against Women and Justice Department Reauthorization Act of 2005 (VAWA).[1] VAWA protects the rights of public housing, tenant-based Section 8, and project-based Section 8 applicants and tenants who are victims of domestic violence, dating violence, or stalking.[2] VAWA, which became effective January 2006, prohibits victims of abuse from being evicted or denied housing assistance based on acts of violence committed against them. This article describes the steps PHAs and advocates have taken to implement VAWA, as well as several emerging issues that the statute does not squarely address.

Current Status of HUD's Implementation of VAWA

It has been several months since HUD has issued any new documents or notices implementing VAWA. The most recent guidance HUD provided was a notice published in the Federal Register on March 16, 2007.[3] The notice outlines VAWA's housing provisions and reminds PHAs and assisted owners that any denial of admission or termination of assistance, tenancy or occupancy rights must comply with VAWA.[4] While the notice also states that "HUD will be amending the regulations of the covered programs to conform with the new statutory language and requirements,"[5] it fails to indicate when HUD will act.

The forms that HUD has issued thus far to implement VAWA include a revised Housing Assistance Payments Contract (HAP Contract, Form HUD 52641) and a revised Tenancy Addendum (Form HUD 52641A) for the housing choice voucher program.[6] The revised HAP contract and tenancy addendum essentially incorporate VAWA's statutory language regarding evictions. According to the notice transmitting these forms, PHAs must use the revised HAP

[1]Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006). For more information on the amendments and HUD's implementation, *see* NHLP, *HUD Continues VAWA Implementation*, 36 Hous. L. Bull. 7 (Jan. 2007); NHLP, *HUD Begins VAWA Implementation*, 36 Hous. L. Bull. 181 (Sept. 2006); NHLP, *Reauthorized Violence Against Women Act Protects Housing Rights of Domestic Violence Survivors*, 36 Hous. L. Bull. 53 (March 2006).
[2]For ease of reference, this article will collectively refer to victims of domestic violence, dating violence, and stalking as victims of abuse.
[3]72 Fed. Reg. 12,696 (Mar. 16, 2007) (The Violence Against Women and Department of Justice Reauthorization Act of 2005: Applicability to HUD Programs).
[4]*Id.* at 12,697.
[5]*Id.* at 12,699.
[6]Revised Voucher Housing Assistance Payments Contract (Form HUD 52641) and Tenancy Addendum (form HUD 52641A), PIH 2007-5 (HA) at 1 (Feb. 16, 2007).

Contract and revised Tenancy Addendum when executing any new HAP contracts or approving new voucher leases after February 16.[7] HUD has also issued a certification form (Form HUD 50066) for the voucher and public housing programs which tenants or applicants may use to certify that they are victims of domestic violence, dating violence, or stalking.[8] Although the form has an Office of Management and Budget expiration date of July 31, 2007, and HUD published a notice seeking comments for revisions to the form, no amended form has been issued.[9] Similarly, HUD published a notice seeking comments on a proposed certification form (Form HUD 90066) for the project-based Section 8 program, but no certification form has been issued for that program.[10]

PHA Implementation

Several PHAs around the country have started to implement VAWA by issuing notices to tenants and private owners. In July 2007, the New York City Housing Authority (NYCHA) sent letters to public housing tenants outlining VAWA's provisions.[11] Translations of the letter were available in Russian, Chinese and Spanish.[12] The letter informed tenants that the NYCHA may not deny housing to or evict an individual based on his or her status as a victim of domestic violence, and that the NYCHA may split public housing tenancy rights to terminate the tenancy of the abuser while protecting the victim from eviction.[13] The letter included a tenancy addendum, which incorporated VAWA's eviction protections, for tenants to attach to their leases.[14]

On May 1, 2007, the Fairfield (California) Housing Authority (FHA) sent letters to Section 8 tenants informing them of VAWA's eviction, lease bifurcation, and certification provisions.[15] In addition, the FHA posted the HUD-approved certification form on its website and informed tenants that the form is available at its office.[16] The FHA also sent letters to Section 8 landlords informing them of the certification requirements and reminding them that they may accept the certification form alone without requiring official documentation of domestic violence.[17]

Several housing authorities have taken steps to incorporate VAWA's protections into their Section 8 Administrative Plans and public housing Admissions and Continued Occupancy Policies (ACOP). On February 14, 2007, the Gloucester (Massachusetts) Housing Authority (GHA) adopted a Violence Against Women Act Policy that will be incorporated into GHA's Section 8 Administrative Plan and ACOP.[18] The policy incorporates VAWA's statutory language regarding admissions, termination of tenancy or assistance, lease bifurcation, certification, confidentiality, and portability.[19] Further, the policy states that if an applicant for housing was a victim of domestic violence, GHA may take this information into account during the admissions process by disregarding poor credit history or previous damage to a dwelling.[20] Additionally, the policy makes clear that certification of incidents of domestic violence may be accomplished in one of three ways: (1) by providing to GHA the HUD-approved certification form; (2) by providing to GHA documentation signed by a victim service provider, attorney, or medical professional from whom the victim has sought assistance; or (3) by providing to GHA a police or court record.[21] The policy also states that if GHA staff members become aware that an individual assisted by GHA is a victim of domestic violence, dating violence, or stalking, GHA will refer the victim to an appropriate service or shelter provider.[22]

Litigation

Advocates have started to use VAWA to contest evictions and terminations of rental assistance. On October 7, 2007, plaintiff Deborah Jones filed a complaint in federal court alleging that her Section 8 voucher was illegally terminated by the Housing Authority of the County of Salt Lake (HACSL) after she was forced to flee her apartment because she was a victim of domestic violence.[23] According to the complaint, Jones obtained permission from HACSL to allow her ex-husband to move into the home.[24] Jones alleges that in the weeks after her ex-husband moved in,

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[7] *Id.* at 3.

[8] Form HUD 50066 Certification of Domestic Violence, Dating Violence, or Stalking (11/2006), hereinafter "Form HUD 50066."

[9] *See* 72 Fed. Reg. 1233 (Jan. 10, 2007) (Notice of Submission of Proposed Information Collection to OMB; Implementation of the Violence Against Women (VAWA) and Justice Department Reauthorization Act of 2005).

[10] *See* 72 Fed. Reg. 5733 (Feb. 7, 2007) (Notice of Proposed Information Collection: Comment Request; Implementation of the Violence Against Women and Department of Justice Reauthorization Act of 2005).

[11] Letter from New York City Housing Authority to Public Housing Tenants (July 19, 2007), *available at* http://www.nyc.gov/html/nycha/downloads/pdf/VAWA_Letter_English.pdf.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Letter from Fairfield Housing Authority to Section 8 Participants (May 1, 2007), *available at* http://www.ci.fairfield.ca.us/files/VAWATenantLetter2007.pdf; *see also* Upland (California) Housing Authority, Landlord Notice (Feb. 1, 2007), *available at* http://www.uplandhousing.com/_fpclass/VAWA%20Landlord%20Notice.pdf (informing landlords that they can, but are not required to, request written verification of domestic violence).

[16] *Id.*

[17] Letter from Fairfield Housing Authority to Section 8 Landlords (May 1, 2007), *available at* http://www.ci.fairfield.ca.us/files/VAWAOwnerLetter2007.pdf.

[18] Gloucester Housing Authority, Violence Against Women Act (VAWA) Policy at 1 (Feb. 14, 2007), *available at* http://www.ghama.com/default.aspx?action=open&id=197424.

[19] *See generally id.*

[20] *Id.* at 3.

[21] *Id.* at 4.

[22] *Id.* at 7.

[23] Complaint ¶ 5, *Jones v. Hous. Auth. of Salt Lake County*, No. 07-743 (D. Utah Oct. 2, 2007); *see also* Erin Alberty, *Woman Says She Was Battered by Ex, then Housing Aid Illegally Pulled*, Salt Lake Trib., Oct. 4, 2007.

[24] Compl. ¶ 21, *Jones v. Hous. Auth. of Salt Lake County*, No. 07-743.

he became increasingly violent.[25] Jones alleges that when she moved out of the home because she feared for her safety and that of her children, HACSL terminated her housing assistance.[26]

The complaint asserts that HACSL violated VAWA by terminating Jones' voucher because of her need to escape domestic violence.[27] The complaint also alleges that HACSL violated the Fair Housing Act by discriminating against Jones on the basis of sex because women represent the majority of domestic violence victims.[28] Jones seeks reinstatement of her housing assistance.[29] On November 9, 2007, HACSL filed an answer asserting that it has complied with the law and raising the affirmative defenses of waiver and estoppel. Given that it is unclear whether VAWA provides victims a private right of action against PHAs, the outcome of this case could be particularly significant.[30]

Legal Momentum and South Brooklyn Legal Services obtained a favorable settlement in a case where a project-based Section 8 owner sought to evict a domestic violence victim after her ex-boyfriend shot at one of the project's security guards.[31] The victim's ex-boyfriend was not a member of the household, nor was he a guest of the victim at the time of the incident.[32] After settlement talks failed, the victim filed a motion for summary judgment asserting that VAWA forbids owners of federally subsidized housing from evicting tenants for acts of domestic violence or stalking against them, or for criminal activity by third parties which is directly related to such violence.[33] The motion also alleged that the owner's attempt to evict the victim constituted sex discrimination in violation of the Fair Housing Act, the New York State Human Rights Law, and the New York City Human Rights Law.[34] After extensive negotiations, the owner agreed to dismiss the eviction proceedings against the victim, and the victim agreed that she would not knowingly or willingly allow the abuser access into the building.[35]

Issues that VAWA Does Not Address

There are several critical housing issues faced by domestic violence survivors that VAWA's housing provisions do not squarely address. For example, a domestic violence survivor may fail to meet a PHA or owner's eligibility standards due to poor credit, work, or rental history resulting from an abusive relationship.[36] Although VAWA prohibits a PHA or owner from denying admission to an applicant based upon the applicant's status as a victim of domestic violence, the statute does not address whether a PHA or owner must consider domestic violence as a mitigating factor in determining whether a victim will be admitted under otherwise applicable tenant selection standards. Advocates may need to work with PHAs to encourage them to adopt a policy, such as the one adopted by the Gloucester Housing Authority, that permits applicants with poor credit or rental histories to present domestic violence, dating violence, or stalking as a mitigating factor.

The implementation of VAWA's certification provisions has raised several issues. An individual may certify that he or she is a victim of abuse by completing and signing the HUD-approved certification form; by submitting a statement signed under penalty of perjury by a service provider, attorney, or medical professional from whom the victim has sought assistance; or by providing a police

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[25]*Id.* ¶ 27.
[26]*Id.* ¶ 34.
[27]*Id.* ¶ 60. The complaint asserts a cause of action under VAWA's provisions prohibiting termination of rental assistance based on a participant's status as a victim of domestic violence. The complaint does not use 42 U.S.C. § 1983 as a vehicle for raising the VAWA cause of action.
[28]*Id.* ¶ 70.
[29]*Id.* ¶ 80.
[30]*See* Elizabeth M. Whitehorn, Note, *Unlawful Evictions of Female Victims of Domestic Violence: Extending Title VII's Sex Stereotyping Theories to the Fair Housing Act*, 101 N.W. U. L. Rev. 1419, 1423 (2007) (noting that while VAWA provides a defense to an eviction action based on the criminal actions of a victim's abuser, the statute does not provide an explicit private right of action).
[31]Legal Momentum, *Brooklyn Landlord v. R.F.* (2007), available *at* http://legalmomentum.org/legalmomentum/inthecourts/2007/06/brooklyn_landlord_v_rf_2007.php.
[32]*Id.*
[33]Motion for Summary Judgment at 1, *Brooklyn Landlord v. R.F.* (N.Y. Civ. Ct. Jan. 8, 2007), *available at* http://www.legalmomentum.org/legal momentum/files/motion.pdf.
[34]*Id.*
[35]Stipulation of Settlement at 2, *Brooklyn Landlord v. R.F.* (N.Y. Civ. Ct. May 30, 2007), *available at* http://www.legalmomentum.org/legalmomentum/files/stipulation.pdf.
[36]*See* 42 U.S.C.A. § 14043e (West, WESTLAW through P.L. 110-107 (End) approved 10-26-07) ("Because abusers frequently manipulate finances in an effort to control their partners, victims often lack steady income, credit history, landlord references, and a current address, all of which are necessary to obtain long-term permanent housing.").

Attention *Bulletin* Subscribers

NHLP staff vacancies and unexpected absences caused us to publish only nine issues of the *Bulletin* in 2007. They also created delays in publication of some issues, including this November/December 2007 issue. We apologize for these delays and will extend all subscriptions by one issue to make up for the issue that we did not publish. We expect to adhere to our regular production schedule in 2008.

We thank you for your support, wish you a very happy and prosperous 2008, and hope that together we can extend housing justice to all those that we serve.

or court record.[37] VAWA provides that the documents an individual uses for certification shall remain confidential, unless the information is "required for use in an eviction proceeding."[38] In the event that a therapist, doctor, or attorney submits a statement certifying that an individual is a victim of abuse, it is unclear whether the professional could be called to testify at an eviction proceeding. Further, in the event that both the innocent and culpable parties submit forms certifying that they have experienced incidents of abuse, neither the statute nor HUD's notices provide guidance to PHAs and owners on how to assess which party is the bona fide victim.

VAWA's portability provisions for Section 8 voucher holders also raise difficult issues. The statute provides that a PHA may permit a family receiving voucher assistance to move to another jurisdiction to protect the health and safety of a victim of abuse, even if the family's existing lease has not yet expired.[39] However, VAWA does not expressly protect a victim from being held liable to the Section 8 owner for any damages resulting from the early lease termination. In eleven states, victims may be protected by laws enabling domestic violence victims to terminate their leases early without penalty.[40]

Conclusion

Because HUD has provided limited guidance regarding VAWA's provisions, PHAs and advocates will be primarily responsible for implementing the statute in their local jurisdictions for at least the near future. As noted above, there are several crucial issues that VAWA does not directly address. Until regulations are promulgated, advocates can address these issues by participating in their PHAs' annual planning processes. Advocates should encourage PHAs to amend their Section 8 Administrative Plans and ACOPs to include admissions, termination, certification, confidentiality, and bifurcation policies that specifically address the needs of victims of domestic violence, dating violence and stalking.

For additional information regarding VAWA implementation, please contact Meliah Schultzman, NHLP Equal Justice Works Fellow, at either 510-251-9400 x116 or mschultzman@nhlp.org. ■

[37] *See* 42 U.S.C.A. §§ 1437d(u)(1)(A) and (C) (West, WESTLAW through P.L. 110-96 (End) approved 10-16-07) (public housing); 42 U.S.C.A. §§ 1437f(ee)(1)(A) and (C) (West, WESTLAW through P.L. 110-96 (End) approved 10-16-07) (Section 8).

[38] 42 U.S.C.A. § 1437d(u)(2)(A); *id.* § 1437f(ee)(2)(A).

[39] 42 U.S.C. A. § 1437f(r)(5) and (ee).

[40] *See, e.g.*, Ariz. Rev. Stat. Ann. § 33-1318 (2007); Colo. Rev. Stat. § 38-12-402(2) (2007); 765 Ill. Comp. Stat. 750/15 (2007); Ind. Code § 32-31-9-12 (2007); Minn. Stat. § 504B.206 (2007); N.C. Gen. Stat. § 42-45.1 (2007); N.Y. Real Prop. Law § 227-c(2) (2007); Or. Rev. Stat. § 90.453 (2005); Tex. Prop. Code Ann. § 92.016 (2007); Wash. Rev. Code Ann. § 59.18.575 (2007).

House of Representatives Passes Affordable Housing Trust Fund Bill

In a major victory for low-income families, the House of Representatives passed the National Affordable Housing Trust Fund Act of 2007 (H.R. 2895) on October 10.[1] According to Rep. Maxine Waters (D-CA), Chairwoman of the Financial Services Subcommittee on Housing and Community Opportunity, the legislation "will tackle the full range of housing crises, providing relief to overburdened renters and homeowners while targeting funds where the need is greatest."[2]

The bill drew opposition from some House Republicans, who argued that the revenue sources dedicated to the trust fund amount to a tax, and that the trust fund would duplicate existing state and federal programs.[3] Further, the White House's Office of Management and Budget (OMB) issued a statement warning that if H.R. 2895 were presented to the President, his senior advisors would recommend that he veto the bill.[4]

Purposes of the Bill

The purpose of the National Affordable Housing Trust Fund (NAHTF) is to create a permanently appropriated fund to finance affordable housing without supplanting existing housing appropriations or state and local funding.[5] The bill also seeks to construct, rehabilitate, or preserve at least 1.5 million affordable housing units over the next decade, to facilitate the construction of rental

[1] Rep. Barney Frank (D-MA), Chairman of the House Financial Services Committee, introduced H.R. 2895 on June 28, 2007, with co-sponsors Rep. Maxine Waters (D-CA), Rep. Gary G. Miller (R-CA), Rep. Jim Ramstad (R-MN), Rep. Nydia M. Velázquez (D-NY), Rep. John M. McHugh (R-NY), Rep. Phil English (R-PA), Rep. Al Green (D-TX), Rep. Christopher Shays (R-CT), Rep. Christopher Murphy (D-CT), Rep. Charlie Dent (R-PA), Rep. Barbara Lee (D-CA), Rep. Rick Renzi (R-AZ), Rep. William Lacy Clay (D-MO), Rep. Christopher H. Smith (R-NJ), Rep. Stephen Lynch (D-MA), and Rep. Rubén Hinojosa (D-TX). It was passed by the House 264-148 on Roll Call 958 *at* http://clerk.house.gov/evs/2007/roll958.xml. The bill would add a subtitle to Title II of 1990's *Cranston Gonzalez National Affordable Housing Act*, 42 U.S.C. § 12721 *et seq*. For the full text of the bill, see http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2895rfs.txt.pdf.

[2] Press Release, House Committee on Financial Services, House of Representatives Passes Affordable Housing Trust Fund Act (Oct. 10, 2007), *available at* http://www.house.gov/apps/list/press/financialsvcs_dem/press1010072.shtml.

[3] *See* 153 Cong. Rec. H11421 (daily ed. Oct. 10, 2007) (statement of Rep. Bachus), *available at* http://thomas.loc.gov.

[4] OMB, *Statement of Administration Policy: H.R. 2895: National Affordable Housing Trust Fund Act of 2007* (Oct. 9, 2007), *available at* http://www.whitehouse.gov/omb/legislative/sap/110-1/hr2895sap-r.pdf.

[5] H.R. 2895, 110th Cong. § 2, establishing a new § 291 of the Cranston Gonzalez National Affordable Housing Act (2007) (hereafter, all cites to H.R. 2895 will be to these new sections of the Cranston Gonzalez Act).

housing in mixed-income settings and in areas with the greatest economic opportunities, and to promote homeownership by low-income families.[6]

Source of Funds

The bill proposes to establish a trust funded through monies derived from several sources. One source of funding is Government Sponsored Enterprises (GSE) reform legislation, which has already been passed by the House but has not yet been taken up by the Senate. Under the House-passed GSE Affordable Housing Fund (H.R. 1427), in each of the next five years, from 2007 to 2011, GSEs Fannie Mae and Freddie Mac would be required to contribute an amount equal to 1.2% of the average total dollar amount of outstanding mortgages for the GSEs during the preceding year.[7] On November 16, Senator Jack Reed (D-RI) introduced the GSE Mission Improvement Act. The bill would require Fannie Mae and Freddie Mac to set aside 4.2 basis points on each dollar of unpaid principal balance of total new business purchases for an Affordable Housing Program.[8] The provisions in Senator Reed's bill are expected to become the affordable housing provisions in the GSE reform legislation.[9]

A second source of funding for the NAHTF is the Federal Housing Administration (FHA) savings that result from the enactment of the Expanding American Homeownership Act (H.R. 1852). The funding sources currently designated in the NAHTF have an estimated combined value of $800 million to $1 billion per year.[10]

Eligible Uses

Trust fund resources and state and local matching funds can be used for construction of new housing, acquisition of property, rehabilitation, and project-based rental assistance.[11] In addition, funds may be used for providing incentives to maintain existing housing as affordable housing, including incentives for manufactured housing and community land trusts.[12] Funds may also be used for downpayment assistance and closing cost assistance for first-time homebuyers.[13] Project-based rental assistance is an eligible use of trust funds for not more than twelve months for a unit.[14] No payments under the bill can be for any individual or head of household who is not a legal resident.[15]

Distribution and Allocation of Funds

The bill requires HUD's Secretary to allocate 40% of trust funds to states, Indian tribes, and insular areas, with each state to receive at least 0.5% of those funds.[16] The remaining 60% would be allocated to participating local jurisdictions.[17]

HUD would administer the trust fund using a needs-based distribution formula that considers for each local jurisdiction or state several factors, including:

- population;
- percentage of families living in substandard housing;
- percentage of families that pay more than 50% of their annual income for housing costs;
- percentage of persons having an income at or below the poverty line;
- percentage of housing stock that is extremely old (forty-five years or older); and
- in jurisdictions that have an extremely low percentage of affordable housing, the extent to which the jurisdiction has in the preceding fiscal year increased the percentage of affordable housing.[18]

States, participating local jurisdictions, and insular areas would then make trust fund grants to eligible recipients. The bill defines an eligible recipient as an organization, agency, for-profit entity, nonprofit entity, faith-based organization, community development financial institution, community development corporation, or a state or local housing trust fund.[19] A recipient must demonstrate that it has the experience to undertake the eligible activity, and that it is familiar with the requirements of the federal, state, or local housing program that will be used in conjunction with the grant.[20] HUD would allocate grants to Indian tribes by competition.[21]

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[6]§ 291.
[7]H.R. 1427, 110th Cong. § 1337(b)(1) (2007); *see also* Joe Akman, *House of Representatives Passes Affordable Housing Fund*, 37 Hous. L. Bull. 110, 110 (2007).
[8]NLIHC, *Memo to Members: Senator Reed Introduces GSE Mission Improvement Bill; Trust Fund Provision Included* (Nov. 16, 2007) available *at* http://www.nlihc.org/detail/article.cfm?article_id=4715.
[9]*Id.*
[10]Press Release, House Committee on Financial Services, House of Representatives Passes Affordable Housing Trust Fund Act (Oct. 10, 2007), http://www.house.gov/apps/list/press/financialsvcs_dem/press1010072.shtml.
[11]H.R. 2895, 110th Cong. § 299 (2007).
[12]§ 299.
[13]*Id.*
[14]*Id.*
[15]§ 299C.
[16]§§ 293(b), 294(c).
[17]§ 293(b).
[18]§ 294(a).
[19]§ 296(b).
[20]*Id.*
[21]§ 294(g).

Matching

The bill requires a match for trust fund grant amounts equal to 12.5% if provided from state, local, or private resources and 25% if provided from federal sources.[22] Binding commitments to provide services to residents of affordable housing may constitute up to 33% of the matching funds.[23] The match could be reduced or waived with respect to eligible activities that require a jurisdiction to approve a zoning variance or other waiver of regulatory requirements.[24]

Income Targeting

The bill requires that grant amounts be distributed only for housing that benefits low-income families, i.e., families whose incomes are under 80% of area median income (AMI) or 80% of the state or insular area's median income, whichever is higher.[25] The bill mandates furthering targeting by requiring that 75% of assistance be provided to extremely low-income families, i.e., families with incomes no higher than 30% of AMI or the poverty line, whichever is higher.[26] In addition, at least 30% of grant amounts must be used for families eligible for Supplemental Security Income (SSI) benefits.[27] Finally, a minimum of 10% of grant amounts must be used to benefit families with incomes above 50% of AMI.[28] For fiscal years in which less than $2 billion is available for allocation, all grant amounts must be used for families with incomes below 60% of AMI.[29]

Project Requirements

To be considered "affordable housing" under the bill, units cannot have rents exceeding the HUD-established Fair Market Rents used by public housing agencies to operate the housing choice voucher program or the applicable payment standard, if higher.[30] Further, rents may not exceed 30% of the adjusted income of a family at 65% of the AMI, with allowance for exception rents to be established by HUD in certain areas.[31] Projects must remain affordable for fifty years.[32]

The bill limits the actual tenant contribution to rent to no more than 30% of the family's adjusted income.[33] The bill also provides that a unit may not be refused for leasing to a prospective tenant due to that tenant's status as a voucher holder.[34]

The bill also requires income-mixing at the project level, mandating that not more than 50% of a particular project's units be used to house families with extremely low incomes.[35] This provision does not apply to projects that have twenty-five or fewer units, that are located in rural areas, or that only house tenants who are elderly or disabled.[36]

The bill limits the actual tenant contribution to rent to no more than 30% of the family's adjusted income and provides that a unit may not be refused for leasing to a prospective tenant due to that tenant's status as a voucher holder.

Selection Criteria

The bill requires states or local jurisdictions to develop annual plans (with public input) for the allocation of trust money.[37] The allocation plan must include a list of factors and preferences for distributing grants to local organizations, agencies, and entities.[38] The allocation plan must express a preference for applicants based on several factors, including the amount of funds leveraged by the applicant from private and "nonfederal" sources; the extent to which the affordable housing will be accessible to persons with disabilities and is in proximity to public transportation, job opportunities, child care, and community revitalization projects; and the extent to which the design, construction, and operation of the affordable housing reduces utility costs for residents.[39] The allocation plan must also consider income-mixing at the neighborhood level by examining the extent to which the affordable housing will be located in census tracts in which the number of families having incomes below the poverty line is less than 20%.[40] In addition, applicants who previously have received trust fund assistance must submit a progress report on the activities previously undertaken with such assistance.[41]

Amendments

Several amendments to H.R. 2895 passed by voice vote. One amendment allows grantees that provide one-to-four family owner-occupied housing units to give

[22] § 294(f).
[23] *Id.*
[24] *Id.*
[25] § 296(c)(1).
[26] § 296(c)(2).
[27] § 296(c)(3).
[28] § 296(c)(4).
[29] § 296(c)(5).
[30] § 297(a)(1).
[31] *Id.*
[32] § 297(a)(6).
[33] § 297(a)(2).
[34] § 297(a)(3).
[35] § 297(a)(4).
[36] *Id.*
[37] § 297(b).
[38] § 295(c).
[39] *Id.*
[40] *Id.*
[41] *Id.*

preferences for first responders, public safety officers, teachers, and other public employees who meet the bill's income requirements.[42] Another allows grantees to use up to 10% of their annual project grant amounts to cover operating expense shortfalls to facilitate housing affordability for families with incomes below the SSI limit.[43] Another requires homebuyers to receive counseling regarding flood or other disaster-specific insurance coverage where appropriate by region.[44] Another directs HUD to establish a green housing clearinghouse and identify green units built with housing trust fund resources.[45]

The Bill's Future

Prior to the adjournment of this session, a bill similar to H.R. 2895 was introduced in the Senate with bipartisan support.[46] The Administration has already threatened to veto the House bill in its current form.[47] According to the OMB, the housing trust fund is "largely redundant" of HUD's HOME Investment Partnerships Program, and financing the trust fund with FHA receipts "could mean fewer low income families have access to affordable FHA mortgages in the long term."[48] Given that the vote on H.R. 2895 was short of the two-thirds margin needed to override a veto, the bill's future remains uncertain. Still, the House's passage of the bill represents a major accomplishment for the National Housing Trust Fund Campaign, which has been working non-stop since 2001 to restore an enduring federal financial commitment to affordable housing through establishment of a national housing trust fund.[49] ■

[42] *Id*.
[43] § 299(1).
[44] § 297(b).
[45] § 298(c).
[46] S. 2523, the National Affordable Housing Trust Fund Act of 2007, was introduced in the Senate on December 19, 2007, with Senators John Kerry (D-MA) and Olympia Snowe (R-ME) as the lead sponsors. The bipartisan bill is nearly identical to the House-passed counterpart. Other Senate co-sponsors at introduction included Bernie Sanders (I-VT), Pete Domenici (R-NM), Charles Schumer (D-NY), Susan Collins, (R-ME), Ted Kennedy (D-MA), and Jack Reed (D-RI). The primary challenge during 2008 will be securing enough additional co-sponsors to catalyze the necessary action in the Senate Banking Committee and on the floor.
[47] OMB, *Statement of Administration Policy: H.R. 2895: National Affordable Housing Trust Fund Act of 2007* (Oct. 9, 2007), *available at* http://www.whitehouse.gov/omb/legislative/sap/110-1/hr2895sap-r.pdf.
[48] *Id*.
[49] NLIHC, *Memo to Members: Victory: House Passes National Affordable Housing Trust Fund Act* (Oct. 12, 2007) *available at* http://www.nlihc.org/detail/article.cfm?article_id=4629&id=40.

Rural Rental Housing Preservation Legislation Introduced

Congressmen Lincoln Davis (D-TN) and Geoff Davis (R-KY) have recently introduced H.R. 4002, the Rural Housing Preservation Act of 2007.[1] The bill has three main purposes: to restructure, revitalize and preserve as decent and affordable housing the 465,000 units of rural rental housing financed under Section 515 of the Housing Act of 1949[2]; provide vouchers to residents of assisted projects to ensure that their rents after revitalization do not exceed 30% of adjusted income; and protect residents who are threatened with displacement due to authorized prepayments or foreclosures by providing them with rural vouchers that allow them to stay in the prepaid project, or, if forced to move, to relocate to other housing.

H.R. 4002 replaces H.R. 5039,[3] which was passed by the House Committee on Financial Services in the 109th Congress and was intended to accomplish some of the same purposes that H.R. 4002 seeks to achieve. Significantly, however, H.R. 4002, unlike H.R. 5039, does not propose to lift the prepayment restrictions that were enacted in the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA).[4] It is also generally much more protective of the interests of residents in Section 515 housing. The balance of this article will review the major provisions of H.R. 4002.

Background

The Rural Rental Housing stock financed under the Section 515 program is aging and in need of physical preservation. Many of the developments financed under the program are more than thirty years old and the stock is generally deteriorating because of inadequate reserves or other financing with which to undertake physical revitalization. Due to the fact that funding for the 515 program has been dramatically reduced since the early 1990s, the need for affordable rental housing in rural areas has been increasing, particularly for very low-income households served by the program. The average annual income of households living in Section 515 housing is about $10,000 and nearly 60% of the households served are elderly or headed by a person with a disability. In most rural areas, Section 515 housing is the only decent and affordable housing in the community.

[1] H.R. 4002, 110th Cong. 1st Sess. (2007) (Hereinafter all citations to this bill will be to the specific sections of the bill).
[2] 42 U.S.C. § 1485.
[3] H.R. 5039, 109th Cong. 1st Sess. (2006).
[4] The rural prepayment restriction enacted by ELIHPA are codified at 42 U.S.C. § 1472(c).

For the past two years the Rural Housing Service (RHS) has operated a demonstration revitalization program that is intended to identify the means and methods by which the agency can revitalize and preserve the Section 515 stock. This demonstration program has been carried out under authority and financing granted to the agency under the Fiscal Year 2006 and 2007 agricultural appropriations acts.[5] Unfortunately, little is known about the achievements or success of the program because the RHS has not released any information about its use of special statutory authorities included in the appropriations acts to refinance or restructure existing loans or of the successes that it has achieved in revitalizing the developments that have been chosen to participate in the demonstration program. Generally, it is believed that the agency is subordinating its existing mortgages to third party financing, such as Low Income Housing Tax Credits or bond financing, that enables owners to rehabilitate their developments. The agency may also be extending or deferring its mortgages to maintain rents in developments and avoid the displacement of residents who are not receiving deep rental assistance subsidies.[6] The agency does not, however, have authority to extend additional subsidies to residents of revitalized developments and may be limiting participation in the demonstration program to developments that have RHS rental assistance or Section 8 subsidies available to most, if not all, the units.

H.R. 4002 is intended to provide RHS with a broad set of tools that expands on the agency's existing revitalization and restructuring authorities and protects residents against displacement through rent increases by proposing to create three new rural voucher programs.

Revitalization and Restructuring Authorities

The bill will authorize RHS to extend to owners of Section 515 housing who wish to revitalize their developments a variety of financial incentives. This includes: reduction or elimination of interest on the existing Section 515 loan; partial or full deferral of payments; outright loan forgiveness; subordination of the Section 515 loan to third party financing; reamortization and extension of the loan; grants (subject to appropriations); payment of the costs associated with the development of a long-term viability plan; and additional direct or guaranteed subsidized loans that are not limited by the value of the project.[7]

To secure one or more of these incentives, an owner will have to file a request with RHS to participate in the revitalization and restructuring program. In response, RHS will have to develop a long-term project viability plan that includes two elements. The first is a physical needs assessment that identifies the repairs, improvements and other changes that need to be made in order to preserve the development together with the cost of those repairs and changes. The second is a financial plan that reviews the financial stability of the project; takes into account the loan restructuring elements, including rent increases, that are needed to preserve the project; provides the owner with a rate of return comparable to that received by other owners under the Low Income Housing Tax Credit program; takes into account the repairs that will be made and the costs, if any, of relocating residents during the repairs; and ensures that the rents in the development, after revitalization, are affordable to the residents of the development.[8]

H.R. 4002 is intended to provide RHS with a broad set of tools that expands on the agency's existing revitalization and restructuring authorities and protects residents.

The bill would authorize RHS to use public or private administrative agencies to develop the long-term viability plans. This includes state housing finance agencies, nonprofit organizations or private contractors.[9]

Based on the long-term viability plan, RHS may offer an owner any incentives for which it has legislative authority and funding. However, before doing so, it will have to give the owner an opportunity to review the viability plan and to discuss it with someone from the agency. In addition, a copy of the viability plan will have to be provided to the residents of the development and they must be given thirty days in which to comment on the plan. RHS must respond in writing to the resident comments.[10]

When an owner and RHS agree on the long-term viability plan and the incentives necessary to put it into place, they will enter into a long-term use agreement. That agreement will incorporate the financial restructuring plan for the development, obligate the owner to maintain the housing as affordable housing for thirty years or the remaining term of the project loan, whichever is longer, require the owner to comply with the viability plan, and comply with certain rent restrictions that are set out in the bill. The agreement also obligates the owner to warrant the provision of safe, healthy and clean buildings, and sets out the project rent terms and any voucher assistance that may be provided to the owner. The agreement will be evidenced with a recordable covenant that runs with the

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[5]See, e.g., Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, Pub. L. 109-97 (Nov. 10, 2005).

[6]Approximately 39% of the residents of Section 515 housing are not receiving Rental Assistance or Section 8 subsidies that ensure that their monthly rent payments, including utilities, do not exceed 30% of adjusted household income.

[7]§ 3(a).

[8]*Id.*

[9]*Id.*

[10]*Id.*

land. It may only be terminated if some material preservation incentives that were extended to the owner are no longer available and RHS determines that their unavailability was not due to the owner's fault.[11]

RHS may be able to deny revitalization or restructuring assistance to any owner who has a history of poor management or maintenance of rental properties, is in default on a Section 515 loan, does not enter into a long-term use agreement within a reasonable amount of time, is suspended or debarred from further participation in a government contracting program, or for other good cause as determined by RHS.[12]

A very interesting provision of the bill will deny owners the right to participate in the revitalization and restructuring program if they are a party to an action against RHS that either seeks to allow the prepayment of a Section 515 loan in contravention of the ELIHPA prepayment restrictions or seeks damages for the imposition of the prepayment restrictions. An owner who has previously secured damages against RHS will be able to participate in the program if the owner contributes 50% of the damage recovery, or $100,000, whichever is less, to the revitalization plan.[13]

Rents Under the Long-term Use Agreement

The bill provides that rents, which include the cost of utilities, in restructured and revitalized developments may not exceed 30% of household adjusted monthly income. This rent limitation applies regardless of whether or not additional rent subsidies, such as rental assistance or rural vouchers, are available to the residents of the development. Rents may not be increased in the developments more than once per year and only in accordance with standards set out in the long-term use agreement.

Rural Earned Income Disregard Program

The bill proposes an Earned Income Disregard program identical to that applicable to residents of public housing and voucher holders. While it appears that the income disregard program is extended to all new rural voucher holders and Section 515 households—as opposed to households residing in revitalized and restructured developments—it is not absolutely clear that this is the intent of the bill because the income disregard provisions are not codified in any specific section of the Housing Act of 1949. Effectively, the program requires owners of Section 515 housing to disregard, for purposes of determining household rent, increased household earned income for a period of twelve months when a household member who has been unemployed for a year or received public assistance within the last six months secures employment or participates in a training or self-sufficiency program. At the end of twelve months, owners are required to disregard 50% of the household member's income for an additional twelve months.[14]

Rural Preservation and Rural Tenant Protection Vouchers

The bill proposes three new rural voucher programs, all subject to future appropriations.[15] The first is a rural preservation voucher that can be made available to residents of Section 515 housing whose developments are restructured or revitalized. These vouchers will make restructuring and revitalization of a development easier because they will subsidize the rent of residents who are not receiving rental or Section 8 assistance. Effectively, this voucher program will relieve owners who are participating in the revitalization and restructuring program of having to maintain the rents for residents who are not receiving deep subsidies at 30% of household income. These preservation vouchers will be project-based and will remain in the development as long as it remains subject to the long-term use agreement.

The other two proposed voucher programs are enhanced rural vouchers, which are intended to protect residents of Section 515 developments whose owners prepay their RHS loans, and rural relocation vouchers, which would allow residents to move from a development whenever an owner prepays or RHS forecloses on the loan.[16] These two voucher programs mirror vouchers available to residents of HUD developments whose owners opt-out of the project-based Section 8 program. The enhanced vouchers subsidize the rents of households who live in the Section 515 program when an owner converts a development to the private market. Effectively, they maintain the residents' rent at 30% of adjusted income and subsidize the difference between the residents' rent payment and the new market rent charged at the development. The bill will require the owners of the converted development to accept the vouchers.

The relocation vouchers would allow residents to move from a Section 515 development to other decent and sanitary housing when an owner seeks to prepay the loan or when RHS forecloses on the loan. Unlike H.R. 5039, these rural vouchers are fully portable and can be used to move anywhere in the country. Moreover, these vouchers remain available to the community in which the development was located as long as appropriations are available for the program.

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[11] *Id.*
[12] *Id.*
[13] *Id.*

[14] *Id.*
[15] § 4.
[16] As drafted, H.R. 4002 does not appear to authorize the extension of these vouchers to residents assisted under either the RHS Rental Assistance or HUD Section 8 voucher programs. This does not appear to have been intended by the bill's sponsors and is expected to be clarified as the bill moves through the committee.

Conclusion

H.R. 4002 will not be considered by the Financial Services Committee until at least February of 2008, at which time it is expected that it will be incorporated into a yet-to-be-drafted larger preservation bill addressing HUD housing preservation issues. It is expected that minor amendments will be made to the bill in the process to eliminate some ambiguities that are in the current version. No comparable bill has yet been introduced in the Senate although the House bill is likely to be considered favorably in the Senate.

The Administration has yet to voice its support or opposition to the bill. With respect to revitalization and restructuring authorities, the bill mirrors H.R. 5039, which was introduced at the Administration's request last year. Moreover, the provision that rents in restructured developments not exceed 30% of residents' income is one that the Administration agreed to last year as H.R. 5039 was moving through the Financial Services Committee. The most significant differences between H.R. 5039 and H.R. 4002 lie in the fact that H.R. 5039 does not lift the prepayment restrictions that were authorized by ELIHPA and in the proposed voucher programs, which are more favorable to residents and the communities where prepaid or foreclosed developments are located.

Notwithstanding, the Administration may be willing to accept the bill because the lifting of the prepayment restriction is not as critical this year as it may have been last year. When H.R. 5039 was first introduced, RHS estimated that owners of nearly 45,000 units of Section 515 housing were interested in applying to prepay their loans and it believed that the preservation of these units in accordance with the ELIHPA incentive program would, in this Administration's view, be too expensive. Accordingly, it proposed to lift the prepayment restrictions, allow the owners to prepay their loans and allow RHS to expend its resources on preserving and restructuring the remaining RHS Section 515 stock. The Administration's view may have shifted however, because there are reports that it recently entered into a settlement agreement with owners of about 20,000 Section 515 units who sued the agency for damages caused to them by the imposition of the ELIHPA prepayment restrictions. Under that settlement agreement, owners who receive damage awards will be required to maintain their developments in the Section 515 program for at least an additional twenty years. Thus, the number of units whose owners may seek ELIHPA prepayments has almost been halved and RHS may now be willing to accept the cost of preserving the remaining units.

With respect to the rural voucher programs proposed in H.R. 4002, the Administration may also be willing to accept them notwithstanding the fact that they are more favorable to residents and local communities than the vouchers proposed in H.R. 5039. This is because these programs require new appropriations. It is quite possible that the Administration is willing to accept the authorization for the voucher programs in order to secure the revitalization and restructuring authorities and oppose financing for the voucher programs when they are considered as part of the appropriations process.

NHLP will report on the progress of H.R. 4002 as the bill moves forward. ■

Federal Circuit Issues Yet Another Significant Cienega Gardens Decision

The Court of Appeals for the Federal Circuit has issued another significant ruling on the issue of whether Congressional restrictions on mortgage prepayments for privately owned, federally subsidized properties constitute a regulatory taking. In *Cienega Gardens v. United States*, acting with an enlarged panel on a consolidated appeal, the Federal Circuit reversed and remanded a lower court decision that the Low-Income Housing Preservation and Resident Homeownership Act (LIHPRHA) restrictions on prepayment of mortgages amounted to a regulatory taking and awarded damages to the owner plaintiffs.[1] The Federal Circuit's analysis examined the factors that must be taken into account when assessing whether a regulatory taking occurred, and may prove important for determining the fate of similar restrictions.

Background

Relevant Statutes

In the late 1960s, Congress enacted first Section 221[2] and then Section 236[3] of the National Housing Act. Section 221 provided below market-rate mortgages for private owners, while Section 236 provided market-rate mortgages with interest subsidies. In exchange for these and other benefits, the private owner had to agree to HUD rent and occupancy restrictions. Owners also benefited financially from significant tax benefits.[4] For both programs,

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[1]*Cienega Gardens v. United States*, __ F.3d___, 2007 WL 2778687 (Fed. Cir. 2007) (hereafter, "Cienega X").

[2]Housing Act of 1954, Pub. L. No. 83-560, 68 Stat. 590, 597 (1954), amended by Housing Act of 1961, Pub. L. No. 97-70, 75 Stat. 149 (1961), *codified as amended at* 12 U.S.C. §§ 1715l(d)(3)(2007).

[3]Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 201(a), 82 Stat. 476, 498, 499 (1969), codified at 12 U.S.C. § 1715z-l (2007).

[4]Though most of these tax benefits were available to all types of properties, owners of Section 221 and 236 were able to maximize their value because of related mortgage insurance and imputed equity provisions.

restrictions only lasted for so long as the mortgage remained in place; most owners had the option to prepay the mortgage after twenty years, and thereby terminate the applicable rent and occupancy restrictions.

In the late 1980s, when a number of these properties were due to hit the twenty-year mark, Congress recognized that many owners would opt to pre-pay their mortgages and thereby exacerbate a severe shortage of affordable housing. In response, Congress passed two pieces of legislation. The Emergency Low Income Housing Preservation Act (ELIHPA), passed in 1987, temporarily restricted owners from prepaying without HUD approval.[5] In 1990 Congress replaced that law with the LIHPRHA,[6] which made permanent the HUD approval requirement and also created market-value incentives for owners to remain in the program or to sell to nonprofits who would do so.

After Congress changed hands in late 1994, Congress passed the Housing Opportunity Program Extension Act of 1996, superceding LIHPRHA and allowing owners to prepay without HUD approval again.[7] Thus, the period of time that owners were restricted from prepaying their mortgages was between 1988 and 1996; many owners reaching their twentieth anniversary during that period were affected.

Procedural Background of the Case

In 1994, a group of similarly situated private owners of these federally subsidized properties filed lawsuits against the government on two theories: first, that the government had breached its contract with owners by changing the prepayment rules and second, that the restrictions amounted to a regulatory taking.[8]

After choosing four "model plaintiffs" out of the forty-two named, the Court of Federal Claims originally granted summary judgment for the owners on the breach of contract claim, and in a separate trial for damages, awarded the owners approximately $3 million.[9] That decision was reversed by the Court of Appeals for the Federal Circuit, which found that there was no privity of contract between the owners and HUD, since the actual loan agreement was only between the owners and their private lenders, subject to a separate regulatory agreement with HUD.[10] Denying the breach of contract claim, the Federal Circuit remanded the case for decision on the issue of whether or not a regulatory taking occurred.

On remand, the Court of Federal Claims considered the regulatory takings issue by relying on *Alexander Investment v. United States*, a case with very similar facts that had held that owners had no protectable property interest in Section 221 and 236 properties because HUD had reserved the right to amend regulations governing those properties and alternatively, that there was no regulatory taking under *Penn Central*.[11] After the owners conceded that the only difference in the legal analysis of the two cases was the issue of economic impact, the lower court issued a judgment for the government. On appeal, the Federal Circuit, in *Cienega VIII*, reversed for the four model plaintiffs, holding that on the factual record presented, a temporary taking had occurred; however, the court remanded for remaining plaintiffs, noting that the outcome could well be different based on whatever factual record was produced.[12]

The Earlier Court of Federal Claims Decision

After the Federal Circuit's decision and remand in *Cienega VIII*, the Court of Federal Claims gathered factual evidence on the remaining properties and applied the *Penn Central* regulatory takings analysis to those facts. This analysis requires that a court consider three issues: the character of the government action, the economic impact of the regulation, and the regulated parties' reasonable investment-backed expectations.[13] Under that analysis, the court found that the restrictions did constitute a temporary regulatory taking on the remaining properties and awarded damages.[14] The government's appeal of this ruling set the stage for this new decision.

The Federal Circuit Decision

The Federal Circuit's decision, a surprising one given its previous rulings on the issue, significantly impacts the analysis in both LIHPRHA regulatory takings cases and claims involving similar restrictions.[15] The court first notes that, despite the case's complexity, the regulatory takings analysis must assess the practical realities of the situation. Because none of the owners were significantly affected by ELIHPA, the court focused its discussion on LIHPRHA.

The Federal Circuit found that the lower court used a faulty analysis under the three-part *Penn Central* test and remanded for further consideration on a number of grounds. The Federal Circuit found four main flaws,

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[5]Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988), codified at 12 U.S.C. § 1715l (1988).

[6]Pub. L. No. 101-625, tit. VI, 104 Stat. 4249 (1990), *codified at* 12 U.S.C. §§ 4101 *et. seq.* (1990).

[7]Pub. L. No. 104-120, 110 Stat. 834 (1996).

[8]Two previous *Bulletin* articles discuss the prior decisions on these claims in greater detail. *See* NHLP, *Recent Takings Decisions on Preservation Laws Could Subject Feds to Big Liability*, 33 Hous. L. Bull. 350 (July 2003); Ching, Erin, *Courts Deal New Setbacks to Takings Challenges of Federal Housing Preservation Laws*, 36 Hous. L. Bull. 145 (Aug. 2006).

[9]*Cienega Gardens v. United States*, 33 Fed. Cl. 196 (1995) ("*Cienega I*").

[10]*Cienega Gardens v. United States*, 194 F.3d 1231 (Fed. Cir. 1998) ("*Cienega IV*").

[11]*Alexander Investment v. United States*, 51 Fed. Cl. 102 (2001).

[12]*Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003) ("*Cienega VIII*").

[13]*See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

[14]*Cienega Gardens v. United States*, 67 Fed. Cl. 434 (2005) ("*Cienega IX*").

[15]*See Cienega X*.

three of which lie in the economic impact analysis and the fourth in the reasonable investment-backed expectations question. First, the trial court "did not consider the impact of the regulation on the value of the property as a whole."[16] Second, the court did not factor the benefits and incentives provided by ELIHPA and LIHPRHA into its analysis.[17] Third, the court did not include the "limited duration of ELIHPA and LIHPRHA, and the restrictions that these statutes imposed."[18] Finally, the court "did not consider whether there was a nexus between the owners' expectations and their investment in the property."[19]

The first problem, failing to consider the effect on the property as a whole, arose when the trial court considered the income from the building for each year as a separate property interest. It had used a "return-on-equity" approach, comparing the return on equity that the owner received under the restrictions with the return on equity the owner would have received if there were no restrictions. The lower court found that difference between these rates of return constituted a major economic impact. The appellate court found that this approach was inconsistent with the U.S. Supreme Court's admonition in *Penn Central* and *Tahoe Sierra* that regulatory takings affecting property interests should be viewed as a whole.[20] The court must look at the property's total value for its entire useful life. To do this, the Federal Circuit provided two options: either compare the market value of the property with and without restrictions on the date that restriction began or compare the lost net income due to the restrictions with total net income achievable without the restrictions over the entire useful life of the property. The court stated that the trial court should consider both valuation methods because neither seemed inherently better.

According to the appellate court, the trial court had also failed to consider the offsetting benefits that the federal preservation laws provided to property owners, as required by *Penn Central*. These offsetting benefits included: (1) the right to sell the property at its fair market value or, if there was no offer or if HUD failed to provide financial assistance to the purchasers, the right to prepay the mortgage and eliminate the regulatory restrictions; or (2) entering into a use agreement with HUD under which HUD would provide market-value financial incentives to the owner. The court found that many of the owners' arguments were dubious and instructed the lower court to "assess whether the sale process prescribed by LIHPRHA provided the opportunity for a fair market value sale at or near the original prepayment date."[21] Owners who entered into use agreements received additional financial benefits that would allow the owners to continue the use and occupancy restrictions on their projects. Thus, the decision also ordered the trial court to consider the individual benefits received by those owners who entered into use agreements.

The Federal Circuit again emphasized the need to consider economic impact as a whole when it mandated the lower court to consider the third issue—the duration of the legislative restriction. The court noted the short duration of LIHPRHA's effectiveness should be taken into account, especially in light of the fact that some owners did not enter into preservation use agreements and thus were restricted only for short periods of between nineteen and twenty-seven months.[22]

The third prong of the *Penn Central* takings analysis is whether or not the owner of a property had both actual subjective reliance and reasonable investment-backed expectations that the property would not be subject to a significant change in the existing law. On this point, while the appellate court affirmed the lower court's finding of a subjective expectation of prepayment on the twentieth anniversary, it also found that the lower court failed to consider the reasonableness of the owners' expectations. While the court agreed that owners could not have reasonably foreseen that the restrictions would change, it found that the lower court had improperly evaluated whether those expectations were actually "investment-backed." The appellate court cited both conflicting testimony and also industry documents from the time of investment that did not heavily emphasize prepayment as a reason to invest in these properties. Thus, the lower court now must determine whether there was actually a nexus between the owners' expectations and their investments, and the parties will no doubt supplement the record on remand with contemporaneous evidence on this crucial issue.

Impact

The ruling in *Cienega X* provides significant guidance on how a temporary takings case should be analyzed, seemingly making it harder to prove a takings claim than suggested previously in *Cienega VIII*. The decision makes clear that the issue of regulatory takings is an extremely fact-based inquiry into the actual losses that an owner might incur over the useful life of a property, as well as proof that the owner's investment was actually and reasonably based upon the right that was later subject to legislative restriction. However, the scope of the decision's impact will not be fully seen until after the trial court reexamines the issues once again on remand, and any subsequent appeals are laid to rest. ■

[16] *Id.* at 6.
[17] *Id.*
[18] *Id.* at 7.
[19] *Id.*
[20] *Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (holding that in the temporary takings context, a court must consider the property interest as a whole, because to define the property interest "in terms of the very regulation being challenged is circular").

[21] *Id.* at 14.
[22] *Id.*

Massachusetts Court Finds State Innocent Tenants Protections Preempted

More than five years ago, the United States Supreme Court decided, in *Department of Housing & Urban Dev. v. Rucker*,[1] that "Congress [had] afford[ed] public housing authorities the discretion to conduct no-fault evictions for drug-related [and other] crimes."[2] Although the public outcry has faded over time, *Rucker*'s impact continues to be felt across the country by public housing residents and voucher holders whose landlords and subsidy providers are imbued with the discretionary power of Solomon but not uniformly with his legendary wisdom.

As earlier predicted,[3] *Rucker* has had dire consequences for many tenants—grandparents raising grandchildren,[4] people with disabilities,[5] victims of domestic violence[6] and other residents of affordable housing caught up in the government's war on drugs. For them, Rucker's holding that federal law contains no innocent tenant defense leaves most at the mercy of their landlords.

The Supreme Judicial Court of Massachusetts recently faced the opportunity to preserve state law protections for innocent household members threatened with eviction under the so-called "one-strike rule"[7] as interpreted by *Rucker*. In *Boston Housing Authority v. Garcia*,[8] the Boston Housing Authority (BHA) sought to evict Ms. Garcia, whose two household-member sons had been arrested for possession of marijuana in separate incidents four days apart. Ms. Garcia, representing herself at trial, told the judge that she did not know of or have control over her sons' actions, a defense previously recognized under state law.[9] The judge replied that that did not matter, because under *Rucker* there is no innocent tenant defense. Since her sons had possessed drugs in violation of the lease, the court ordered the family's eviction.

On appeal, now represented by counsel, Ms. Garcia sought to preserve the applicability of state law protections by arguing that federal law did not preempt state law defenses. The court, affirming the lower court, held that the state protections were indeed preempted by federal law.

Garcia argued that a long line of federal pronouncements required the court to view federal public housing eviction law as an amalgam of state and federal law.[10] She noted that HUD's Public Housing Lease & Grievance Procedures specified the opportunity to present available defenses as an element of due process that, according to HUD, "signified that the tenant must be able to raise in the proceeding any defense which would defeat the landlord's eviction claim for possession as a matter of substantive law."[11] Consequently, plaintiff argued, the court must recognize both legal and equitable state law defenses to eviction from federal public housing, citing numerous state court decisions in public housing eviction cases recognizing state law protections.

Under this line of reasoning, Garcia's primary contention was that a Massachusetts statute[12] required a finding of "cause" for the eviction and that interpretive case law[13] had established that tenants have a right to attempt to rebut the inference that they were aware of the offending action of other household members and be able to exercise some influence to prevent it. Tenants could avoid eviction if they could demonstrate "special circumstances indicating that [they] could not foresee or prevent the [lease violation by another household member]."[14] Using the state/federal amalgam framework, Ms. Garcia requested the opportunity to demonstrate her special circumstances—that she did not know or have reason to know of her sons' drug-related activities. If a court found this to be true, the alleged "cause" would be rebutted, and the court could refuse to evict her, as she had already agreed that her sons would no longer reside with her.

Garcia also argued that *Rucker* did not apply because the BHA eviction notice did not reference the so-called "one-strike" clause of her lease. Rather than invoke the provision which provided that the lease could be terminated for "commission by the Resident, a member of the Resident's household, a guest, or other person under Resident's control, of . . . (b) Any violent or drug-related criminal activity on or off BHA property," BHA chose to use a different paragraph under which Ms. Garcia agreed to refrain from engaging in any criminal or illegal activity,

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[1]535 U.S. 125, 122 S.Ct. 1230 (2002).
[2]*Id.* at 135.
[3]NHLP, *In Congress' Hands—The Aftermath of the Rucker Decision*, 32 Hous. L. Bull. 122 (May/June 2002).
[4]Low-Income Grandparents As the Newest Draftees in the Government's War on Drugs: A Legal and Rhetorical Analysis of Department of Housing and Urban Development v. Rucker, 10 Geo. J. on Poverty L. & Pol'y 157 (2003).
[5]Protecting The Innocent: The Future Of Mentally Disabled Tenants In Federally Subsidized Housing After HUD v. Rucker, 40 Harv. C.R.-C.L. L. Rev. 197 (2005).
[6]Eviction, Discrimination, and Domestic Violence: Unfair Housing Practices Against Domestic Violence Survivors, 18 Hastings Women's L.J. 249 (2007).
[7]42 U.S.C. § 1437d(l)(6).
[8]449 Mass. 727, 871 N.E.2d 1073 (Aug. 17, 2007).
[9]MASS. GEN. LAWS ch. 121B, § 32 (2007), as interpreted by Spence v. Gormley, 387 Mass. 258 (1982) (holding that tenant can demonstrate "special circumstances" exception to eviction-for-cause requirement).

[10]*See, e.g.*, 53 Fed. Reg. 33,216, 33,257 (Aug. 30, 1988); 56 Fed. Reg. 51,560, 51,565 & 51,567 (Oct. 11, 1991).
[11]56 Fed. Reg. 6248, at 6252 (Feb. 14, 1991); *see also* 56 Fed. Reg. 51,573 (1991).
[12]MASS. GEN. LAWS ch. 121B, § 32 (2007).
[13]Spence v. Gormley, 387 Mass. 258 (1982).
[14]*Id.* at 265. Massachusetts' Supreme Judicial Court had reaffirmed this "special circumstances" rule in 1998 in BHA v. Bell, 697 N.E.2d 130 (1998), a case in which BHA did not assert federal preemption.

including drug-related criminal activity. She argued that the "refrain from engaging" language allowed her to defend based upon her lack of knowledge or consent. Since the BHA could have, but did not, invoke lease language that tracked the federal statute[15] underpinning *Rucker*, Garcia argued that the court should not reach the federal preemption issue. The court did not address this argument.

Garcia also suggested that the state court should be allowed to use a tenant's special circumstances testimony to determine whether the housing authority had abused the discretion afforded it by the implementing federal regulations,[16] or, in the alternative, to fashion some remedy short of lease termination that would meet the goals of removing wrongdoers without evicting innocent household members. In effect, the federal and state goals would both be furthered by recognizing the authority of the state court to balance these considerations. The court's preemption analysis effectively ignored this reconciliation approach.

On the question of "conflict preemption," whether the state protections must yield because they irreconcilably conflict with federal objectives, Garcia argued that *Rucker* had not decided this issue, because *Rucker* was not concerned with any state statute or rule, but only with whether federal law provided an "innocent tenant" defense. Further, in the absence of express preemption, she argued that courts should seek to reconcile any supposed conflicts and that state limitations on the exercise of federal discretion are well recognized.[17] While the housing authority must use the "one-strike" lease clause, it is not required to evict, and must also use discretion and consider all applicable circumstances in determining when an eviction is warranted. Therefore, Garcia argued, these federal mandates do not conflict with the Massachusetts "special circumstances" rule, and thus that the rule does not constitute an additional hurdle or impediment that impermissibly thwarts the will of Congress.

The Supreme Judicial Court of Massachusetts understood its task to be "to consider whether the 'special circumstances' limitation on the existence of cause, referred to as the 'innocent tenant defense,' remains viable in termination of tenancies in federally assisted public housing projects [in light of *Rucker*],"[18] or is instead preempted by federal law because it conflicts with and frustrates the goals and objectives of Congress.

By ignoring the long history of reconciliation between federal and state laws, the court's conflict preemption analysis exalted federal power. Quoting *Rucker*'s statement that there are "no 'serious constitutional doubts' about Congress' affording public housing authorities the discretion to conduct no-fault evictions for drug-related crimes,"[19] the court found that Congress believed that housing authorities "are in the best position to take account of, among other things, the degree to which the housing project suffers from 'rampant drug-related or violent crime' . . . 'the seriousness of the offending action', . . . and the extent to which the leaseholder has . . . taken all reasonable steps as to prevent or mitigate the offending action."[20] Finding that individualized consideration of special circumstances is all well and good,[21] the court stated that Congress has given that responsibility and discretion to housing authorities and that to allow state judges to second-guess housing authorities was a direct conflict:[22]

> . . .[P]ermitting a judge to override the use of that discretion, based on the judge's evaluation of evidence presented on the issue of a tenant's knowledge or control, would run afoul of and substantially interfere with the congressional objective. It is therefore preempted.[23]

In the court's view, the extent of the state court's authority is to determine if there is "cause" for the eviction, which is defined by the federally required lease clause. If a household member engaged in drug-related activity, cause has been shown and the court must enforce the lease and evict.[24] In making these determinations, courts may also consider whether a PHA has abused its discretion, by making decisions unsupported by sufficient facts or in violation of due process requirements.

The *Garcia* ruling portends hard times ahead for asserting state law defenses in one-strike cases. The District of Columbia Court of Appeals, in a similar ruling nearly two years ago, found that a local thirty-day notice and opportunity to cure law was preempted by a similar federally mandated cause provision permitting eviction of a Section 8 Mod-Rehab complex after two guns and ammunition were found in her apartment.[25] In a conclusion very similar to *Garcia*, that court stated that "the role of reviewing courts (besides insuring proper notice and opportunity to defend) is to determine whether the

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[15]42 U.S.C. § 1437d(l)(6).

[16]24 C.F.R. § 966.4(l)(5)(vii)(B-C).

[17]Citing both state and federal case law, including Attorney General v. Brown, 400 Mass. 826, 830, Mass. Medical Society v. Dukakis, 637 F. Supp. 684, 699 (D. Mass. 1986), *aff'd*., 815 F.2d 790 (1st Cir. 1987), *cert. denied*, 484 U.S. 896 (1987).

[18]449 Mass. 727, 728-729, 871 N.E.2d 1073.

[19]*Id*., quoting *Rucker*, *supra*, at 130.

[20]449 Mass. 727, 734 (internal citations omitted).

[21]*Id*. at 735: "HUD policy encourages local housing authorities to engage in this individualized consideration of the circumstances of each case to ensure 'humane results,' particularly 'when a tenant has taken all reasonable steps to prevent the criminal activity.'"

[22]*Id*. at 735 (a lengthy footnote 14 describes HUD's policy of individualized consideration by the authorities in detail).

[23]*Id*. at 734.

[24]*Id*. at 737.

[25]Scarborough v. Winn Residential L.L.P./Atlantic Terrace Apartments, 890 A.2d 249 (2006) (one of the guns had been used in the apartment by a non-tenant, in what was ultimately ruled to be a self-defense killing).

ground relied upon for eviction exists." Where the eviction does not involve public housing and the landlord may therefore lack a clear obligation to at least consider mitigating circumstances, asserting substantive defenses in state court may therefore be difficult indeed.

Faced with individual cases of injustice, advocates will continue to press state courts to vindicate their authority to enforce any state law claims, as well as due process and equity in eviction proceedings. From all appearances, until a more compassionate Congress amends the current law, many more innocent tenants will lose their homes. ■

Recent Cases

The following are brief summaries of recently reported federal and state 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 website.[3] Copies of the cases are *not* available from NHLP.

Retaliatory Eviction—Public Housing

Housing Authority of City of Bayonne v. Mims, 933 A.2d 613, 2007 WL 2982258, (N.J.Super.A.D., Oct. 15, 2007). The appellate court reversed a trial court decision granting a housing authority the right to evict the defendant and her daughter for providing accommodation to a person not on the lease and failing to abide by the housing authority's pet policy. The trial court found that the housing authority's eviction action was retaliatory under New Jersey law because it was undertaken in response to the resident's filing numerous complaints about the condition and maintenance of the housing. The trial court, however, refused to apply New Jersey retaliatory eviction law, concluding that it was preempted by federal law because it contravened federal statutes and regulations authorizing the eviction of residents from public housing. The court of appeals rejected the trial court's conclusion and found that the federal eviction laws did not preempt New Jersey's retaliatory eviction statute. Indeed, it found them to be consistent.

[1]http://www.westlaw.com.
[2]http://www.lexis.com.
[3]For a list of courts that are accessible online, see http://www.uscourts.gov/links.html (federal courts) and http://www.ncsc.dni.us/COURT/SITES/courts.htm#state (for state courts). See also http://www.courts.net.

One-Strike Eviction—Public Housing

Long Branch Housing Authority v. Villano, 933 A.2d 607, 2007 WL 2935405 (N.J.Super.A.D., Oct. 10, 2007). The court of appeals reversed and remanded a lower court judgment in favor of a resident in an eviction proceeding initiated by the housing authority for the resident's violation of the federal "one-strike and you're out policy" after a guest in the resident's public housing apartment was arrested for selling cocaine from the unit. The trial judge concluded that the housing authority had not shown, consistent with New Jersey law, that the resident had knowingly harbored someone who committed a drug related offense. The court of appeals reversed and remanded because the trial judge failed to consider whether the authority had met its burden under another section of New Jersey law that authorized evictions from public housing for drug offenses without a showing that the resident had knowledge of the offense. Accordingly, the court of appeals remanded the case for further proceeding. In doing so, it stated that under the one-strike policy the authority was not required to evict the resident and strongly suggested, in light of the fact that the resident did not know of the drug dealings, had a positive five-year history of living in public housing, and had removed her daughter and the guest from the premises after the arrest of the guest, that the authority should consider not pursuing the eviction.

Eviction—Threat to Other Residents; Public Housing

Howell v. Justice of Peace Court No. 16, 2007 WL 4201125 (Del.Super., Nov. 2, 2007). The court reversed a Justice of Peace Court eviction order on the ground that there was no evidence before the court that showed that the activities of the resident actually threatened a resident of the public housing complex. The mere fact that the activities could threaten the quiet enjoyment of other residents was insufficient to authorize the eviction.

Eviction–Harm to Agency Employees; Public Housing

Johnson v. Wichita Falls Housing Authority, 2007 WL 4126475 (Tex. App., Nov. 21, 2007) (Unpublished). The court upheld the eviction of a public housing resident who alleged, in a draft complaint that he passed around to other residents, that the public housing agency's executive director had a sexual affair with a former director. When the resident refused to remove allegations from the papers, the housing authority initiated eviction action on the grounds that the resident violated the lease by causing harm to agency employees. The trial court upheld the eviction and the court of appeals affirmed. It rejected the resident's claims that his actions were protected by the First Amendment

and litigation privileges and found that the hearing officer's decision was supported by the evidence presented at the hearing.

Eviction—Refusal to Set Aside Settlement Agreement; Public Housing

New York City Housing Authority V. Dunn, 17 Misc.3d 137(A), 2007 WL 4244804 (N.Y.Sup.App.Term., Nov. 21, 2007)(Slip copy). The court refused to set aside an agreement entered into to settle a holdover proceeding, on the ground that settlement stipulations are favored and will not be undone absent proof that the settlement was obtained by fraud, collusion, mistake, accident or other ground sufficient to invalidate a contract. The resident failed to make any such argument. Moreover, the court rejected the resident's effort to set aside the hearing officer's decision because the time for challenging the decision in court had expired.

Eviction—Criminal Activity; Public Housing

Housing and Redevelopment Authority of Tp. of Franklin v. Miller, 2007 WL 4052473 (N.J.Super.A.D., Nov. 19, 2007). The court upheld the eviction of a public housing resident who was criminally convicted for assault of other residents on the public housing premises. The court rejected the resident's argument that simple assaults were not covered under the statutory provision authorizing evictions for "criminal activity." It concluded that the term was to be construed liberally and not so narrowly as to exclude petty offenses.

Eviction—Good Cause; Public Housing

Anacortes Housing Authority v. Assenberg, 2007 WL 3348459 (Wash.App. Div. 1, Nov. 13, 2007)(per curium, unpublished). The state court of appeals upheld a lower court decision to authorize eviction of a resident who violated a housing authority's pet and drug policies. It also upheld the lower court's denial of supersedeas bond pending resolution of an appeal to the 9th Circuit of a federal district court's decision. The federal district court had denied the resident's claim that the housing authority had failed to reasonably accommodate a disabled household member by not allowing him to maintain snakes as service animals and to use marijuana under Washington State's medical marijuana law. The resident argued that the lower court wrongfully relied on the *res judicata* effect of the federal district court decision, which rejected the resident's argument that the housing authority failed to reasonably accommodate him, to conclude that the resident did not have a valid defenses to eviction. The court of appeals did not reach the *res judicata* issue, finding that there was ample evidence in the record below to support an independent finding that the housing authority had cause to evict the resident. The court of appeals also rejected the resident's bond argument on the ground that he did not timely appeal the eviction decision and that he was not entitled to a state supersedeas bond based on his appeal of the federal district court decision.

Exclusion of Family Member—Public Housing

McLurkin, v. Hernandez, 843 N.Y.S.2d 305 (N.Y.A.D., Oct. 18, 2007). Court denied plaintiff's petition seeking to annul New York City Housing Authority's permanent exclusion of her son from her apartment on ground of nondesirability and placing her on probation for one year to ensure compliance with the exclusion. Court found that substantial evidence supported finding that son possessed a gun while on housing authority property and that he resisted arrest by two uniformed police officers.

Termination of Voucher—Good Cause at End of Lease Term

Rosina v. Parra, 2007 WL 4244983 (N.Y.Sup.App.Term., Nov. 29, 2007). The court upheld a district court decision that a landlord may, under federal law, terminate a Section 8 voucher holder's lease at the end of the lease term without good cause.

Termination of Voucher—Constitutionality of Pre-termination Administrative Hearing

Hendrix v. Seattle Housing Authority, 2007 WL 3357715 (W.D.Wash., Nov. 9, 2007). The housing authority filed a motion to dismiss against a Section 8 voucher holder's complaint that its grievance hearing process did not meet constitutional or regulatory due process requirements. The plaintiff alleged that she was entitled to a writ of prohibition and declaratory and injunctive relief. The court had previously granted the plaintiff an injunction against the housing authority terminating the resident's participation in the voucher program. Ruling on the housing authority's motion to dismiss, the court granted the motion with respect to the plaintiff's claim seeking a writ of prohibition. The court held that the writ stops the proceedings of any board or person when such proceedings are without or in excess of its jurisdiction. The court concluded that in this case the housing authority is clearly acting within its jurisdiction under federal law, which authorizes it to determine whether a voucher participant has violated Section 8 regulations. With respect to the housing authority's other arguments, the court denied the motion either because

the arguments were not appropriate for a motion to dismiss or not persuasive. The court rejected its claim that the voucher holder had an obligation to exhaust administrative remedies and that she did not have a claim with respect to the housing authority's procedure not following the HUD regulations. The court found that the challenge to the grievance and appeals regulations was not of the nature that required exhaustion and that while the housing authority's regulations mirrored the HUD grievance and appeals regulations, the plaintiff survived a motion to dismiss because she claimed that in practice the housing authority did not meet the HUD regulatory requirements. Significantly, the court rejected the housing authority's argument that its and HUD's grievance and appeal regulations met the *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970), due process requirements with respect to a pretermination informal hearing when that hearing is not followed by a full, post-termination administrative review. The court found that the informal hearing procedure set out in the regulations failed to include a verbatim transcript or official report containing the substance of what transpired at the hearing as well as the right of the challenging recipient to advance *any* arguments at the hearing without undue interference. The court concluded that the latter requirement lies at the heart of the plaintiff's complaint that voucher holders are not permitted to raise legal arguments at the informal hearing that might constitute a defense to the facts that the housing authority has found to require termination from the voucher program and that the hearing officers, who are only required to be familiar with the Section 8 program, may not be qualified to hear such arguments. Accordingly, it rejected the remaining portions of the housing authority's motion to dismiss.

Right to Discovery in Termination Proceeding; Public Housing

Hudson v. Housing Authority of Baltimore City, 2007 WL 3274773 (Md., Nov. 7, 2007). The court reversed an appellate court grant of review of a district court decision to grant limited pretrial discovery to a public housing resident in a breach of lease action brought by the housing authority and reversed the appellate court's denial of discovery. The court held that Maryland's collateral order doctrine does not justify the interlocutory appeal granted by the appellate court and held that Maryland rules do not exclude limited discovery in breach of lease actions brought in district court.

Voucher Termination–Hearing Decision Not Based on Preponderance of the Evidence

Gammons, V. Massachusetts Dept. of Housing and Community Development, 2007 WL 4180804 (D.Mass., Nov. 28, 2007). Court denied the Department of Housing and Community Development's (DHCD) motion to dismiss a voucher holder's complaint on the ground that the plaintiff did not have a Section 1983 cause of action against DHCD when she alleged that the termination of her Section 8 voucher was arbitrary because the hearing officer's decision was not based on a preponderance of the evidence presented at the hearing. The court concluded that federal statute, 42 U.S.C. § 1437d(k), mandates the creation of procedural rights for tenants faced with adverse action and that the statute unambiguously confers rights for the benefit of Section 8 subsidy recipients. One of these rights entitles tenants to receive a written decision by the public housing agency on the proposed action. The HUD regulations clarify what constitutes a proper written decision by specifying that a hearing officer must state briefly the reasons for the decision and that factual determinations shall be based on a preponderance of the evidence presented at the hearing. 24 C.F.R. § 982.555(e)(6). Accordingly, the court concluded that a voucher holder who claims her Section 8 benefits were arbitrarily terminated because a hearing officer's decision was not based on a preponderance of the evidence presented at the hearing states a sufficient claim under § 1983.

Voucher Termination—Implied Warranty of Habitability

Penny Point Park Apartments v. Barnes, 2007 WL 3289133 (N.J.Super.A.D., Nov. 8, 2007)(per curium) (unpublished). The appellate court upheld a lower court finding of an implied warranty of habitability defense to a landlord's eviction action against a Section 8 assisted tenant who complained of offensive odors coming from an upstairs neighbor's apartment. The lower court found that the resident notified the landlord of the odors and that they were not remedied. The lower court abated the resident's rent in proportion to her subsidy payment and ordered continuing abatement pending third-party verification of abatement.

Damages for Breach of Right of Quiet Enjoyment—Illegal Termination of Project-Based Section 8 Subsidy

Homesavers Council of Greenfield Gardens, Inc. v. Sanchez, 70 Mass.App.Ct. 453, 874 N.E.2d 497 (Mass.App.Ct., Oct. 10, 2007). Appellate court upheld lower court award of damages for breach of quiet enjoyment of premises and resulting emotional distress to tenant whose landlord sought to evict her for nonpayment of rent. The landlord, without notice, improperly terminated tenant's project-based Section 8 subsidy and substituted a shallower Section 236 subsidy. When tenant took an unpaid medical leave of absence, landlord refused to adjust tenant's rent because she was no longer assisted by the Section 8 program and sought to evict her when she failed to pay the higher

Section 236 rent. Appellate court found that damages for emotional distress could be awarded as consequential damages in an action for quiet enjoyment of the premises and that to recover the damages the resident only needed to show negligent interference and not intentional interference with the right to quiet enjoyment. Moreover, the court upheld the lower court's finding that the resident suffered emotional distress.

Reasonable Accommodation—Voucher Program

Gaither v. Housing Authority of City of New Haven, 2007 WL 3378533 (D.Conn., Nov. 2, 2007). The court denied the resident plaintiff's motion to amend its previous order that required the housing authority to produce a list of accessible residential units in the New Haven, Connecticut area, including information on the units' availability. It refused to order defendants to hire temporary aides to help the plaintiff get out of his apartment building and onto the school bus and to pay the excess cost of an accessible unit, or the cost of making a unit accessible. The court concluded that the housing authority had to make reasonable accommodations for a person with a disability but was not required to provide every accommodation the disabled person may request. The court, however, modified its previous order to state that insufficient evidence was submitted in the case for it to make a determination whether the requested remedial measures are reasonable accommodations rather than additional, substantive benefits.

Right to Prepay Loan—RHS Section 515 Program

Schroeder, v. United States, 2007 WL 3028432 (D.Or., Oct. 17, 2007).[4] The district court reversed a magistrate's recommendation that the owner of an RHS Section 515 Rural Rental Housing development be granted quiet title under Oregon law on the ground that RHS improperly refused to accept the owner's prepayment of a Section 515 loan. The district court held that the owner could not prepay the loan without first complying with the prepayment restrictions imposed on Section 515 owners by the Emergency Low Income Housing Preservation Act of 1987.

Breach of HAP Contract by Adoption of REAC Regulations—Project Based Section 8 Program

Valentine Properties Associates v. U.S. Dept. of Housing and Urban Development, 2007 WL 3146698 (S.D.N.Y., Oct. 12, 2007). In an action brought by owners of two federally subsidized projects against HUD, the court granted HUD's motion to dismiss the plaintiffs' claim that the Real Estate Assessment Center's (REAC) regulations, which were adopted after the owners entered into a Housing Assistance Payment (HAP) contract with HUD, unlawfully amended the standards and practices of the HAP contracts. It also granted HUD's motion to dismiss the owners' claims that REAC unlawfully abridged plaintiffs' contractual and constitutional right to notice and an opportunity to cure alleged building deficiencies and that HUD's REAC inspections of the owners' buildings as implemented were defective. The court, however, denied HUD motions to dismiss plaintiffs' claims that HUD's adoption of two different definitions of decent, safe, and sanitary was arbitrary and capricious as REAC inspections are applied only to certain types of Section 8 contracts, that HUD's attempt to apply REAC to terminate the owners' pre-1980 HAP contracts is barred and illegal under HUD regulations, and that the REAC regulations violate federal provisions, standards, and preconditions to adoptions of the regulations.

Refusal to Rent to Voucher Holder—Violation of Local Source of Income Discrimination Laws

Montgomery County v. Glenmont Hills Assoc., 2007 WL 4208631 (Md., Nov. 30, 2007). In an administrative proceeding, the County Human Rights Commission found that a landlord who refused to lease apartments to persons who held federal housing choice vouchers violated a county ordinance that made it unlawful for certain landlords to refuse to lease or rent to any person based on source of income. In an action filed by the landlord to review the decision, the county circuit court reversed the administrative decision and Maryland's supreme court granted *certiorari*. The court held that local ordinance, which defined income to include "any government or private assistance [or] grant program" was intended to cover the Section 8 voucher program and thus precluded landlords from refusing to rent to otherwise qualified applicants because they participated in the program. The court rejected the landlord's argument, that the local ordinance was preempted by federal law that makes the voucher program a voluntary housing assistance program, on the ground that the Department of Housing and Urban Development explicitly stated in implementing regulations that the voluntary nature of the program is not intended to preempt state and local anti-discrimination laws. Lastly, the court also rejected the landlord's argument that the program established severe administrative burdens that made its failure to rent a viable defense to the ordinance's enforcement. Accordingly, it granted civil penalties against the landlord.

[4]A more complete summary of this decision appeared in the October issue of the *Housing Law Bulletin*. *See, Owner Denied Right to Prepay RHS 515 Loan*, 37 HOUS. L. BULL. 183 (Oct. 2007).

Refusal to Rent to State Voucher Holder—Source of Income Discrimination

DiLiddo v. Oxford Street Realty, 450 Mass. 66, 876 N.E.2d 421 (Mass., Nov. 15, 2007). The court reversed a superior court's partial summary judgment holding in favor of a landlord's agent who refused to rent a unit to a person participating in Massachusetts' alternative housing voucher program because of objections to the program's lease termination requirements. Under Massachusetts law it is unlawful for any person furnishing rental accommodations to discriminate against a participant in a local, state or federal rental assistance or housing subsidy program on the grounds that the individual is such a participant, or because of any requirement of such rental assistance or housing subsidy program. The agent argued that it did not discriminate against the applicant but refused to rent to her because the lease termination provisions, among other lease provisions, were economically disadvantageous to the landlord. The court held that lease provisions were a requirement of the alternative housing choice voucher program and that under current Massachusetts law the landlord's agent could not refuse to rent a unit to a tenant because a lease requirement may be onerous. The court also rejected the agent's effort to avoid liability by arguing that it acted under direction of landlord and counsel.

Fair Housing Act, Withdrawal from Section 8 Program—Failure to Support Disparate Impact Allegation.

Graoch Associates #33 v. Louisville/Jefferson County Metro Human Relations Com'n, (6th Cir., Nov. 21, 2007). The court of appeals, in a split decision, affirmed a district court reversal of the Human Relations Commission (HRC) finding that a landlord's withdrawal from the Section 8 voucher program was insufficient, by itself, to establish a violation of the Fair Housing Act (FHA). The court of appeals concluded that a plaintiff, like the HRC, can in principle rely on evidence of some instances of disparate impact to show that a landlord violated the FHA by withdrawing from the Section 8 program. However, in this case it found that the HRC did not even allege facts making the statistical comparison necessary to state a *prima facie* case of disparate-impact discrimination. Accordingly, it affirmed the lower court decision. The court of appeals decision distinguishes Second and Seventh Circuit cases that have found that withdrawal from the Section 8 program cannot constitute a basis for disparate impact under the FHA.

Fair Housing—Damages for Failure to Fix Elevators

Davis v. Lane Management, 2007 WL 3306959 (S.D.Fla., Nov. 6, 2007). The court awarded an $861,334 default judgment under the Fair Housing Act to a quadriplegic plaintiff whose landlord refused to fix elevators in an apartment complex for a seven-month period during which the resident was forced to crawl up stairs to his second floor apartment and suffer physical and mental injury as well as humiliation.

Removal of State Eviction Proceeding to Federal Court—Lack of Federal Question

Eden Housing Management, v. Muhammad, 2007 WL 4219397 (N.D.Cal., Nov. 27, 2007). A district court denied a subsidized resident's effort to remove an eviction action from state court to federal court on the ground that HUD was involved in the rental contract and that the plaintiff violated the resident's civil rights. Court held that the plaintiff's claim had no federal question and that removal of jurisdiction cannot be created by the defendant filing a counterclaim that raises a federal question. The court awarded attorneys fees to the plaintiff for the defendant's failure to support the removal motion with a reasonable basis for removal.

Class Action Certification—Habitability Damage Action; Public Housing

Thames River Apartment Tenants v. New London Housing Authority, 2007 WL 4305525 (Conn.Super., Nov. 13, 2007). The court denied the plaintiff's effort to maintain a class action law suit on eight damage claims against the housing authority and others for failure to maintain a public housing development as habitable housing. The court found that the plaintiff had failed to show that class action in this case satisfies the requirement that a class proceeding predominate and be superior to a series of individual proceedings. The court did, however, certify a class with respect to the resident's ninth cause of action that sought to enjoin the housing authority from continuing to operate the housing in violation of its obligations to provide decent, safe and sanitary housing and sought the appointment of a receiver. ■

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), the Department of Agriculture (USDA—Rural Housing Service/Rural Development (RD)) and the Veterans Administration issued in October of 2007. 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 website,[1] (2) bound volumes of the Federal Register, (3) HUD Clips,[2] (4) HUD,[3] and (5) USDA's Rural Development website.[4] Citations are included with each document to help you secure copies.

HUD Final Regulations

72 Fed. Reg. 56,001 (Oct. 1, 2007)
Standards for Mortgagor's Investment in Mortgaged Property

Summary: This final rule amends the department's regulations governing the specific standards for a mortgagor's investment in property for which the mortgage is insured by the Federal Housing Administration. Specifically, this final rule codifies HUD's longstanding practice, authorized by statute, of allowing a mortgagor's investment to be derived from gifts by family members and certain organizations. The standards established by this final rule address a situation in which the mortgagor's investment is derived from a gift, loan or other payment that is provided by any donor, including an individual or an organization, and also specify prohibited sources for a mortgagor's investment.

Effective Date: October 31, 2007.

72 Fed. Reg. 56,155 (Oct. 2, 2007)
Revisions to the Single Family Mortgage Insurance Program

Summary: This final rule revises HUD's regulations under the single family mortgage insurance program that govern actions by mortgages with respect to mortgages in default to implement recent statutory changes. The rule also amends regulations under the program to make them consistent with industry practices. HUD believes that these changes will help to increase the administrative efficiency of the single family mortgage insurance program.

Effective Date: November 1, 2007.

72 Fed. Reg. 59,003 (Oct. 18, 2007)
Use of Indian Housing Block Grant Funds for Rental Assistance in Low-Income Housing Tax Credit Projects

Summary: This final rule amends the Indian Housing Block Grant (IHBG) program regulations to specify the conditions under which IHBG funds may be used for project-based or tenant-based rental assistance. The final rule clarifies that such rental assistance may be provided in a manner consistent with assistance provided under Section 8 of the United States Housing Act of 1937 on behalf of a tenant receiving assistance under the Native American Housing Assistance and Self-Determination Act of 1996.

Effective Date: November 19, 2007.

72 Fed. Reg. 59,337 (Oct. 19, 2007)
Model Manufactured Home Installation Standards

Summary: This final rule establishes new Model Manufactured Home Installation Standards for the installation of new manufactured homes and includes standards for the completion of certain aspects necessary to join all sections of multi-section homes.

Effective Date: October 20, 2008.

72 Fed. Reg. 59,935 (Oct. 22, 2007)
Housing Choice Voucher Program Homeownership Option; Eligibility of Units Not Yet Under Construction

Summary: This final rule revises HUD's regulations for the homeownership option authorized under the Housing Choice Voucher (HCV) program. Through the homeownership option, a public housing agency may provide voucher assistance for an eligible family that purchases a dwelling unit for residence by the family. This final rule authorizes the use of voucher homeownership assistance for the purchase of units not yet under construction at the time the family contracts to purchase the home. This revision will expand the housing choices available to families participating in the homeownership option under the HCV program.

Effective Date: November 21, 2007.

72 Fed. Reg. 65,205 (Nov. 19, 2007)
Project-Based Voucher Rents for Units Receiving Low-Income Housing Tax Credits

Summary: This rule revises the low-income housing tax credit (LIHTC) rent provisions of HUD's Project-Based Voucher (PBV) program regulations. This rule reinstates the regulatory provision where the LIHTC rent does not serve as a cap on rents in PBV projects receiving LIHTCs. The rule also re-emphasizes that public housing authorities may not enter into assistance contracts until HUD or

[1]http://www.access.gpo.gov/su_docs.
[2]http://www.hudclips.org/cgi/index.cgi.
[3]To order notices and handbooks from HUD, call (800) 767-7468 or fax (202) 708-2313.
[4]http://www.rdinit.usda.gov/regs.

an independent entity approved by HUD has conducted the required subsidy layering review and determined that the assistance is in accordance with HUD requirements. This final rule follows a May 1, 2007, proposed rule and takes into consideration public comments received on the proposed rule. HUD carefully considered the public comments, but adopts the proposed rule without change.

Effective Date: December 19, 2007.

72 Fed. Reg. 66,033 (Nov. 26, 2007)
Implementation of Mark-to-Market Program Revisions

Summary: Based on statutory changes and HUD's technical operational experience in administering the program, this final rule implements a number of changes to the Mark-to-Market (M2M) program, HUD's mortgage restructuring program for FHA-insured projects with project-based Section 8 assistance, to facilitate processing. Unlike the M2M proposed and final rules addressing renewal of expiring Section 8 project-based assistance contracts that HUD published on January 12, 2006, this rule addresses a range of administrative and programmatic issues other than the project-based assistance contracts. This final rule follows publication of a March 14, 2006, proposed rule and takes into consideration the public comments received on the proposed rule.

Effective Date: December 26, 2007.

HUD Proposed Rules

72 Fed. Reg. 58,447 (Oct. 15, 2007)
Pet Ownership for the Elderly and Persons With Disabilities

Summary: This proposed rule would revise HUD's regulations that apply to pet ownership in HUD-assisted housing for the elderly and persons with disabilities by conforming the exceptions for animals that assist persons with disabilities to those that apply to HUD's public housing programs, as defined in Section 3(b) of the United States Housing Act.

Comment Due Date: December 14, 2007.

72 Fed. Reg. 61,269 (Oct. 29, 2007)
HUD Acquisition Regulation (HUDAR) Debarment and Suspension Procedures

Summary: This rule amends HUD's Acquisition Regulation (HUDAR) to codify the suspension and debarment procedures applicable to HUD's procurement contracts. Such an amendment affirms that the suspension and debarment procedures in 24 CFR part 24 apply to both procurement and non-procurement contracts. The contracting community is familiar with the suspension and debarment procedures in part 24, and this rule is limited to amending the HUDAR regulations to reflect the applicability of these requirements to procurement contracts.

Effective Date: November 28, 2007.

HUD Federal Register Notices

72 Fed. Reg. 55,939 (Oct. 1, 2007)
Final Fair Market Rents (FMRs) for Fiscal Year 2008 for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program

Summary: The Secretary of HUD is required to publish FMRs periodically, but not less than annually, adjusted to be effective on October 1 of each year. The primary uses of FMRs are to determine payment standard amounts for the Housing Choice Voucher program, to determine initial renewal rents for some expiring project-based Section 8 contracts, to determine initial rents for housing assistance payment contracts in the Moderate Rehabilitation Single Room Occupancy program, and to serve as a rent ceiling in the HOME rental assistance program. Today's notice provides final FY 2008 FMRs for all areas that reflect the estimated fortieth and fiftieth percentile rent levels trended to April 1, 2008. FY 2008 FMRs are the first to be able to take advantage of the full implementation of American Community Survey (ACS), a major new Census survey that is being conducted annually. The ACS will replace the Decennial Census "long-form" sample survey that is the source of Decennial Census rent information. The ACS will permit more accurate FMR estimates each year than were possible using the Decennial Census trending techniques of previous FMR estimates.

Effective Date: October 1, 2007.

72 Fed. Reg. 55,799 (Oct. 1, 2007)
Notice of Proposed Information Collection for Public Comment: Section 8 Random Digit Dialing Fair Market Rent Telephone Survey

Summary: HUD has submitted to the Office of Management and Budget an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to Section 8 Random Digit Dialing Fair Market Rent Telephone Survey. This provides HUD with a relatively fast and accurate way to estimate and update Section 8 Fair Market Rents (FMRs) in areas where FMRs are believed to be incorrect and data from the American Community Survey is not available at the local level. Random Digit Dialing (RDD) telephone surveys have been used for many years to adjust FMRs. These surveys are based on a sampling procedure that uses computers to select statistically random samples of telephone numbers to locate certain types of rental housing units for surveying. HUD will conduct RDD surveys of up to twenty individual FMR areas per year to test the accuracy of their FMRs.

Comments Due Date: November 30, 2007.

72 Fed. Reg. 56,784 (Oct. 4, 2007)
Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request, Disaster Housing Assistance Program (DHAP)

Summary: HUD has submitted to the Office of Management and Budget an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to the DHAP. This document provides notice that HUD and the Federal Emergency Management Agency (FEMA) have executed an Interagency Agreement establishing a pilot grant program called the Disaster Housing Assistance Program (DHAP), and that the operating requirements for the DHAP have been issued through HUD Notice. DHAP is a joint initiative undertaken by HUD and FEMA to provide monthly rent subsidies and case management services for individuals and families displaced by Hurricane Katrina or Hurricane Rita who were not receiving housing assistance from HUD.

Comment Due Date: October 18, 2007.

72 Fed. Reg. 57,055 (Oct. 5, 2007)
Notice of Submission of Proposed Information Collection to OMB; HUD-Owned Real Estate—Dollar Home Sales Program

Summary: HUD has submitted to the Office of Management and Budget an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to the department's program that offers single-family properties to local governments for one dollar and to community development corporations on a cost-recovery basis. The information collected will be used in binding contracts between the purchaser and HUD. The respondents are purchasers of HUD-owned properties: community development corporations and governmental entities.

Comments Due Date: November 5, 2007.

72 Fed. Reg. 57,056 (Oct. 5, 2007)
Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request, Disaster Housing Assistance Program (DHAP)

Summary: HUD has submitted to the Office of Management and Budget an information collection requirement for review and is soliciting public comments on the subject proposal. This document provides notice that HUD and the Federal Emergency Management Agency (FEMA) have executed an Interagency Agreement establishing a pilot grant program called the Disaster Housing Assistance Program (DHAP), and that the operating requirements for the DHAP have been issued through HUD Notice. DHAP is a joint initiative undertaken by HUD and FEMA to provide monthly rent subsidies and case management services for individuals and families displaced by Hurricane Katrina or Hurricane Rita who were not receiving housing assistance from HUD.

Comment Due Date: October 6, 2007.

72 Fed. Reg. 58,319 (Oct. 15, 2007)
Notice of Proposed Information Collection for Public Comment; Resident Opportunities and Supportive Services (ROSS) Program Forms for Applying for Funding

Summary: HUD has submitted to the Office of Management and Budget an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to the ROSS program. Applicants for ROSS Service Coordinator grant funds submit applications for Service Coordinator positions. The grant program is being changed to provide funding for Service Coordinators only. The application is being streamlined. Applicants describe the needs of their residents and the services and partners available in the community, their past performance in similar programs, their ability to commit matching funds, and indicate their expected outputs and outcomes.

Comments Due Date: December 14, 2007.

72 Fed. Reg. 60,687 (Oct. 25, 2007)
Notice of Submission of Proposed Information Collection to OMB; Public Housing Assessment System (PHAS) Memorandum of Agreement (MOA), MOA Monthly Report, and Improvement Plan (IP)

Summary: HUD has submitted to the Office of Management and Budget an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to the Public Housing Assessment System (PHAS). A public housing agency which is designated troubled or substandard under PHAS must enter into a Memorandum of Agreement with HUD to outline its planned improvements. Similarly, a public housing agency which is a standard performer, but receives a total PHAS score of less than 70% but not less than 60%, is required to submit an improvement Plan. These plans are designed to address deficiencies in a public housing agency's operations found through the PHAS assessment process (management, financial, physical or resident related) and any other deficiencies identified by HUD through independent assessments or other methods.

Comment Due Date: November 26, 2007.

72 Fed. Reg. 65,344 (Nov. 20, 2007)
Notice of Submission of Proposed Information Collection to OMB; Public Housing 5-Year and Annual PHA Plan

Summary: HUD has submitted to the Office of Management and Budget an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to the requirement that public housing authorities (PHAs) are required to submit annual and 5-Year Plans to HUD. The purpose of the plan is to provide a framework for local accountability and an easily identifiable source by which public housing residents, participants in the tenant-based assistance program, and other members of the public may

locate basic PHA policies, rules and requirements concerning the PHA's operations, programs and services.

Due Date: December 20, 2007.

72 Fed. Reg. 65,348 (Nov. 20, 2007)
Privacy Act of 1974; Notice of a New System of Records, Single Family Insurance System CLAIMS Subsystem

Summary: Pursuant to the provisions of the Privacy Act of 1974, HUD's Single Family Claims Branch is providing notification of the establishment of this new record system, the Single Family Insurance System CLAIMS Subsystem, A43C. The purpose of A43C is to collect, maintain and verify data needed to support the claim payment activities received from mortgagees.

Comment Due Date: December 20, 2007.

Effective Date: This action shall be effective without further notice on December 20, 2007, unless comments are received which will result in a contrary determination.

72 Fed. Reg. 65,350 (Nov. 20, 2007)
Privacy Act of 1974; Notice of a New System of Records, Single Family Default Monitoring System

Summary: Pursuant to the provisions of the Privacy Act of 1974, HUD's Single Family Housing, Office of Evaluation is providing notice of its intent to establish a new record system, entitled the Single Family Default Monitoring System. The new record system contains information on FHA mortgage loans that are ninety days or more delinquent on a mortgage payment. The system will be utilized to track debt servicing activities submitted to the department on behalf of the mortgagee or loan servicer.

Comment Due Date: December 20, 2007

Effective Date: This action shall be effective without further notice on December 20, 2007, unless comments are received which will result in a contrary determination.

HUD Notices

PIH-2007-29 (Oct. 10, 2007)
Reporting Requirements and Sanctions Policy under the Housing Choice Voucher Program for the Family Report into the Public and Indian Housing Information Center

Summary: This notice renews with significant changes the Form HUD-50058 assessment and sanctions process implemented under Notice PIH 2006-24 for the Housing Choice Voucher (HCV) program only as the assessment process is not applicable to the public housing program. The department continues to place great importance on the data it receives from public housing agency (PHAs) in its Public and Indian Housing Information Center. The department relies on PHAs to submit accurate, complete and timely data in order to administer, monitor and report on the management of the HCV program. In order to fully justify its budget requests to Congress, the department needs full cooperation from all PHAs in meeting their reporting requirements. The Form HUD-50058 data will also assist the department in responding to future natural disasters and emergencies.

PIH Notice 2007-31 (Nov. 6, 2007)
Disaster Housing Assistance Program (DHAP)—Revisions to the Operating Requirements

Summary: This notice revises the Disaster Housing Assistance Program (DHAP) Operating Requirements to reflect that rental subsidy payments under DHAP will not commence until December 1, 2007. Previously, DHAP rental subsidy payments for the initial group of families transitioning from Federal Emergency Management Agency (FEMA) rental assistance to DHAP were scheduled to commence on November 1, 2007. FEMA will continue to make rental assistance payments (either directly or through FEMA's contractor Corporate Lodging Consultants) on behalf of these families for November. The notice also clarifies that if a DHAP eligible family is admitted into another permanent housing assistance program such as the housing choice voucher program or public housing instead of receiving DHAP rental assistance, DHAP case management services are no longer provided to that family. The notice revises the PHA's eligibility for the one-time placement fee to cover cases where a family is permanently housed in lieu of receiving DHAP rental assistance payments. The notice addresses the applicability of the family obligations with respect to serious and repeated lease violations. In addition, the notice corrects the list of family obligations to include three obligations inadvertently omitted from HUD Notice PIH 2007-26. Finally, the notice provides guidance on changes in family composition, including the family's eligibility for continued DHAP assistance if the head of household dies or otherwise leaves the family.

CPD-07-08 (Nov. 21, 2007)
Use of Community Development Block Grant (CDBG) Program Funds in Support of Housing

Summary: This notice describes ways in which grantees can use the CDBG program to expand the development of decent, accessible and affordable housing in their communities. Many of these subjects are discussed further in the Guide to National Objectives and Eligible Activities located on the web at http://www.hud.gov/offices/cpd/communitydevelopment/library/deskguid.cfm. This notice brings together ways to use CDBG funds for housing that are supported in various sections of the CDBG regulations and the Guide. ■

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