NATIONAL HOUSING LAW PROJECT
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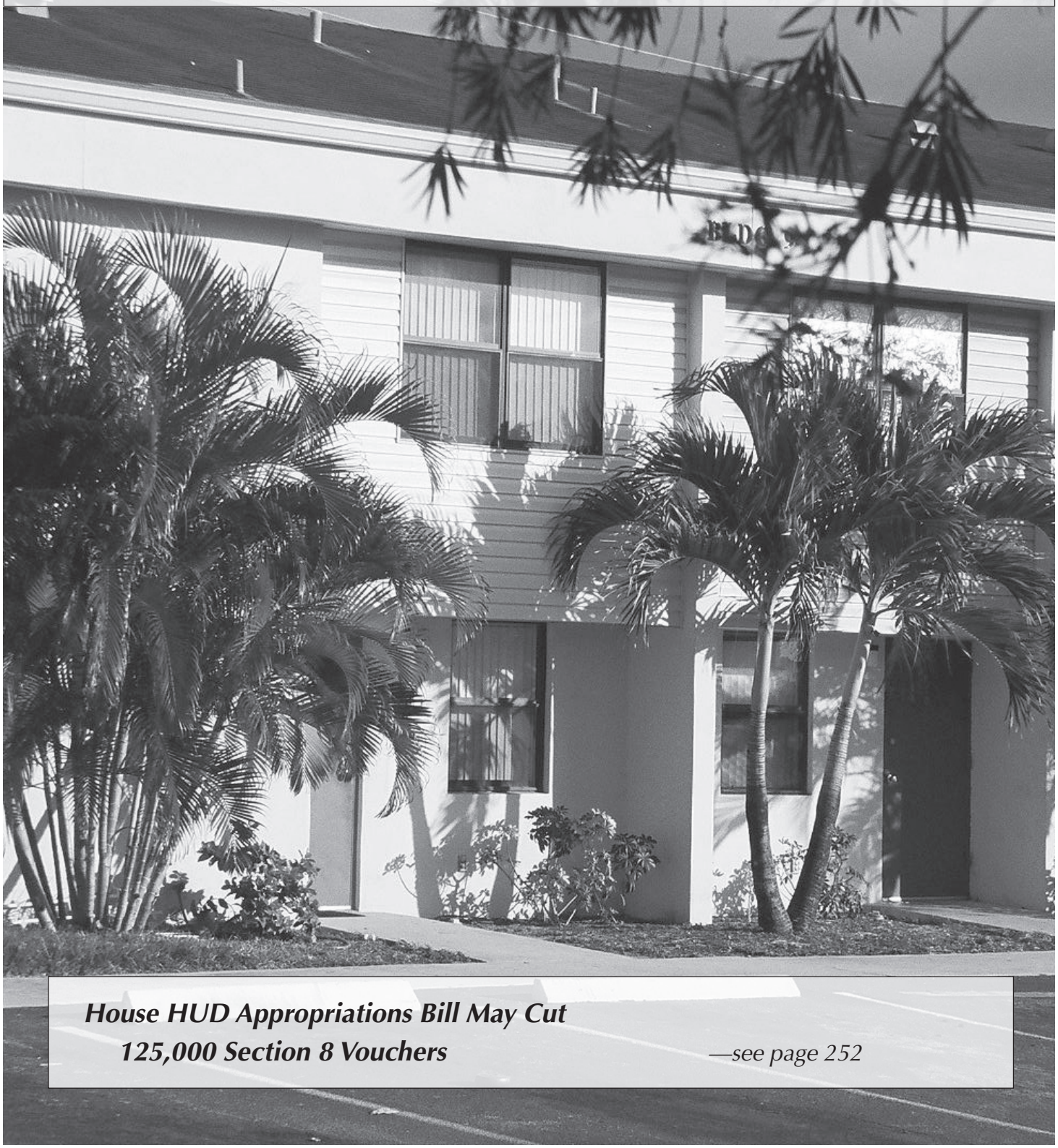
Housing Law Bulletin

Volume 32 • November/December 2002
Published by the National Housing Law Project



House HUD Appropriations Bill May Cut 125,000 Section 8 Vouchers

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Housing Law Bulletin

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Cover: Robinson Village—a 60-unit townhouse public housing development in West Palm Beach, Florida. Constructed in the 1980s and operated by the West Palm Beach Housing Authority.

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

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

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Congress Adjourns with Few Housing Accomplishments

After reconvening a lame-duck session following the election, the 107th Congress adjourned in late November with few legislative accomplishments, despite the extensive groundwork of many bills and hearings that had been laid earlier in the session. Even the annual appropriations ritual, often the only legislative vehicle of late, became enmeshed in larger budget politics and failed to emerge as a separate bill, being folded instead into the Continuing Resolution covering most federal operations into January after the 108th Congress convenes.

In order to receive further consideration, bills not enacted by the 107th Congress must be reintroduced in the 108th Congress. This article briefly summarizes some of the major housing hits and misses of the 107th Congress.

Appropriations

The House and Senate HUD-VA-IA Appropriations bills for Fiscal Year (FY) 2003[1] passed out of their respective committees but never received floor action before Congress adjourned. Instead, HUD has received pro-rata appropriations at the FY '02 levels under a series of Continuing Resolutions, the most recent of which passed during the lame-duck session and runs through January 11, 2003.[2] However, due to escalating costs and incremental authority needed to fund a growing number of expiring Section 8 contracts, FY '02 appropriation levels are insufficient to meet HUD's FY '03 needs. Additional funding to meet these needs in the 108th Congress may well be problematic because of the Administration's likely post-election hard line on domestic discretionary spending.

The Appropriations Committee Chairs of the new Congress have reportedly agreed to limit FY '03 overall spending to about $750 billion, around the level the House considered in its past deliberations but lower than that considered by the Senate. Squeezing spending under this overall cap will require significant revision to all of the pending appropriations bills, especially the Senate version of the HUD bill. Housing advocates remain extremely concerned about the House proposal that would have changed the formula for the renewal of tenant-based vouchers in a way that would cut as many as 125,000 vouchers.[3] In addition, advocates fear

[1]H.R. 5605, Rep. Walsh (R-NY), reported out of committee October 10, 2002 (H.R. Rep. No. 107-740), and S. 2797, Sen. Mikulski (D-MD), reported out of committee on July 25, 2002 (S. Rep. No. 107-222). For more background on the funding levels and contents of these bills, as well as the Continuing Resolutions, *see Usual Waiting Game for HUD Appropriations Brings New Twists*, 32 HOUS. L. BULL. 235 (Oct. 2002).

[2]H.J.Res. 124, Pub. L. No. 107-294 (Nov. 23, 2002).

[3]See *Report Concludes that HUD Appropriations Bill Will Cut 125,000 Section 8 Vouchers*, on page 252 of this issue. The Center on Budget and Policy Priorities has issued two papers, an updated analysis of the House proposal and another providing data about the proposal's effects in each state, available at www.cbpp.org.

that the Senate's previously proposed $100 million appropriation for rehabilitation of HUD-insured multifamily properties from recaptured Section 236 subsidies will succumb to the House proposal to rescind those funds.

Earlier in the year, Congress passed a Supplemental Appropriations measure for FY '02, H.R. 4775. Unfortunately, this bill added no funds for HUD programs, and took away ("rescinded") $738.5 million, including $300 million from the existing accumulated pot of Section 236 recaptures which Congress had previously designated for multifamily rehabilitation.[4]

Authorizing Legislation

The 107th Congress saw a raft of housing bills introduced.[5] A few were even subjected to committee hearing and the mark-up process, but little emerged into law. Here are brief summaries of the status of the most significant bills affecting the interests of very low-income people.

Affordable Housing Production

Several bills sought to augment the federal government's efforts to produce more affordable housing for very low-income people. While some made real progress in the legislative process, largely due to the efforts of the National Affordable Housing Trust Fund Campaign,[6] none reached the finish line, setting the stage for renewed efforts in the next Congress.

In the House, the bill to create a National Affordable Housing Trust Fund, H.R. 2349, introduced by Reps. Sanders (I-VT), Lee (D-CA) and McHugh (R-NY), was referred to the Housing subcommittee and introduced as an amendment to the Banking Committee's mark-up of H.R. 3995, Rep. Roukema's omnibus housing bill (*infra*). After initial passage, it was, however, defeated on reconsideration by a single vote in Committee.[7] Substituted was an amendment offered by Rep. Kelly (R-NY) to provide federal funds, as appropriated, to match new state and local investments from existing housing trust funds in affordable housing.[8] The revised H.R. 3995, however, never made it to a vote on the House floor prior to adjournment.

On the Senate side, two bills were introduced to address the need for more federal housing production. S. 1248, which also sought to establish a National Affordable Housing Trust Fund, was introduced in July of 2001 by Senator Kerry.[9] S. 2967, introduced in September of 2002 by Senator Bond (R-MO), sought to promote production through direct appropriations.[10] Testimony on both bills was heard in the Senate Housing and Transportation Subcommittee in September, but no further action was taken.

Efforts to advance federal support for new production efforts for very low-income families will be renewed next year in the 108th Congress. Progress may well be heavily influenced by how housing fits within the larger picture of budget politics and the degree of support, if any, provided by the Administration.

Affordable Housing Preservation

While two bills were reintroduced from the prior Congress to provide funds for the preservation of affordable housing, neither made much headway. H.R. 425 (Rep. Nadler, D-NY) and S. 1365 (Sen. Jeffords, I-VT) sought to authorize federal matching grants for state and local investments to preserve federally assisted affordable housing.

Two other companion bills, S. 1887 (Sen. Snowe, R-ME) and H.R. 3737 (Rep. Andrews, D-NJ), sought to authorize renewal of expiring project-based Section 8 moderate rehabilitation contracts on terms equal to other project-based contracts. This would have allowed such properties to take full advantage of other available HUD programs, like Mark-Up-To-Market. However, no action was taken on either bill.

While the Senate Subcommittee held an October 9 hearing on housing preservation issues, it took no action. It remains unclear how the subsequent shift in control of the Senate will affect the Subcommittee's oversight and reform agenda for the next Congress.

Community Development Block Grant Program

In the House, H.R. 1191 (Rep. Meek, D-FL) proposed to increase the amount of Community Development Block Grant program (CDBG) funds targeted to low-income people and neighborhoods. A hearing was held, but no action was taken.

FHA Surplus

In addition to the proposed use of the FHA Fund surplus for expansion of affordable housing under the Trust Fund concept, other bills proposed using the funds to prevent suspension of FHA insurance programs or to provide rebates to homebuyers. No action was taken on any of these bills.

Homeownership Initiatives

Reflecting the political popularity of homeownership, a host of homeownership bills were introduced in the 107th Congress. Key proposals included H.R. 4446 (Rep. Rogers, R-MI) and S. 2584 (Allard, R-CO), seeking to authorize the Administration's homeownership proposals in the FY '03 budget. While no action was taken on these, Congress did pass S. 2239 (Sen. Sarbanes, D-MD) during the lame-duck session to simplify FHA single-family downpayment requirements, which was signed into law by the President.[11]

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[4]Pub. L. No. 107-206, 116 Stat. 892 (Aug. 2, 2002). *See Midnight Caper Snatches Federal Housing Rehabilitation Funds*, 32 HOUS. L. BULL. 213 (Sept. 2002).

[5]*See Memo to Members*, the weekly newsletter of the National Low-Income Housing Coalition, www.nlihc.org, *e.g.*, Vol. 7, No. 47 (Dec. 6, 2002), which contains a running list of pending federal legislation and the bills' status.

[6]For details on the Campaign, *see* www.nhtf.org.

[7]*See H.R. 3995: National Housing Trust Fund Spoiled*, 32 HOUS. L. BULL. 186 (Aug. 2002). For more on H.R. 3995, *see also Omnibus Housing Bill Introduced in the House*, 32 HOUS. L. BULL 98 (Apr. 2002).

[8]H.R. 3995, Sec. 102 (adopted in Committee, July 10, 2002). *See H.R. 3995: National Housing Trust Fund Spoiled*, 32 HOUS. L. BULL. 186 (Aug. 2002).

[9]*See Support Builds for New Production Bills*, 31 HOUS. L. BULL. 210 (Sept. 2001); *Housing Production Campaign Gains Ground*, 32 HOUS. L. BULL. 47 (Feb. 2002).

[10]*See Senator Bond Introduces Long-Awaited Housing Production Bill*, 32 HOUS. L. BULL. 237 (Oct. 2002).

[11]Pub. L. No. 107-326, 116 Stat. 2792 (Dec. 4, 2002).

Homelessness

S. 2573 (Sen. Reed, D-RI), which would reauthorize and amend the *McKinney-Vento Homeless Assistance Act*, also saw no action. Hence any reauthorization will occur during the forthcoming appropriations process for FY '03.

Low-Income Housing Tax Credit

Various bills were introduced that would have made changes to the Low-Income Housing Tax Credit Program. Among the proposed changes were authorization to use the higher of area or state median incomes for determining income limits, permit moderate rehabilitation, clarify expense eligibility, and provide exemption from recapture of credits for certain recipients of federal multifamily housing loans. None saw any action.

Native American Housing

S. 1210 (Sen. Campbell, R-CO), the reauthorization of the *Native American Housing Assistance and Self-Determination Act of 1996*, passed both houses and was signed by the President.[12]

Omnibus Housing Legislation

H.R. 3995 (Rep. Roukema, R-NJ), proposing to amend and extend numerous housing laws and programs, passed the House Banking Committee and was calendared for floor action which never came.[13] This bill contained many provisions affecting federal housing programs, including:

- a housing production program within the HOME program funded by Section 8 recaptures, with 50 percent of the funds targeted for production and preservation of units for extremely low-income families; authorizing less costly "thrifty production vouchers" (based on the property's operating cost and assuming capital subsidies) to be used in conjunction with this program;
- provisions designed to improve Section 8 voucher utilization, such as revising the Section 8 rent cap from 40 percent of adjusted net income to 40 percent of gross income, allowing PHAs to use up to 5 percent of funds to directly support the program via means such as counseling, downpayment assistance, security deposits and other supportive services; and performance incentives for those PHAs that achieve high SEMAP scores or show substantial improvements;
- improvements to HUD's enhanced voucher program protecting tenants when formerly subsidized buildings convert to market, such as prohibiting rescreening of tenants;
- suspending for three years the requirement that PHAs with fewer than 100 public housing units file an annual PHA plan;
- allowing HUD to waive the requirement that PHAs have at least one resident on their governing board on certain conditions;
- granting HUD the authority to develop a prototype PHA evaluation system as an alternative to the controversial Public Housing Assessment System (PHAS);
- extending and altering the HOPE VI program through 2004, and expanding the eligibility criteria to include smaller PHAs;
- several provisions regarding assistance for the homeless, such as moving Shelter Plus Care renewals and the Supportive Housing Program to the Housing Certificate Fund, extending those programs as well as the several others through 2004, and providing increased funding for Section 8 Assistance for Single Room Occupancy Dwellings, and extending it through 2004.

Although the legislation's sponsor, Representative Roukema, retired at the end of the 107th Congress, Republican control of the House and Senate in the 108th Congress means that many of these provisions may be reconsidered through new legislation.

Conditions Under Which LSC Grantees May Participate in Statewide Web Sites

The Legal Services Corporation (LSC) Office of Legal Affairs has released a long-awaited internal opinion: "Transfer, Subgrant and Subsidy Considerations for LSC Grantees Participating in Statewide Web sites using LSC Funds." The opinion should be of interest to LSC grantees who are either considering contributing, or are already contributing, housing materials and substance to statewide Web sites.

The opinion reaches the following conclusions:

1. An LSC grantee can use LSC funds to pay another organization to perform certain administrative and ministerial functions for a statewide Web site without such payment constituting a transfer or subgrant, so long as there is also no subsidy with those funds.

2. Use of LSC funds to pay for Web site content development by another organization is a transfer or subgrant. Some content-related work though, such as purchasing content or translating content, may not rise to the level of a transfer or subgrant.

3. An LSC grantee can contribute to and participate in a statewide Web site without creating an LSC subsidy of the Web site or other partners if it can demonstrate that it realizes benefits from the Web site in at least equal proportion to its contributions.

The full text of the opinion is available at: www.lsc.gov/FOIA/olaeo/in-2002-2008.html.

[12]Pub. L. No. 107-292 (Nov. 13, 2002).

[13]For details on the bill's contents, *see Omnibus Housing Bill Introduced in the House*, 32 HOUS. L. BULL 98 (Apr. 2002).

Predatory Lending

Various bills sought to amend the federal *Truth in Lending Act* to reduce the incidence of predatory lending practices, but none advanced.

Public and Assisted Housing

In addition to the provisions of H.R. 3995, H.R. 1960 (Rep. Bereuter, R-NE) proposed to exempt small public housing authorities from the requirement of an annual PHA plan. H.R. 2243 (Rep. Velazquez, D-NY) sought to revise Section 3 to provide improved job opportunities for low-income people, including public housing tenants. H.R. 2493 (Rep. Rangel, D-NY) proposed repeal of community service requirements for public housing residents (which had been suspended through the FY '02 appropriations bill for most residents). H.R. 5499 (Rep. Watt, D-NC), seeking to reauthorize the HOPE VI program, passed the House, but also never reached the finish line. However, one of the Continuing Resolutions[14] passed in October authorized the program until the expiration of the resolution, and thus it has been extended as Congress has passed subsequent resolutions inserting a new expiration date.

Supportive and Veterans Housing

H.R. 2716 (Rep. Smith, R-NJ), providing a small number of additional vouchers for eligible homeless veterans and accompanying services from the Veterans Administration, was signed into law.[15] Also enacted was H.R. 3699 (Rep. Crenshaw, R-FL), which capped a designated grant for continuum of care homeless assistance in Jacksonville, and redistributed any excess to other applicants in the area.[16]

Voucher Utilization and Success

Legislation was introduced in the Senate (S. 2721, Sen. Sarbanes, D-MD) making changes in the voucher program to improve its performance locally.[17] Although it never passed the Senate, many of its provisions were also incorporated into H.R. 3995, the House's omnibus housing legislation that passed out of the House Banking Committee (*supra*). That legislation also failed to achieve passage, but many of these provisions may re-emerge in the 108th Congress.

The *Bulletin* will continue to report on future progress of these and other major housing bills in the next Congress. ■

[14]Pub. L. No. 107-240, §132 (Oct. 11, 2002) (H.J. Res. 122, amending Pub. L. No. 107-229).

[15]Pub. L. No. 107-95, 115 Stat. 903 (Dec. 21, 2001). Similar legislation had been introduced in the Senate as S. 739 by the late Sen. Wellstone (D-MN).

[16]Pub. L. No. 107-151, 115 Stat. 903 (March 13, 2002).

[17]*See Proposed Housing Voucher Improvement Act of 2002*, 32 HOUS. L. BULL. 182 (Aug. 2002).

Report Concludes that HUD Appropriations Bill Will Cut 125,000 Section 8 Vouchers

In the October 2002 *Housing Law Bulletin*, we reported that Congress had not enacted an appropriations bill for the Department of Housing and Urban Development (HUD) housing programs and related agencies for Fiscal Year (FY) 2003 as well as for many other departments when it adjourned on October 18, 2002.[1] Instead, it has adopted a series of Continuing Resolutions that are currently keeping the government funded at the FY 2002 level at least until January 11, 2003. We also reported that the Senate's HUD FY 2003 appropriations bill (S.2797), marked up in committee months ago, still awaits floor action, while the House Appropriations Committee reported out its version (H.R. 5605) on October 9. The House bill would reduce the President's budget for the Section 8 housing voucher program by $938 million.

The Center on Budget and Policy Priorities (CBPP) has issued a report that concludes that the House bill's proposed budget reduction would result in the loss of more than 125,000 Section 8 vouchers.[2] It also projects that there will be other unintended consequences, such as decreased interest by PHAs in improving voucher utilization, a reduction in the voucher subsidy level for families already participating in the program, and a loss of confidence in the voucher program by key players. This article summarizes the findings of that report.

A Historic Reduction Proposed Under the House Bill

Since 1974, the Section 8 program has functioned as the federal government's primary form of housing assistance to low-income families.[3] The program includes a tenant-based subsidy (currently the Housing Choice voucher) and project-based subsidies. To be eligible for assistance under the programs, tenants must have an income that is less than 80 percent of the median for families in their geographic area, with adjustments for different family sizes.[4] Under the Housing Choice Voucher program, the participating family may pay up to 40 percent of its adjusted monthly income for rent.[5] The PHA pays the landlord the remainder

[1]*See* 32 HOUS. L. BULL. 235 (Oct. 2002).

[2]Barbara Sard, Will Fischer, *House VA-HUD Appropriations Bill Would Jeopardize Access to Housing Vouchers for Low-Income Families. More than 125,000 Vouchers Likely to Be Lost.* Center on Budget and Policy Priorities (Nov. 22, 2002), p.1. (hereinafter, CBPP Report).

[3]42 U.S.C.A. §1437f (West 1978 and Supp. 1991), referring to Section 8 of the revised *United States Housing Act of 1937.*

[4]42 U.S.C.A §1437a(b)(2). Seventy-five percent of Section 8 funding received by any entity can only be used for people with incomes beneath 30 percent of the area median. *See* 42 U.S.C.A §1437n.

[5]42 U.S.C.A. §1437(o)(2)(C)(3) (West 2002).

up to the lower of the local "payment standard" or the gross rent.[6] Thus, the tenant pays the landlord the difference between the rent charged by the landlord and the payment made by the PHA.[7] If the unit's rent exceeds the payment standard, which is permissible under the voucher program, the tenant pays more than 30 percent (up to 40 percent) of adjusted income for rent. Over the years, reductions in funding have limited the voucher program's reach such that about three-fourths of the low-income households who are eligible for vouchers do not receive any form of federal housing assistance.[8]

Almost $174 million of the proposed House FY 2003 budget reduction would result from a cut in the number of incremental[9] housing vouchers provided, from 34,000 requested by the Administration to 7,100. However, the vast majority of the budget reduction—$764 million—would result from a significant change in the formula *used* to determine the annual voucher funding levels for local housing agencies.[10] The House proposed appropriation, would, for the first time in the program's history, not provide enough funding to renew all vouchers previously authorized and funded. This is in sharp contrast to both the Bush budget and the Senate Appropriations Committee's version of the bill that would renew all currently authorized vouchers.[11]

Downsizing a Highly Effective Program

Highlighting how troubling the undermining of the voucher program would be, the CBPP report points out the efficacy and far-reaching positive impacts of the program. The report notes that, in addition to making housing affordable to low-income families, vouchers may also ". . .reduce welfare receipt and have positive effects on employment, earnings, educational outcomes, and child well-being."[12] In addition, it notes that the voucher program is the single most cost-effective of the federal housing programs studied in a General Accounting Office report.[13] Thus, the positive impacts of the voucher program extend far beyond the immediate and already important concern of keeping families housed.

Even before any funding reduction, there is a vast, unmet housing need in the United States. According to 1999 census data (the last year for which these data are available), nearly 5 million low-income households that did not receive housing assistance either paid more than half of their income for rent and utilities or lived in severely substandard rental housing. Most of these "worst-case," low-income families are low-income *working* families. The report notes that housing costs have increased faster than incomes since 1999, making the lack of affordable housing an even more severe problem today than it was when these census figures were gathered.[14]

Voucher Utilization Problems Cited as Impetus for the House Bill

Readers of prior issues of the *Housing Law Bulletin* will recall the problem of voucher underutilization—the phenomenon of families being unable to rent a unit[15] using their voucher, and, consequently, having to return the voucher to the PHA unused. Underutilization has resulted in some of the voucher program's appropriated funds going unspent. Typically, the House and Senate appropriations committees recaptured the unused funds through rescissions and channelled the reclaimed funds to other uses (usually to help fund the subsequent year's VA-HUD appropriations bill).[16] The House Appropriations bill is intended, in part, to address this issue.

However, the CBPP report points out that reforms implemented since 1999 by Congress, HUD and a large number of PHAs have improved voucher utilization. For example, the committee report accompanying the House bill indicates that PHAs' use of voucher funds rose from 83 percent in 1999 to 87 percent. Another report indicates that the increase was actually to 94.6 percent.[17] HUD recently reported that voucher funds utilization reached 95 percent by the end of FY 2002 and is expected to reach 97 percent by the end of 2003.[18] Thus, it would appear that using underutilization as a reason to decrease funding is inconsistent with the data showing that utilization is trending upward.

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[6] *Id.* §1437f(o)(2).

[7] 24 C.F.R. § 982.451 (1996), added at 60 Fed. Reg. 34,712 (July 3, 1995).

[8] CBPP Report, p.1.

[9] Incremental (Fair Share) vouchers are allocated based on the housing needs of low-income families in each state. These vouchers are available to any family that qualifies to be on the Section 8 program. Funding is awarded on a competitive basis.

[10] CBPP Report, p.1.

[11] *Id.*

[12] *Id.*

[13] *Id., citing to* Barbara Sard and Margy Waller, *Housing Strategies to Strengthen Welfare Policy and Support Working Families,* Brookings Institution Center on Urban and Metropolitan Policy, 2002, and also *citing to* General Accounting Office, *Federal Housing Assistance: Comparing the Characteristics and Costs of Housing Programs,* GAO-02-76 (Jan. 31, 2002).

[14] *Id.* at 2.

[15] The reasons for being unable to rent a unit include subsidy levels that are below market, landlord bias against and misconceptions about the program and/or program participants, and a lack of affordable rental housing generally.

[16] CBPP Report, p. 2.

[17] *Id.* at 3, *citing to* Department of Housing and Urban Development, *Section 8 Management Assessment Program: Report to Congress* (April 2002). The 94.6 percent utilization rate is based on data from PHAs with fiscal years that ended no later than June 30, 2001. CBPP notes that the methodology HUD uses in determining utilization rates excludes vouchers awarded as part of litigation settlements (because their use is often restricted by the settlement terms) and vouchers awarded to a PHA for the first time in its current fiscal year (to give the agency reasonable time to issue the new vouchers and have families locate housing in which to use these vouchers). Failure to use such an approach artificially lowers utilization rates.

[18] *Id., citing to* Statement by Paula Blunt, Deputy Assistant Secretary, HUD, at the Quadel Consulting Corporation's Housing Choice Voucher Conference, Washington D.C., October 17, 2002.

The House Bill's Proposed New Funding Formula

The new formula proposed by the House Committee bill would limit voucher funding to each PHA's *actual voucher program expenditures during the period five to 16 months earlier*, adjusted for inflation. PHAs would, thus, receive funding equal to the average number of vouchers actually in use in the agency's program during the 12-month period that began 16 months earlier. For some agencies for which voucher renewal comes at different times during the year, the time lag would stretch out such that their funding would be based on the average number of vouchers in use during FY 2001—two years earlier. Thus, PHAs that have increased their utilization rates in the interim would be penalized for earlier utilization problems. According to the CBPP report, the number of families served by the voucher program would plummet as a result, by approximately 125,000 below the currently authorized level until such time as future appropriations bills abandon the House proposed formula.[19]

In addition, the report hypothesizes that the proposed new formula would probably discourage PHAs from trying to increase utilization since current funding would be dependent on performance from quite a number of months earlier.

PHA Program Reserves Would Not Soften Blow

Though PHAs have program reserves, they are not allowed to use them for ongoing housing assistance for families not already covered by their annual voucher funding. Local reserves are needed to cover increased funding needs when per voucher costs rise more rapidly than expected. Even if reserves were permitted to be used to offset a shortfall in voucher funding, they probably would be insufficient to cover both shortfalls. Furthermore, under the House bill, program reserves would not be replenished by HUD (which they have been in the past, almost without fail). HUD would not be required to replenish reserves, nor would it receive funding to do so. Though the bill would establish a "central reserve" to help address increased voucher use, funding for the reserve would cover only a fraction of the vouchers projected to be lost under the proposed new formula.[20] The report surmises that PHAs could find themselves having to lower voucher payments to maintain the same number of families in the program, or may even need to force families currently receiving assistance to turn their vouchers back in.

Other Problems Created by House Proposal on Vouchers

Additional problems created by the House bill include discouraging or effectively eliminating utilization reforms, discouraging participation in the voucher program by landlords and lenders, and damaging the Moving-to-Work demonstration program.

[19]*Id.* at 3.

[20]*Id.* at 5.

Utilization Reforms

The bill would effectively undo recent program improvements, which include:

- The ability to increase the payment standard to a level that reflects the cost of rental housing in the area.[21]
- A HUD performance measurement system that penalizes housing agencies that use less than 95 percent of their vouchers. The report states that this new system has encouraged PHAs to improve voucher utilization by reducing the number of vouchers for which an agency receives funding to the average number in use in the last completed fiscal year.[22]
- The reallocation of unused vouchers to PHAs with a proven track record of voucher utilization and a need for more vouchers.[23]
- The overissuing of vouchers, which is a technique used to assure utilization.[24]
- The project-basing of tenant-based vouchers.[25]

Discouraging Participation by Key Players

Without willing landlords, the voucher program would cease to exist. One of its key attractions to landlords has been the fact that the federal (voucher) portion of the rent payment was virtually guaranteed. If the reductions proposed in the House bill were to be implemented, landlords could lose their interest in the program, since it would appear that funding could disappear at any time. Similarly, lenders participating in the homeownership program may well decide not to offer loans since the voucher subsidy is a key component in making the purchase of the home affordable and securing the lender's loan.

[21]*Id.* at 6.

[22]Some commentators, including NHLP, have found the assessment formula for this system to be excessively punitive in its calculation of the utilization rate. *See Low Voucher Utilization Rates Impact Community Housing Resources, Particularly for Persons with Disabilities*, 32 HOUS. L. BULL. 178 (Aug. 2002).

[23]By not providing renewal funds for vouchers that were not used during FY 2002 (or an earlier period), the House bill would, in effect, defund the vouchers that would have otherwise been reallocated. CBPP Report, p. 7.

[24]PHAs rely on their program reserves to cover the cost of more families than expected being able to use their vouchers. The proposed bill would discourage or make it impossible for HUD to replenish those reserves, thus effectively eliminating the ability of PHAs to overissue vouchers, at least to the extent that they do now. This, in turn, will reduce utilization. *Id*. at 7-8.

[25]Under the project-basing authority, PHAs may utilize up to 20 percent of their vouchers at particular housing developments. This option has helped some PHAs increase voucher utilization by guaranteeing that units will be available where tenants can use their vouchers. Since project-basing of vouchers is a relatively new authority, the proposed House funding formula would not cover vouchers that were not used during the period in the past on which an agency's funding level would be based but that have since been committed by the agency for use as project-based vouchers in 2003. *Id*. at 8.

Damage To Moving-to-Work Demonstration Program

Congress has authorized HUD to designate up to 30 PHAs to experiment with a wide range of policy variations under the Moving-to-Work demonstration. Some policies could increase voucher utilization. HUD originally committed to participating PHAs that their future funding levels would not be reduced below the level of funding they received at the start of their participation in the demonstration. The House bill withdraws this promise by explicitly stating that its voucher funding provisions would apply to agencies participating in the Moving-to-Work program. PHAs would lose funding even if the reason that they did not use all of their vouchers was that they had shifted voucher funds to support innovative activities that HUD had approved under the demonstration, such as rehabilitating housing for use by voucher holders or providing housing search assistance to help families use their vouchers.[26]

Conclusion

While the CBPP report lauds the goal of reducing voucher underutilization, its authors believe that approaches other than those made by the House bill would achieve that goal, and more effectively. The House bill could even have the unintended consequence of decreasing voucher utilization, which is very much at odds with the endorsement of the bipartisan, Congressionally chartered Millennial Housing Commission, which recommended that Congress *expand* the voucher program, as well as take steps to improve voucher utilization.

More effective approaches would focus energy on increasing utilization, thereby reducing the amount of unused funds. For example, providing housing search assistance to voucher-holders (allowed for under both H.R. 3995, approved by the House Financial Services Committee in July 2002, and S. 2721, introduced by Senate Banking Committee Chairman Paul Sarbanes) would probably increase utilization. An improved reallocation system, such as that proposed under S. 2721, the Sarbanes bill, and S. 2967, introduced by Senator Christopher Bond, the ranking member of the Senate VA-HUD Appropriations Subcommittee, could also improve utilization.[27] In sum, the CBPP report finds that taking a more positive approach to the underutilization problem that focuses on improvement rather than simply eliminating unused funding would be a more effective choice in this time of severe shortages of affordable housing. ■

[26]*Id.* at 9.

[27]*Id.* at 10-11.

Stockton Must Provide Relocation Benefits and Replacement Housing to Displaced SRO Residents

A federal district has issued a preliminary injunction prohibiting the City of Stockton, California, from forcing tenants to vacate residential hotels due to code enforcement activity without first providing relocation assistance and adopting a replacement housing plan. *Price v. City of Stockton*.[1] The injunction also requires the city to refrain from demolishing or converting the hotels at issue, and to provide temporary housing to persons previously displaced by the city's code enforcement activities.

Background

The plaintiffs, former hotel residents displaced by Stockton's code enforcement activity and the Stockton Metro Ministry (SMM), a nonprofit organization operating for the benefit of homeless and other low-income residents of Stockton,[2] filed a complaint against the city seeking a preliminary injunction. They alleged that the city violated its statutory duties under the federal *Housing and Community Development Act* (HCD),[3] which governs the Community Development Block Grant (CDBG) program, the *Uniform Relocation Act*, the *Fair Housing Act*, the California Community Redevelopment Law, and the *California Relocation Assistance Act*. The complaint also sought declaratory relief and a writ of mandate.

After plaintiffs moved for a preliminary injunction, but prior to the court's decision, the court granted a temporary restraining order against the city's attempt to evict tenants without prior notice to plaintiffs' counsel. In that decision, the court noted that if the affidavits submitted by plaintiffs concerning the hotel closing were accurate, "the brutal manner in which the evictions were carried out demonstrate a complete indifference to the well-being of the hotel's residents."[4]

City Redevelopment Activities

In 1961, Stockton and its Redevelopment Agency adopted the West End Urban Renewal Development Plan (West End Plan) to redevelop downtown Stockton. The West End Plan was amended in 1991 to allow the Redevelopment Agency to acquire all real property in areas that were marked

[1]No. Civ. S-02-65 LKK/JFM (E.D. Cal. Order May 2, 2002)(this unpublished decision is available online at www.wclp.org/advocates/housing/price_order.pdf).

[2]Named plaintiff Richard Price lived in a residential hotel for 16 years before being displaced into a migrant labor camp that closed promptly after his arrival.

[3]42 U.S.C.A. §§ 5301 *et. seq.* (Westlaw 2002).

[4]Slip Op. at 25, n.16.

for development, and to eliminate the "blighting influence" of existing buildings. To encourage such redevelopment, the City stablished a fund to finance the purchase of desired properties and the demolition of unwanted buildings.

In June of 2001, at the urging of the city manager, the Stockton City Council established an acquisition list to purchase property for redevelopment. The list consisted of 29 downtown properties, many of them single room occupancy (SRO) hotels in the West End project area. Two days after the list was established, the city and its redevelopment agency implemented a zero tolerance policy for code violations in downtown hotels. A team of city employees called the Community Health Action Team (CHAT) was created to enforce the new policy. The team consisted of two Stockton police officers and three employees of the Department of Housing and Redevelopment.

During the next four months, CHAT inspected and cited more than 15 SRO hotels for code violations. All of the hotels were on the city's acquisition list. By January of 2002, nine of these hotels were closed due to violations, and five were scheduled for demolition.

As of June 2001, over 250 hotel residents (including the plaintiffs) had been displaced by the city's actions. Many of the residents were sent to other hotels or to a migrant labor camp that closed a short while later. The court found that a "disproportionate number" of those displaced were disabled.[5]

Procedural Issues: Federal Abstention and Standing

As a preliminary matter, Stockton asked the court to abstain from deciding the case on the ground that a separate suit brought against the city by the residential hotel owners was pending in the California courts. The court rejected the city's abstention motion because the fundamental reasons for abstention were not present in the case. Neither the residents nor SMM were parties to the state court proceedings and their interests were not represented in that proceeding, the predominate issues in the case were federal and not state law questions, and the plaintiffs were not asking the federal court to interpret an unclear provision of state eminent domain law. In short, the court found no abstention theory that precluded it from considering the case.[6]

The court also rejected the city's claim that SMM lacked standing. It found that "displacement of low income persons from downtown hotels and motels continues to drain [SMM's] resources and frustrate the mission of the organization."[7] Thus, it concluded that the organization suffered injury and had standing to maintain the action. This finding was significant because the city also challenged the individual plaintiffs' standing to maintain an action to prevent the acquisition, conversion or demolition of hotels in which they were not residents. Its finding with respect to SMM obviated the need to resolve the individual plaintiffs' standing on that claim because SMM had standing to maintain it.

Violations of the *Housing and Community Development Act*

Upon its review of the statutes and regulation, the court found that the HCD was enacted in 1974 to provide CDBG funding to local and state governments to address a broad array of social, economic and environmental problems in urban areas. In 1999, the act was amended to add anti-displacement and relocation assistance provisions. The provisions are triggered when CDBG funds are used in connection with the demolition or conversion of lower-income housing. Regulations adopted by the Department of Housing and Urban Development (HUD) require CDBG recipients to "assure that they have taken all reasonable steps to minimize the displacement of persons as a result of activities assisted" with CDBG funds. They also require one-for-one replacement of low-income housing units that are demolished by CDBG recipients and that a plan be in place at the time a recipient contracts for demolition that will replace the units with comparable housing within three years after demolition is commenced.[8] Lastly, they require CDBG recipients to plan and provide for relocation assistance to persons scheduled for displacement *before* the displacement occurs, and to advise displaced persons of their right to such assistance.

The plaintiffs and the city agreed that if HCD applied, the city must provide displaced residents relocation assistance and adopt a replacement housing plan. However, they disagreed that HCD applied, the city contending that it had not used CDBG funds for the demolition or conversion of lower-income housing. Thus the plaintiffs had to show that:

- the city's code enforcement activities were undertaken, in whole or in part, with CDBG funding;
- these activities qualified as a "program or project" that triggers anti-displacement and relocation provision of the act;
- the city failed to develop a replacement housing plan; and
- that the city failed to provide adequate relocation assistance to the plaintiffs who had been displaced.

The court found in favor of plaintiffs on all four of these issues.

CDBG Funds Were Used for Code Enforcement

In its pleadings, the city claimed that CDBG funds were not used for code enforcement activities. It supported those claims with affidavits, the city's budget and a HUD letter that concluded, based on the city's representations, that no federal funds were used for the code enforcement activities.

[5] *Id.* at 5.

[6] *Id.* at 10-15.

[7] *Id.* at 9.

[8] 24 C.F.R. § 42.375 (2002).

The plaintiffs countered with a showing that a CHAT team member, a policy officer, was paid partially with CDBG funds for the first few months of the code enforcement activities. Moreover, plaintiffs pointed to the CDBG requests made by the city to HUD between 1997 and 2001 seeking funding to accelerate code enforcement in downtown hotels, reports sent to HUD stating that CDBG funds were used for code enforcement, and the city's annual budgets for 2000-01 and 2001-02 which allocate CDBG funds for costs associated with the code enforcement program.

In light of the massive evidence submitted by the plaintiffs, which was supported in part by the city's evidence, the court concluded that federal funds were used to fund downtown code enforcement activities.

In light of the massive evidence submitted by the plaintiffs, which was supported in part by the city's evidence, the court concluded that federal funds were used to fund downtown code enforcement activities. Notably, the court refused to give any deference to the HUD letter because HUD failed to follow up on plaintiffs' counsel offer to provide it evidence on how CDBG funds were used in the city's code enforcement activities, finding that in light of the "massive record tendered to the court, HUD's conclusions cannot be taken seriously."[9]

City Activities Constitute a Single "Program or Project," Triggering Anti-Displacement Provisions

The city sought to avoid liability by distinguishing its code enforcement activities from its redevelopment plans, arguing that the two were not a single "program or project" pursuant to HCD. The plaintiffs contended, however, that the city's redevelopment activities, including its notices to vacate and demolish and its acquisition of hotels, amounted to a "single undertaking" as opposed to a "separate project" that is exempt from the HCD. Plaintiffs pointed out that within two days of creating an acquisition list for desired properties, the Stockton City Council ordered aggressive inspections of the downtown hotels that were included on the list. The hotels were then vacated as a result of the inspections. In other words, the violations issued by the CHAT task force were inescapably connected with the city's goal of accelerated redevelopment.

The city countered that the aggressive inspections were pursued in response to a grand jury report that found excessive code violations in the downtown hotels resulting from lack of code enforcement.

The court began its analysis by noting that HUD's definition of a single "project" means "a series of activities that are integrally related, each essential to the others, whether or not all of the component activities received Federal financial assistance."[10] Based on that definition and the evidence before it, it found a "clear logical connection" between the city's code enforcement activities and its redevelopment goals and dismissed the city's insinuation that the relationship was merely a "happy coincidence."

The City Failed to Develop Replacement Housing as Required by the Act

Once HCD is determined applicable, the city must have a replacement housing plan in place prior to entering into any contract for demolition of any units. The city asserted that it had made "substantial and successful efforts" to obtain new low-income housing and rehabilitate existing buildings in the downtown area and throughout Stockton. It also claimed to have constructed or rehabilitated more than 680 housing units in the downtown area, and had devised plans to develop an additional 250 units of affordable housing. However, the court held that the city had failed to demonstrate that the replacement units were "comparable" to the demolished units as required by the HCD, since the city provided no evidence of the number, location, dimensions or affordability of the units in question.[11] Moreover, the city conceded in oral argument that they had not submitted a replacement plan to HUD, leading the court to conclude that defendants have not adopted and implemented the federally required replacement plan.

The City Failed to Provide Required Relocation Assistance

HCD requires that prior to any displacement, the city must also provide relocation assistance, including "advisory services, actual and reasonable moving expenses, the reasonable cost of security deposits and credit checks necessary to rent a replacement unit, interim costs, and replaceable housing."[12] The court found that the city's documents "support the conclusion that they never provided substantial relocation assistance and services." In fact, the only support received by the displaced residents came from other sources such as San Joaquin County. As with the required replacement housing, the city failed to provide any evidence that the homes in which it purported to have placed the residents were "comparable." The city also failed to offer evidence that it provided actual and reasonable moving expenses or replacement housing.

[9]Slip. Op. at 18, n.10.

[10]*Id.* at 22.

[11]*Id.* at 29. The court further noted that the City had double-counted replacement housing that already had been allotted to other residents. *Id.* n. 21.

[12]*Id.* at 30, citing 42 U.S.C. § 5304(d)(2)(A); 24 C.F.R. § 42.350.

Conclusion

Having found against the city on all issues relating to the merits of the case, the court lastly concluded that the hardship to the plaintiffs—displacement without relocation assistance or replacement housing—was greater than the hardship to the city, for which there was no showing. Accordingly, the court preliminarily enjoined the city from vacating, demolishing or converting the residential hotels and motels at issue until it adopts and implements a valid replacement housing plan and relocation assistance required by the HCD. The order allowed an exception for situations where CHAT issues an emergency order or finds an immediately dangerous condition. However, even under those circumstances, the city must provide relocation assistance to any displaced residents. In addition, the city was also required to provide temporary housing to persons previously displaced by the city's code enforcement activities.[13]

Municipalities frequently use CDBG funds for a wide range of redevelopment activities that demolish affordable housing and relocate low-income residents. This case provides a good road map of a city's attempt to avoid its HCD relocation and replacement housing obligations.

Municipalities frequently use CDBG funds for a wide range of redevelopment activities that demolish affordable housing and relocate low-income residents. This case provides a good road map of a city's attempt to avoid its HCD relocation and replacement housing obligations. For another case that found that Section 104(d) of the HCD applied to a city's redevelopment activities, *see Reese v. Miami-Dade County*, 210 F.Supp.2d 1324 (S.D. Fla., 2002). As of this time, other similar challenges are being mounted in Florida and Massachusetts to a HOPE VI development and the demolition of a state-financed housing project. Advocates challenging municipal action which causes displacement should consider whether federal law would trigger these relocation and one-for-one replacement requirements. ■

[13]The court's order did not address the plaintiffs' fair housing or California state law claims, except to note it was not necessary to address them given that the relief sought by the plaintiffs under those claims was the same as the relief sought under the HCD.

RHS Owners Allowed to Quiet Title to Their Property in Derogation of ELIHPA

Two Idaho district court judges recently issued unprecedented and erroneous decisions that allow owners of 18 Rural Housing Service (RHS) Section 515 projects to quiet title to their properties in complete derogation of the prepayment restrictions imposed by the *Emergency Low Income Housing Preservation Act of 1987* (ELIHPA) after the owners offered to prepay their loans and the RHS, consistent with ELIHPA, refused to accept those offers. *Atwood-Leisman v. United States*;[1] *Kimberly Associates v. United States*.[2]

Background

In 1998, the owners of 18 Rural Housing Service (RHS) Section 515 rental housing projects initiated two federal lawsuits in Idaho challenging the prepayment restrictions that were placed on Section 515 rental projects financed before December 21, 1979, by ELIHPA and for projects financed between December 21, 1979, and December 15, 1989, by the *Housing and Community Development Act of 1992* (HCD). The suits alleged breach of contract and quiet title claims against the RHS and sought to allow the owners to prepay their loans without regard to the ELIHPA statutory restrictions. In *Kimberly*, which involved a 24-unit elderly project, the owners tendered to RHS the final amount due on the loan prior to initiating the action. When RHS refused the payment, they tendered the payment to the court when the suit was filed. In *Atwood*, which involved 17 projects, the owners did not tender payment to RHS or the court but simply offered to make the payments at the time the prepayment was approved.

Before filing an answer in either case, RHS filed motions to dismiss the owners' claims in both cases on, *inter alia*, the ground that they were barred by the unmistakability and sovereign acts doctrines, two contract defense theories that immunize the government from damages when a governmental act, such as an act of Congress, prevents an agency from performing on a previously negotiated contract.[3]

In one of the cases, the district court agreed with the government that the owner's claims were barred by the unmistakability doctrine alone and accordingly dismissed

[1]No. 98-0416-S-BLW (Nov. 18, 2002) (hereinafter *Atwood*).

[2]No. CV 98-0083-S-LMB (Dec. 12, 2002) (hereinafter *Kimberly II)*.

[3]The unmistakability doctrine is actually a canon of contract construction that precludes a party that contracts with the government from asserting that the contract includes an unstated term exempting that party from the application of a subsequent sovereign act, including an act of Congress. In other words, a subsequent act of the sovereign may alter the obligation of the parties to perform on a contract unless the government abdicated that right in the contract in unmistakeable terms. *See, U.S. v. Winstar*, 116 S.Ct. 2432, 2456 (1996). The sovereign acts doctrine, on the other hand, relieves the government from having to perform on a contract when a sovereign act, that is public and general, precludes it from performing on that contract. *See, id.* at 2463.

the case.[4] The plaintiffs decided to appeal the decision to the Ninth Circuit and agreed to postpone consideration of the second case until after the appeals court completed its review of the first.

Initial Appeal to the Ninth Circuit

On appeal, the Ninth Circuit reversed *Kimberly I*, holding that the unmistakability doctrine did not apply unless the sovereign acts doctrine also applied to the case. Relying on a Federal Court of Claims damage action case, which considered the applicability of the two doctrines separately and concluded that while the sovereign acts doctrine did not apply to that case but that the unmistakability doctrine did apply, the Ninth Circuit concluded that ELIHPA was not a sovereign act, that it, therefore, need not consider the applicability of the unmistakablilty doctrine, and that the owners could proceed with their case.[5]

Though the issue was not before the Ninth Circuit, the opinion, in what is clear dictum, proceeded to suggest that under Idaho law the owners would be entitled to quiet their title because the owners had tendered the final payment on the loan and the government refused to accept that payment.[6] The court then remanded the case to the Idaho district court for further consideration.

Remand to the District Courts

When the case was remanded, two residents of the development, who had previously not been aware of the owner's efforts to prepay the loan, sought to intervene in the case. They sought to enjoin the owner from prepaying their loan by asserting their rights under ELIHPA and RHS regulations implementing ELIHPA and seeking declaratory relief against RHS under the *Administrative Procedure Act* (APA), claiming that ELIHPA precluded the agency from accepting the prepayment and its acceptance would injure the plaintiffs by terminating the use restrictions on the property and eliminating a host of tenants' rights that are accorded to residents through RHS regulations.

Shortly after the residents sought to intervene, the owners filed motions in both cases seeking judgment on the pleadings. They contended, *inter alia*, that the Ninth Circuit *Kimberly* decision resolved all the issues in the cases, namely that Idaho law applied, and that they were entitled to quiet title to the property under Idaho law. RHS opposed the motions by contending, primarily, that Idaho law did not permit the issuance of a quiet title when the lender justifiably refused to accept the tender of payment. RHS claimed that ELIHPA precluded its staff from accepting the prepayment and that the owners were therefore not entitled to a declaration of quiet title. In *Atwood*, RHS also argued that the owners of five of the developments had executed amended loan agreements after the passage of ELIHPA that explicitly subjected them to ELIHPA.

The residents also filed an opposition to the owner's motion in *Kimberly*, contending that Idaho law does not apply to the case because the contracts in question are federal contracts and that they are governed by federal and not state law. Accordingly, they argued that ELIHPA is the applicable federal law and that Idaho state law should not be considered at all. In the alternative, they argued that ELIHPA preempted state law, or that if the court had the option of adopting state law as the applicable federal law, it could not do so in this case because of ELIHPA.

In November of 2002, one of the Idaho District Courts issued a memorandum decision in *Atwood*. It ruled in favor of the owners' right to prepay their loans in an opinion that addressed and dismisses the government's primary argument in the case in one sentence.

> After examining documents and circumstances similar to those in this case, [the Ninth Circuit in] *Kimberly* held that the original loan documents "bind future Congresses" in "unmistakeable terms," preventing Congress from retroactively altering the terms of those original documents.[7]

The court next proceeded to dispatch the government's argument with respect to five of the developments that had signed new loan agreements by concluding that the amendments did not intend to alter the unaltered promissory notes that the owners had signed earlier and which gave them the unconditional right to prepay.[8]

The court also rejected the government's argument that the owners are not entitled to prepay their loans under Idaho law if the lender has a good reason to reject the prepayment, in this case the passage of ELIHPA. The court stated

> The Government seeks to be relieved of its legal obligations by a condition that it created. None of the cases cited by the government support its position. Indeed, the rule is just the opposite: A party's obligation to perform is not excused by conditions created by that party. *See Restatement (Second) of Contracts*, § 251 (1981). If the government is arguing that it is entitled to some special treatment, the Ninth Circuit rejected that argument in *Kimberly*, holding that the Government is to be treated as any other private party.[9]

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[4] *Kimberly Associates v. United States*, No. CV 98-0083-S-LMB (Jan. 25, 1999) (hereinafter *Kimberly I*).

[5] *Kimberly v. United States*, 261 F.3d 864 (9th Cir. 2001).

[6] *Id.* at 868.

[7] *Atwood* at 4. In fact, the decision is entirely wrong to the extent that it seems to state that the Ninth Circuit concluded that RHS unmistakably abridged the government's right to alter the law in the future. The Ninth Circuit explicitly rejected consideration of the unmistakability doctrine because it considered it to be subordinate to the sovereign acts doctrine. 261 F3d. 864, 870 (9th Cir. 2001).

[8] *Atwood* at 4-8.

[9] *Id.* at 8-9.

The court rejected the owners' claim that they could secure quiet title without paying the debts on their loans and held that before a quiet title is issued they must do equity by paying the balance due on the loans.[10]

Lastly, it rejected the government's contention that ELIHPA cannot be ignored unless it is declared unconstitutional. Without citation to any authority, it stated: "The Court disagrees. The Court need only find ELIHPA inapplicable to order quiet title—there is no need to go further and find the legislation unconstitutional."[11]

The court thus ordered the parties to meet within the next 30 days to agree to payoff figures that the plaintiffs must pay and asked to be advised when payment was to be made, at which point it would grant the plaintiffs' motion for summary judgment, issue a quiet title order and deny the government's motion to dismiss.

Less than a month later the *Kimberly II* court effectively followed the *Atwood* decision by issuing a quiet title order in favor of the owners and rejecting the residents' right to intervene in the case.[12]

The *Kimberly* court began its opinion by rejecting the residents' right to intervene under Rule 24 of the Federal Rules of Civil Procedure on essentially standing grounds. While conceding that prospective intervenors do not have to establish independent standing, it found that standing is an integral issue relating to the court's determination that the intervenors have an interest to the property or transaction which is the subject of the action.[13] Accordingly, after a review of the record in the case, it determined that the residents do not have an interest relating to the property or transaction.

> Although the Court recognizes that the prospective intervenors are residents of Kimberly Sunset Manor, they have not suffered any harm, but only assert that such harm is likely if the provisions of ELIHPA are not enforced. There is no evidence in the record that the prospective intervenors have been deprived of any rights, and the Court is of the view that a threat of future harm is insufficient to establish an interest in the property or transaction which is the subject of this transaction.[14]

The court then proceeded to analyze and reject the various contentions presented by the government. In a slightly more detailed analysis than that of the *Atwood* court, the *Kimberly* court began its analysis by reiterating the Ninth Circuit's conclusion that the unmistakability doctrine did not bar the owners' quiet title action.[15]

Next it concluded that ELIHPA is not applicable to the case, that it does not bar the RHS from accepting the prepayment and that it does not need to be declared unconstitutional in order to make it inapplicable to the case. Relying on the dictum in the Ninth Circuit opinion, the court stated

> The Ninth Circuit in *Kimberly* held that [RHS] was acting in a private capacity when it altered the terms of the contract with Plaintiff and insisted the Plaintiff comply with the requirements of ELIHPA. The Ninth Circuit characterized ELIHPA's prepayment restrictions as a "partial repudiation by Congress of its contractual obligation to perform." Thus, since [RHS] was not acting in a sovereign capacity, the Ninth Circuit concluded that [RHS] "cannot exercise sovereign power 'for the purpose of altering, modifying, obstructing or violating the particular contracts into which it had entered with private parties.'" Therefore, as the Ninth Circuit concluded, [RHS]'s delay in the performance of the contract amounted to a "substantial breach of the contractual terms."[16]

Thus, the court concluded that ELIHPA is not applicable to the case because RHS was not acting in a sovereign capacity when it altered the terms of the loan.[17]

Extending that rationale to RHS's refusal of the owners' prepayment offer, the court concluded that the "government created its own condition to preclude performance, and further concludes that RHS does not have a justifiable and good faith reason for rejection of Kimberly's tender of full payment."[18]

Lastly, the court dismissed the government claim that unless it declares ELIHPA unconstitutional it cannot direct the government to accept the tender, issue a deed of reconveyance, or release the property from the lien created by the deed of trust. "In the Court's view, a ruling on constitutional issues is unnecessary because the Court concludes ELIHPA is not applicable to the circumstances presented here and the legislation enacted by Congress may not retroactively alter the terms and conditions of the parties' promissory note and trust deed."[19]

Relying on the Ninth Circuit's earlier opinion that suggests that Idaho law may be applicable in the case, the court concluded that RHS had wrongfully refused tender of payment and that the owners are therefore entitled to judgement quieting title on the subject property. It thus entered a final judgment in favor of the owners.[20]

Analysis

The *Atwood* and *Kimberly II* decisions are wrong and disquietingly display the extent to which these federal judges

[10] *Id.* at 10.

[11] *Id.*

[12] *Kimberly II.*

[13] *Id.* at 5.

[14] *Id.*

[15] *Id.* at 7-8.

[16] *Id.* at 9.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 10.

[20] *Id.* at 12-13.

either fail to understand the law at issue or, more disturbingly, the extent to which they are prepared to ignore valid law in order to reach results that they believe are warranted.[21]

Both decisions entirely misread the Ninth Circuit's opinion in *Kimberly*. That decision, which was issued in response to the RHS motion to dismiss and advanced before an answer was ever filed in the case, decided only two issues. First, whether 28 U.S.C. § 2810 constitutes a waiver of sovereign immunity for a quiet title action. And, second, whether the unmistakability doctrine barred all relief against RHS. In *Kimberly I,* the district court held that sovereign immunity was waived by 28 U.S.C. § 2810 and the Ninth Circuit affirmed on that ground. Second, the district court concluded that the unmistakability doctrine barred the owners' claims and the Ninth Circuit reversed on that issue. Although the court of appeals decision clearly discussed the applicability of Idaho law to the quiet title action,[22] the issue was not before the court and consequently was not briefed by either party. Moreover, it is obvious from a reading of the opinion that the discussion on the issue is pure dictum.

While one may agree or disagree with the Ninth Circuit's holding on the issues which it did decide, there is no question that the Idaho district courts were bound by its holdings. They were not, however, bound by its dicta dealing with the applicability of Idaho law, which effectively grants the owners a cause of action.[23] Because the Idaho law issue was not before the court of appeals, it never discussed and appears not to have considered the fact that the contracts between RHS and the owner are federal and not state contracts and that federal rather than state law must be applied to resolve the parties' rights under those contracts.[24] Moreover, the court of appeals opinion did not consider a very fundamental proposition in American jurisprudence that federal laws prevail over state laws, and that, as a consequence, ELIHPA would preclude the application of Idaho quiet title law to a federal contract.[25] Kimberly also did not consider whether ELIHPA specifically or impliedly preempted state law, or whether Idaho quiet title law could be adopted as the applicable federal law in the case. Had it done so, it would probably have concluded that Idaho law was preempted or, given the conflict that exists between Idaho quiet title law and ELIHPA, that Idaho law could not be adopted as the applicable federal law.[26] Neither the *Atwood* or *Kimberly II* courts addressed the choice of law issues even though they were invited to do so.

The district courts' failure to understand the limited nature of the Ninth Circuit's *Kimberly* decision and their failure to consider the choice of law issue is a fundamental error that has resulted in two unprecedented and erroneous decisions. In both cases, the courts have elevated state law and contractual provisions over a federal statute and provided the owners with an unprecedented remedy of specific performance on contracts that have been repudiated by the government through validly enacted legislation. In both cases, the courts simply ignore ELIHPA by relying on the Ninth Circuit's conclusion that it was not a sovereign act. What they failed to understand is that the sovereign acts doctrine has been used exclusively to determine whether the government is completely immune from damages in contract causes of action, in which case, absent any other defense, the government is liable for the monetary damages like any private party that has breached or repudiated a contract. The doctrine has never been used to grant a party contracting with the government specific performance on a contract by simply labeling the repudiating action as "not sovereign act of Congress." There is absolutely no precedent for such a holding. Not surprisingly, neither court cited to any cases in support of their conclusion that an act of Congress can be simply ignored or that the owners are entitled to the relief which they sought. Acts of Congress have either been declared unconstitutional or not applicable to a particular party or circumstance because of provisions in that act which exclude the party or circumstance. They are never otherwise simply ignored.

Motion to Intervene

The *Kimberly II* court's denial of the residents' motion to intervene is also highly questionable. The court's decision injured the residents directly by relieving the owners of their ELIHPA obligations which were adopted to protect residents, allowing the owners to remove the development from the Section 8 subsidy program in less than a year, and terminating the tenants' RHS rights, such as the right to make use of a tenant grievance and appeals procedure. The residents sought to avoid those injuries by intervening in the case and asserting their rights to be protected under ELIHPA. Such imminent injury is clearly sufficient to have granted the residents a right to intervene in the case.

Current Developments

The Ninth Circuit's *Kimberly* decision and the *Atwood* and *Kimberly II* decision have made RHS cautious about litigating prepayment issues in Idaho and the Ninth Circuit. In order to protect the over 600 residents of the 17 developments affected by *Atwood*, it has entered into negotiations with the owners to sell the developments to nonprofit organizations that would continue to operate them with RHS financing and subsidies. The negotiations may in fact extend to other projects owned by the same owners in Oregon, Utah and

[21]In *Kimberly I* the court expressed its inclination to rule in favor of the owners because it felt that the government unjustifiably altered their prepayment rights. However, it concluded that it was constrained from doing so because of the unmistakability doctrine. The Ninth Circuit's reversal on the unmistakability doctrine appears to have freed the court to rule in accordance with its original inclination.

[22]261 F.3d 864, 868 (2001).

[23]28 U.S.C. § 2410 is simply a waiver of sovereign immunity in quiet title actions brought against the federal government. It does not supply the cause of action. Usually, the cause of action is under state law if the state law does not conflict with federal law. *See* below.

[24]*See, Clearfield Trust v. United States*, 63 S.Ct. 573, 574 (1943).

[25]*See, Carter v. Derwinski*, 987 F.2d 611 (9th Cir. 1993)(en banc).

[26]*Cf. United States v. Kimbell Foods,* 99 S.Ct. 1448 (1979).

Arizona. If the sale is successful, RHS will settle the case and not appeal the case to the Ninth Circuit.

RHS is also inclined not to appeal *Kimberly II* because in its view the residents of the development will not be subject to immediate rent increases because the development is assisted under the Section 8 program. However, because the residents of the development have filed a notice of intent to appeal the denial of their motion to intervene, it is possible that RHS will join them and appeal the decision. NHLP will report on further developments in the case in future issues of the *Bulletin*. ■

Owners Appeal Adverse Prepayment Notice Decision

The owners of a HUD rental development who recently lost a federal district court effort to nullify a Minnesota statute, which required them to provide a one-year advance notice of intent to prepay their HUD-subsidized mortgage, have appealed the decision to the United States Court of Appeals for the Eighth Circuit.

In the district court, the owners sought declaratory relief against the state and residents of the development based on their argument that Minnesota law was preempted by an express provision of the *Low Income Housing Preservation and Resident Homeownership Act of 1990* (LIHPRHA).[1] The residents of the development, represented by the Minnesota Housing Preservation Project, successfully argued that the Minnesota law was not preempted by LIHPRHA. *Forest Park II v. Hadley*, Civil No. 02-480 (MJD/SRN) (D. Minn. 2002).[2]

The owners' appeal raises the federal preemption issue to a circuit court for the first time. The issue is of significant importance to many other states and localities that have passed similar laws to protect residents of properties that are at risk of losing their federal subsidies.[3]

The National Housing Law Project (NHLP) filed an *amicus curiae* brief in the Eighth Circuit on behalf of the California Coalition for Rural Housing. The brief supports the tenants' position and seeks to uphold the district court decision. It reviews state and local laws adopted to provide protections based on local conditions, and refutes the owners' claims that recent federal policy favors tenant-based vouchers as opposed to project-based assistance. The NHLP brief is available to Housing Justice Network members on NHLP's Web site at www.nhlp.org/html/pres/cases.cfm. ■

[1]Pub.L. No.101-625, Title VI, Subtitle A, codified at 12 U.S.C. §§ 4101-4125 (2002) (preemption provision is Section 232 of LIHPRHA and codified at 12 U.S.C. § 4122).

[2]For a more detailed discussion of the district court opinion, *see Federal Preemption of State and Local Preservation Acts Rejected by Two Courts*, 32 HOUS. L. BULL. 140 (May/June 2002).

[3]*See* www.nhlp.org/html/pres/state/index.htm.

GAO Releases Study on Mark-to-Market "Watch List" Properties

The General Accounting Office (GAO), an investigative arm of Congress, recently issued a report on the status of Department of Housing and Urban Development (HUD) "watch list" properties, which are federally assisted developments that experience a reduction in their project-based Section 8 subsidies but do not participate in the benefits of the Mark-to-Market debt restructuring program.[1] The GAO investigation of the watch list was conducted in response to Congressional requests for information about these properties.

Background

All project-based Section 8 subsidized developments that reach the end of their original Section 8 Housing Assistance Payment (HAP) contract term are subject to a rent review by HUD. Properties with rents above the local market rate are offered an annual renewal of the HAP contract at rents that are reduced to the local market rate. If such properties also have HUD-insured financing, they are eligible to participate in the Mark-to-Market restructuring program, which reduces the debt payment on the HUD-insured mortgage to a level that ensures the project's continued financial and physical viability. Properties placed on the "watch list" are those that have had their Section 8 rents reduced, are eligible for the Mark-to-Market debt restructuring program, but have not had their debt restructured. They are placed on the watch list because their failure to participate in the loan restructuring program increases the risk that they will default on their federally insured loan or deteriorate physically. This is due to the fact that they continue to be obligated to pay their full monthly loan obligation even though their Section 8 subsidy has been reduced. When an owner of such a development defaults on the federally insured loan and the lender forecloses on the property, the lender typically turns the property over to the federal government, which is obligated to pay the lender the balance of the debt.

Three Types of Watch List Properties

The GAO review determined that HUD's Office of Multifamily Housing Restructuring (OMHAR) had placed a total of 211 properties on the watch list prior to April 15, 2002.[2]

[1]United States General Accounting Office, *Physical and Financial Condition of Mark-to-Market At-Risk Properties* (September 2002)(GAO 02-953).

[2]It appears that this number is the total number of properties that have ever been placed on the Watch List prior to April 15, 2002 and that it includes properties that had been removed prior to that date. The most recent OMHAR status report indicates that there are 243 properties on the watch list. *See* www.hud.gov/offices/omhar/readingrm/m2mstats.pdf. Since this is not a cumulative count (*i.e.* some properties have likely been removed from the watch list since April 2002), it appears that the number of properties on the list is growing.

These properties include 15,301 units and total $207 million in outstanding principle debt.

The report examined the reasons that properties are on the watch list, and found they could be categorized into three groups:

- properties that did not enter or complete OMHAR's Mark-to-Market restructuring program (84 percent);
- properties that were deemed ineligible for debt restructuring by OMHAR (or its contractor) due to economic or financial reasons (15 percent); and
- properties that were ineligible for debt restructuring due to owner misconduct (1 percent).

There are many reasons why an owner may fail to complete the Mark-to-Market process. First, OMHAR may refuse to complete a restructuring with an "uncooperative" owner who (1) does not provide requested information, (2) does not make a timely response to a proposed restructuring plan, (3) fails to address critical repair needs or (4) fails to close a viable transaction. Second, owners may elect not to participate in Mark-to-Market restructuring because (1) it may require them to pay for property rehabilitation, (2) they believe that the property can be operated at lower rents, or (3) they are reluctant to enter into the required 30-year affordable housing use agreement as part of the restructuring. According to OMHAR, a number of owners do not complete restructuring because they plan to opt-out of their project-based Section 8 contract in order to gain higher rents from tenant-based enhanced vouchers.[3]

This second watch list category is illustrated by examples contained in the GAO report, a substantial portion of which consists of six case studies. Two of these are on the watch list for economic or financial reasons. One of these, a Washington D.C. property, carried a $1.3 million debt and required $4 million for rehabilitation. Based on these facts, OMHAR concluded that the market rents in the area would not support the debt and needed repairs. The second example was of a Rhode Island property that had a loan balance of $421,280, required $200,000 in rehabilitation, and had an appraised value of only $217,000. OMHAR judged this property as ineligible for restructuring for financial reasons.

No specific example is given for the third category, properties on the watch list due to owner misconduct. Instead the report lists reasons for ineligibility, such as violations of state, federal and local laws, breach of the Section 8 contract, or repeated failure to make mortgage payments.[4]

Removal from Watch List

Once a property is placed on the watch list, it may be removed for a variety of reasons. The GAO reports that at the time of its review OMHAR had removed 70 properties from the 211 properties that had been placed on the list. Of these, 32 had been removed due to prepayment of the HUD-insured financing. This terminated HUD's potential liability from a loan default and thus its concern. Unfortunately, it also removed any tenant protections that came with such financing. Similarly, six properties were removed after the owners opted out of their Section 8 contract. The report does not state whether the owners increased the rents in the developments after the opt-outs, which would provide justification for removing the properties from the watch list. Presumably, if the rents were not increased, there would be no justification for removing the property from the watch list.[5] The remaining 32 properties were removed because the owner reentered the mortgage restructuring process. According to OMHAR guidelines, properties may also be removed from the watch list if they maintain their physical and financial condition for three years. However, no properties have been removed from the list for this reason.

Guidance and Monitoring by HUD

After OMHAR places properties on the watch list, the responsibility for monitoring shifts to HUD field offices. The GAO's report found that implementation of HUD's monitoring guide,[6] which was issued in September 2001, "has been slow and inconsistent among field offices"[7] visited by GAO staff. HUD, in response to a draft of the GAO report, stated that the GAO provided valuable advice in the course of its research, and disseminated guidance to Multifamily Hub Directors that was designed to increase consistency of implementation.[8]

HUD's Section 8 Renewal Guide directs field offices to closely monitor the physical and financial condition of watch list properties. Although the GAO reports that most properties (87 percent) are in satisfactory physical condition, it found that many had not been inspected since they were placed on

[3]The GAO report does not report that the *Mark-to-Market Extension Act*, which was enacted in January 2001, requires HUD to create guidelines and procedures to ensure consistency between enhanced vouchers and Section 8 contract renewals. *Multifamily Assisted Housing Reform and Affordability Act* (MAHRAA) § 525, added by Pub. L. 107-116, §613 (Jan. 10, 2002). To date, HUD has not published any guidelines under this authority.

[4]*GAO Watch List Report*, p. 11, n. 11.

[5]Since these six opt-out properties were not counted in the prepayment tally above, they presumably still have HUD-insured financing. Therefore, it appears that HUD made a judgment that the properties became viable when the residents received enhanced vouchers. Otherwise, HUD would have had to keep the projects on the watch list in order to protect the federal government against losses that may accrue from owners' default on their loans.

[6]This guide is included in HUD's Section 8 Renewal Policy, Appendix 5-4, available online at www.hud.gov/offices/hsg/mfh/exp/guide/s8guide.cfm. The GAO report does not discuss the existence of an earlier guide, also on the same site as Appendix 5-2 (Aug. 15, 2000), for "Troubled and Potentially Troubled" OMHAR Projects, which also covers properties whose owners reject debt restructuring. The September 2001 Guide states that it is "consistent with" the earlier memo.

[7]*GAO Watch List Report* at 4.

[8]The GAO report notes that the HUD field office for the Washington D.C. project has not prepared quarterly monitoring reports because HUD headquarters has not provided a format for reporting. *Id.* at 26.

the watch list. This is significant because owners typically respond to lowered rents by deferring maintenance and major improvements, and making lower contributions to replacement reserves. Twenty-six properties were in substandard physical condition, and three were in severely distressed condition.[9]

The financial condition of most properties on the watch list is poor. According to HUD scoring, 45 percent are "high risk" while 17 percent have a "cautionary risk" status. GAO questioned this scoring since some properties in the cautionary and acceptable risk categories did not have adequate income to pay their debt, meaning that they had a debt-service coverage ratio below 1.0. This poor financial condition underscores the need for proper HUD monitoring, though the GAO concluded that in the 10 months since the issuance of the HUD's guidance it "is too early to assess how effective the monitoring will be."[10] Instead, the report implies that the GAO provided advice to HUD on how to better monitor properties on the list and states that HUD's July 2002 guidance was issued in response to the report.

The size and character of the watch list raises issues about the success of the Mark-to-Market program since, to date, fewer than 1,000 properties have been restructured under the program.

Conclusion

The size and character of the watch list raises issues about the success of the Mark-to-Market program since, to date, fewer than 1,000 properties have been restructured under the program. If owners are not participating in the program and HUD is not approving projects for restructuring, affordable assisted housing will not be preserved. Owners will opt out of their Section 8 contracts and prepay the HUD-insured financing. In the alternative, they will default on their loans and have the properties foreclosed upon. Tenants in these developments will lose their project-based subsidies and, at best, get tenant-based vouchers. At worst, they will be displaced when owners change the use of their properties or when they neglect their properties and allow them to fall into disrepair. These scenarios notwithstanding, the GAO watch list report should be a useful tool to tenants who learn that their property is on the watch list, and to communities interested in preservation of that housing. ■

[9]Since HUD's inspection reports are generally not released to the public, it is unclear whether these percentages are higher or lower than in the overall HUD inventory of 8,500 projects. Estimate of the number of projects taken from *GAO Watch List Report* at 5.

[10]*GAO Watch List Report* at 4.

Evaluation of LIHTC State Qualified Allocation Plans

The Department of Housing and Urban Development's (HUD) office of Policy Development and Research (PD&R) recently published *Analysis of State Qualified Allocation Plans for the Low-Income Housing Tax Credit Program*, a state-by-state study analyzing Qualified Allocation Plans (QAP), which govern the award of Low Income Housing Tax Credits (LIHTC).[1] The study compares QAPs adopted in 1990 with those adopted in 2000 and 2001, and reviews eight elements of the plans: geographic location, local housing needs, financing, resident characteristics, project activities and types, building characteristics, sponsorship and costs, and affordability. The report also evaluates possible linkages between the allocation policies, the measures of housing needs, and the characteristics of LIHTC units actually built. For advocates interested in assessing their state's QAP, the study is a useful tool.

Background

The LIHTC program is now a significant portion of the nation's low-income housing stock, with about 1 million units placed in service, and 70,000 new units added each year[2] at a cost of about $3 billion annually in foregone revenue. The Internal Revenue Code[3] requires that each state designate a state agency to be responsible for the federal tax credit allocation. The allocation must be made in accordance with the QAP which the designated agency must adopt annually. The statute and the implementing regulations[4] provide considerable flexibility to the states to assess local needs, select preferences for allocation of the credits, and establish policies for the allocation method.

According to the PD&R study, states typically use two mechanisms to guide the allocation of tax credits: competitive preferences and set-asides. The competitive preference process encourages developer applications that respond to criteria and priorities set by the awarding agency. Most states employ a point system to score properties, so additional points are given for the selected preference, and the measure is easily quantifiable. Second, the set-aside method allocates a percentage of the state's allocation or a specific dollar amount for specific types of projects. For example, federal law requires that states set aside at least 10 percent of each annual allocation for projects involving qualified nonprofit organizations.[5]

[1]HUD contracted with the Urban Institute to conduct the study. The report is available from the HUDuser Web site at www.huduser.org/publications/hsgfin/analysis_of_sqa_plans.html, or a printed version is available for $5 per copy by calling (800) 245-2691.

[2]Annual housing credit utilization charts are available online from the National Council of State Housing Agencies at www.ncsha.org.

[3]26 U.S.C.A. § 42(m) (Westlaw, 2002).

[4]26 C.F.R. § 1.42-17 (2002).

[5]26 U.S.C.A. § 42(h)(5) (Westlaw, Current through P.L. 107_346 (December 24, 2002).

The PD&R report reviewed QAPs for each state,[6] choosing 1990 as a baseline year for comparison, a time when the LIHTC program, which was enacted in 1986,[7] was still fairly new. The 1990 QAPs were distant enough in time to demonstrate significant developments in the program over a decade. The study chose to review both the 2000 and 2001 QAPs in an effort to identify stable policy trends in the adopted preferences and set-asides, rather than short-term fluctuations in program priorities. Although a goal of the survey was to query state agency staff about the changes between 1990 and 2001, the study found that only a handful of staff remained at each agency for the entire 10-year period, so no results were found in this regard.

Review of the Eight Preferences

Geographic Location

Nearly all of the states seek to influence the location of projects, favoring projects on the basis of whether they were in urban or rural areas, served communities meeting particular population thresholds, or promoted revitalization plans. This trend was much stronger in 1990 than in 2001, as demonstrated by the strength of the preference or size of the set-aside. For states with a quantifiable scoring process, the average weight of a geographic element dropped from 8.3 percent of points awarded to 4.7 percent. For states with set-asides the drop was from 20 to 10 percent of funds. Half of the states gave a specific preference to Farmers Home Administration, now Rural Housing Service (RHS), Section 515 developments, and another quarter targeted rural areas. Federal law was amended in 2000 to require states to favor projects located in targeted improvement areas.

Local Housing Needs

The PD&R report grouped together preferences that reflect local housing needs or market conditions such as vacancy rates, income levels and housing construction costs. A controversial preference in this regard is for properties that will be constructed in areas with high poverty rates. The number of states with such a preference increased from 25 states in 1990 to 40 states in 2001. Use of this criterion may have fair housing and poverty concentration implications, since it tends to keep low-income developments in already impacted or even distressed neighborhoods. At the same time, however, it typically also improves the housing conditions of those neighborhoods.

Only eight states established a preference for projects with low vacancy rates in 2001. While this preference has not increased over time, the percentage of total points awarded for such criteria increased from 5.5 to 8.2 percent.

Financing

QAP preferences also focused on developers' ability to secure matching funds from other sources. By 2001, 46 states had a preference for this characteristic, and 15 had a set-aside, with an increasing trend in the number of states and point allocation over the 1990 baseline. Another trend was to prefer projects in which the developer has a significant amount of developer equity, moving from two to 13 states over the comparison period.

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Resident Characteristics

These include preferences for persons with a mental or physical disability, elderly, homeless, minorities, large families, and households either residing in or on the waiting list for public housing developments. "Special needs" preferences, commonly defined as those for tenants with a mental illness, HIV, developmental disabilities or drug and alcohol abuse, were given by 47 states in 2001. Extra points were given for projects which target households below 50 percent of area median income in 45 states.

Project Activities and Types

Twenty-seven states had preferences and nine states had set-asides for "at risk" properties, those with expiring project-based (Section 8) rental subsidies, or those where the owners are seeking to prepay a subsidized mortgage (both from HUD and RHS) in 2001.[8] The 23 states that in 2001 gave preference for rehabilitation projects greatly outnumbered the five states favoring newly constructed developments. This reflects the trend to focus on blighted areas, and the fact that most LIHTC applications propose new construction.

Building Characteristics

The criteria used here could be either for the size of the units or for the number of units in a project. Both in 1990 and 2001, about 30 states gave a unit-size preference, either for greater number of bedrooms or larger square foot standard. However, the average weight of this preference dropped from 11.6 percent of points awarded to 4.3 percent over the study period. About half of the states rewarded small projects of 50 units or less, and none awarded preference for projects with over 150 units, with some states penalizing projects if they went over this threshold.

[6]The report includes the City of Chicago which receives its own tax credit allocation and adopts a QAP, independently from the State of Illinois.

[7]The program was added by Pub. L. No. 99-514, Title II, § 252(a), 100 Stat. 2189 (Oct. 22, 1986).

[8]Interestingly, the National Housing Trust conducted an informal survey of QAPs on this issue and found 39 states had adopted such a preference by late 2002. This could reflect either a quickly changing trend, or a discrepancy in the survey techniques.

Sponsorship and Costs

Several states give preference to properties developed by nonprofit, minority or women-owned businesses. Half of the states in 2001 made provision for specific types of nonprofits, which included local governments, public development agencies, and Community Housing Development Corporations (CHDOs). Nearly half gave preference to locally based nonprofits, and a similar number made set-asides for this purpose. Several states restricted development costs, often deducting points as costs rise, and others setting a cap on the amount of credits any one project could receive. Throughout the 1990s allocating agencies progressively implemented criteria to focus on quality of construction rather than cost containment, so as to produce quality developments rather than set a dollar cap. All states have some restriction on developer or builder fees.

Restricted-Use Period

In both 1990 and 2001, nearly 90 percent of states gave preference to projects proposing affordability restrictions beyond the 30-year minimum in effect in 1990.[9] Some QAPs go so far as to require maintenance of the restrictions in perpetuity, while others specify terms between 40 and 60 years, and may award point preferences for these extensions.

Overall Trends

The PD&R study finds three major trends in the evolution of the QAPs over the 1990s. The first was increased precision with which the allocating agencies defined their criteria. Next, there was a strong correlation between the amount of tax credits a state had to allocate and complexity of the plan. Finally, QAPs tend to change slowly over time, without drastic variances when state administrations change. Preference criteria have been added cumulatively. In other words, older preferences are generally retained when new preferences are added.

LIHTC Unit Production and QAP as Measures of State Activism

Another section of the report focused on the actual number of units produced under the LIHTC program. The report found no relationship between the measured state-level housing needs and QAP preferences or set-asides designed to target these needs. However, the study found a substantial relationship between QAPs and the characteristics of LIHTC units actually developed. The plans generally functioned to foster growth of nonprofit developers in the early 1990s, and they also resisted industry trends for new construction or rehabilitation (encouraging either one or the other depending on region). The report reviews many of the same eight characteristics reviewed above for results in the sort of units developed.

[9]The LIHTC program initially only required a 15-year affordability period. *See Tax Credit Projects' Use Restrictions Begin to Expire*, 32 HOUS. L. BULL. 65 (Mar. 2002).

QAP Preferences and Set-Asides as Measures of State Activism

A final section of the report sought to evaluate QAPs in terms of the levels of activism to promote "people-based" and "place-based" priorities. Examples of "people-based" developments were: special needs, very low-income, homeless, public housing residents/waiting lists, large families, elderly, and minority. "Place-based" criteria were: metro/non-metro, community size, improvement area, vacancy rate, and poverty rate. The study concludes that while there is no general trend, positive or negative, with respect to place-based priorities, there is a measurable trend towards increased activism in place-based preferences. This suggests that states are attempting to exert greater influence over where projects are located.

Conclusion

The PD&R study may be useful for advocates who are seeking changes in their state QAP, such as including provisions to serve or protect low-income households. It should help in identifying the type of preferences that other states are providing and enable advocates to suggest changes in their states' QAPs. ■

Subprime Lending in North Carolina After Predatory Lending Reform

Predatory lending is a term used to refer to a broad series of abusive loan practices aimed at taking as much money out of the hands of the borrower as possible. Most of these practices target the elderly and people of color, ranging from so-called pay-day loans[1] to mortgage loan flipping and a wide variety of other practices designed to strip equity from homeowners.[2] These practices result in low and moderate-income families losing whatever assets they have or not being able to build assets in the first place. Predatory lending practices within the subprime mortgage market cause tens of thousands of people in this country to lose their homes—probably the biggest asset that they will ever own.

The problem has grown to such an extent that states and municipalities have been considering and actually taking legislative action to end some of these practices. North Carolina led the way in 1999 by enacting the first state anti-predatory

[1]*See* Elizabeth Renuart, Jean Ann Fox, *Payday Loans: A High Cost for a Small Loan in Low-Income and Working Communities,* Journal of Poverty Law and Policy, (Jan.-Feb. 2001). *See also* James H. Carr, Lopa Kolluri, *Predatory Lending: An Overview*, Fannie Mae Foundation (2001).

[2]*See* Center for Community Change, *Risk or Race? Racial Disparities and the Subprime Refinance Market* (May 2002). *See also* Neal Walters, Sharon Hermanson, AARP Public Policy Institute, *Older Subprime Refinance Mortgage Borrowers*, Data Digest Number 74 (July 2002).

lending law in the nation. Practices prohibited under the North Carolina law include:

- financing of single premium credit insurance;
- refinancing an existing loan when there is no tangible net benefit to the borrower;
- the financing, in high-cost loans, of fees, the inclusion of balloon payments or negative amortization, and lending without regard to a homeowner's ability to repay;[3] and
- inclusion of prepayment penalties on first-lien mortgages of less than $150,000.

The law also requires that prospective borrowers of high-cost loans receive financial counseling before entering into such an agreement.[4]

Prior to this law, it was estimated that more than one-third of all subprime home loans in the state were predatory in nature, stripping equity or imposing unnecessary costs on the borrowers.[5]

The first comprehensive report on the impact of North Carolina's anti-predatory lending law, released recently, has found the law to have a salutary effect on the economic health of subprime borrowers.[6] The study compares the performance of North Carolina's subprime and prime home lending markets from 1998 to 2000 to comparable national markets during the same period. The drafters also analyzed industry pricing data, and data from the U.S. Census Bureau and the Department of Housing and Urban Development (HUD).[7]

Consumer Choice and Access to Subprime Loans Remains Strong

The study found that the subprime market continues to thrive in North Carolina, despite the passage of the state's anti-predatory lending law. Based on its share of all subprime home loans, North Carolina ranked sixth in the country in 2000.[8] Subprime lending is above the national level in *all* of North Carolina's metropolitan statistical areas—a phenomenon unique to North Carolina.[9] In addition, a survey of subprime branch managers and brokers found that the law had not reduced subprime residential lending volume.[10]

Consumer choice appears to have remained at the same level as well. Every lender with more than 1 percent of North Carolina's subprime market in 1999 continued to originate loans in the state in 2000. Loan product pricing remained comparable to other states, which the authors of the study found indicative of a steady supply of loans (*i.e.*, no scarcity to cause an increase in prices).[11] Thus, low-income borrowers did not experience reduced access to loans after passage of the law. The amount of subprime lending to borrowers with annual incomes of less than $25,000 as a percentage of all home loans and as a percentage of all subprime loans has remained almost constant from 1998 to 2000.[12] Thus the gloom and doom predictions—of reduced access to loans or increased prices—painted by opponents of the law have not materialized.

The study compares the performance of North Carolina's subprime and prime home lending markets from 1998 to 2000 to comparable national markets during the same period.

Conclusion

The report estimates that the new law has saved North Carolina homeowners at least $100 million thus far. This figure is based on a prior analysis of the prevalence and cost of the practices addressed by the law compared to year 2000 data on subprime volume.[13] Since the majority of predatory lending occurs in the subprime market, the authors hypothesized that a net drop in subprime lending in North Carolina (taking into consideration other factors affecting the sector nationally) would indicate a reduction in such practices. North Carolina's subprime sector dropped 24.3 percent compared to 15.3 percent in the rest of the U.S. The authors acknowledge that various other factors could have also contributed to this decline but suggest that the new law has played a part in this change.[14] ■

[3]High-cost is defined as loans with fees in excess of 5 percent, or interest rates more than 10 percent above comparable U.S. Treasury Securities.

[4]*See* Center for Community Change, *Risk or Race? Racial Disparities and the Subprime Refinance Market* (May 2002), at 2.

[5]*Id.*, referring to Eric Stein, *Quantifying the Economic Cost of Predatory Lending*, Coalition for Responsible Lending report (rev. Oct. 30, 2001).

[6]Keith Ernst, John Farris, Eric Stein, *North Carolina's Subprime Home Loan Market After Predatory Lending Reform, Center for Responsible Lending* (Aug. 13, 2002).

[7]*Id*. at 2-3. Over 28 million home loans were analyzed, totaling $3.3 billion in 50 states and the District of Columbia from 1998 to 2000 that were reported under the *Home Mortgage Disclosure Act* (HMDA).

[8]*Id*. at 3.

[9]*Id*. at 4, *citing to Risk or Race? Racial Disparities and the Subprime Refinance Market, Center for Community Change* (May 2002), p.15.

[10]*Id.* at 4, *citing to* John Dooley, *Subprime Lending Stays Strong Despite Fed Warnings, Poll Finds,* The Wall Street Journal, August 8, 2002, at D2; Paul Muolo, *Predatory Laws Not Crimping B&C*, National Mortgage News, August 15, 2002, at 30.

[11]*Id.* at 5.

[12]*Id.* at 7.

[13]*Id.* at 8-10.

[14]*Id.* at 11-12.

Recent Housing Cases

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

***Padilla v. Martinez*,** 2002 WL 31771275 (N.Y.A.D., Dec. 12, 2002). The Appellate Division of the New York Supreme Court annulled an administrative decision granting New York City Housing Authority's (NYCHA) petition to terminate the tenancy of a public housing resident who may have been mentally disabled. The resident had physically and verbally abused a housing development employee after being served eviction notices she felt were erroneous. After a hearing, the reviewing court found that the housing authority's administrative proceedings were defective in failing to protect the resident's due process rights and to enforce NYCHA's own procedures. Despite testimony by the resident that she had received psychiatric care and behavior that may have indicated she suffered from a mental disability, NYCHA had failed to follow a policy requiring referral for evaluation and possible appointment of a guardian prior to initiating the termination hearing. The court further found that the hearing officer did not accommodate the resident's possible disability by failing to adjourn the hearing and refer the resident for evaluation. In addition, because of the tenant's *pro se* status, the court looked askance at the hearing officer's use of several unconfirmed allegations by NYCHA concerning other alleged assaults as an evidentiary basis for the administrative decision. The court remanded the matter for a new administrative hearing.

***Carrington Gardens v. U.S.*,** 2002 WL 31399148 (4th Cir., Oct. 25, 2002) (unpublished). The Fourth Circuit affirmed a district court, which in turn upheld a Bankruptcy Court grant of summary judgment in favor of the Department of Housing and Urban Development (HUD) The judgment held that HUD's denial of rent increases in a building, half of whose tenants' rents were subsidized by HUD, did not constitute a breach of contract with the owner. The party in bankruptcy, Carrington Gardens (CG), was a Section 236 development with a Housing Assistance Payment (HAP) contract that required HUD approval for any rent increases. CG also received a loan for capital improvements under Section 241 of the *National Housing Act*, which prohibited both changes to the construction contract and certain disbursements of the loan balance without HUD approval.

HUD determined that reports on the capital improvements undertaken by CG were misleading and that funds were misused. Accordingly, it refused to release further funds. An additional HUD audit found that the project was out of compliance with Section 236 requirements, including evidence of overpayments to an independent management agency and the use of reserve account funds to make up operating deficiencies. HUD eventually declared that the Section 236 mortgage was in default and refused CG's multiple requests for rent increase. CG then defaulted on the Section 241 loan. CG filed for bankruptcy to stay the foreclosure proceeding and in which it also sued HUD for breach of contract. The Fourth Circuit upheld the Bankruptcy Court's grant of HUD's motion for summary judgment on CG's breach of contract claim against HUD, affirming the lower court's findings that HUD, in its discretion, may appropriately refuse to grant rent increases in light of CG's misuse of funds.

***North Country Housing v. Board of Assessment Review*,** 748 N.Y.S.2d 428 (N.Y.A.D., Oct. 17, 2002). A state appeals court affirmed and modified a successful challenge to a city tax assessment of a property receiving a project-based subsidy. North Country Housing was subject to a 30-year Housing Assistance Payment (HAP) by which HUD fixed contract rents for the property. The owners objected to the city's appraisal of the property, which was based on the *sales* price of comparable properties. Instead, the owners offered an income capitalization appraisal based on *market rents* of comparable properties and, in the alternative, one based on the *actual rents* received by the project. The trial court rejected the city's appraisal, adopting the market-rent-based income capitalization value of the property. On appeal by the city, the reviewing court affirmed the rejection of the city's appraisal method, but adopted an appraisal based on the property's actual rents, which were apparently higher than market rents.

***Community Action Agency v. Board of Equalization*,** 57 P.3d 793 (Idaho, 2002). The Idaho Supreme Court affirmed prior administrative and district court decisions affirming the revocation of a property tax exemption for a low-income housing development owned by the agency. Community Action Agency (CAA), a 501(c)(3) organization that managed several under-market-rent apartment complexes, had received a charitable exemption in years prior and subsequent to the year at issue. The CAA buildings' construction had been financed by federal HOME program loans as well as state funds. The development received no project-based rental subsidy, although some tenants received state and/or federal rental assistance.

The Idaho Supreme Court analyzed the organization's charitable status for purposes of determining its eligibility for property tax exemption according to a number of factors, including the purpose and charitable nature of the organization's undertaking, whether the project is supported by non-public donations, whether the recipients of the service are required to pay for the assistance received, and whether any income received produces a profit. The court

[1]www.westlaw.com.12

[2]www.lexis.com12.

[3]For a list of courts that are accessible through the World Wide Web, see www.uscourts.gov/links.html (federal courts) and www.ncsc.dni.us/COURT/SITES/courts.htm#state (for state courts). See also www.courts.net.12

upheld the Tax Board's revocation of the tax exemption, despite finding that CAA was created to provide low-income housing to local residents and that it had never generated profit. The fact that tenants were charged to live in CAA's facilities, albeit at below-market rents, weighed against granting the organization a tax exemption despite CAA's argument that it had never commenced eviction proceedings and therefore tenants were, in theory, not *required* to pay rent to receive the benefit offered. The fact that the exemption was granted in one year, revoked in the next, then granted again in a subsequent tax year, was seen by the court as a valid exercise of the administrative tax board's discretion. The court also rejected CAA's argument that the board of tax appeals had promised that the property tax exemption would continue so long as it continued to provide low-income housing, and should therefore be estopped from revoking the property's exempt status. Construing the tax exemption strictly against the taxpayer, the Idaho Supreme Court affirmed the decisions below to allow the revocation.

Davis v. New York City Housing Authority, 2002 WL 31748586 (S.D.N.Y., Dec. 6, 2002). Class action plaintiffs were awarded attorneys' fees, costs and expenses pursuant to 42 U.S.C. §§1988 and 3613(c)(2) after successfully enjoining the New York City Housing Authority (NYCHA) from implementing a working families preference, which the plaintiffs claimed would allow white families to cluster in predominantly white housing projects, therefore slowing or reversing desegregation of public housing required by a prior consent decree. Fees were awarded according to the lodestar method to determine a reasonable hourly rate. The plaintiffs' representation by a nonprofit legal services organization had no effect on the hourly rate.

Over objections by the defendants, billable hours attributed to discussions with counsel pursuing similar litigation were awarded, as were fees for consultation with an expert for the purpose of developing legal theories, though no expert affidavit was obtained or used in the litigation. The court also rejected NYCHA's request that the entire number of hours be reduced by 50 percent in light of the plaintiffs' limited success, as measured by the fact that ultimately only a small number of NYCHA's developments were affected by the injunction. However, the court discounted hours in the fee application for an unsuccessful interlocutory appeal, as well as to account for the plaintiffs' lack of success in pursuing an alternative legal theory of liability.[4]

[4]The merits of this case were discussed in *Public Housing Working Family Preference Thwarts Desegregation Efforts*, 29 HOUS. L. BULL. 166 (Sept. 1999) and *Court Considers Fair Housing Implications of Preference for Employer Public Housing Applicants*, 27 HOUS. L. BULL. 143 (Sept. 1997). The background and prior proceedings in this action are set forth in previous opinions. *See,* Davis v. New York City Hous. Auth., 1992 WL 420923 (S.D.N.Y. Dec.31, 1992) (Davis I); Davis v. New York City Hous. Auth., 1997 WL 407250 (S.D.N.Y. July 18, 1997) (Davis II); Davis v. New York City Hous. Auth., 1997 WL 711360 (S.D.N.Y. Nov.13, 1997) (Davis III); Davis v. New York City Hous. Auth., 166 F.3d 432 (2d Cir.1999) (Davis IV); Davis v. New York City Hous. Auth., 60 F.Supp.2d 220 (S.D.N.Y.1999) (Davis V); Davis v. New York City Hous. Auth., No. 99-6238, 2000 WL 232191 (2d Cir. Feb.23, 2000); and Davis v. New York City Hous. Auth., 103 F. Supp. 2d 208 (S.D. 2000).

Broward Gardens Tenants Assoc. v. E.P.A., 311 F.3d 1066 (11th Cir. 2002). The Eleventh Circuit dashed efforts by a low-income tenants' association to modify a cleanup plan for a Florida Superfund site located a quarter mile from a public housing development. The tenants' association for the HUD-insured development, comprised of 99 percent African-Americans receiving rental subsidies, sued the Environmental Protection Agency (EPA), HUD, the city, and others, alleging that the cleanup plan adopted by the EPA pursuant to the *Comprehensive Environmental Response, Compensation and Liability Act* (CERCLA) failed to eliminate tenants' exposure to toxic substances such as arsenic and dioxin emanating from the Superfund site. The plaintiffs connected the cleanup plan's inadequacy to a broad historical plan to maintain *de jure* racial segregation in Ft. Lauderdale, and brought claims based on the Fifth and Thirteenth Amendments, §§1982 and 1983, Title VI and VIII, and the *Fair Housing Act*. The complaint sought, *inter alia*, to prohibit a plan to cap and leave the contamination, demanding instead that the cleanup plan be similar to that remediating another Florida Superfund site near a largely white community.

The defendants claimed that the court lacked subject matter jurisdiction over the case because §113(h) of CERCLA, a provision severely limiting federal courts' jurisdiction to hear challenges to cleanups undertaken pursuant to CERCLA until those cleanups have been completed. In response, the plaintiffs first argued that their suit was not a challenge to the cleanup plan for the site since the residents were located off the Superfund site and because they sought relocation of the residents as a remedy. The district court found, and the Eleventh Circuit affirmed, that because relocation of off-site residents was an option available through CERCLA in formulating a cleanup plan, a request for such relief constituted a challenge prohibited by § 113(h). Second, the plaintiffs argued that §113(h) should not be read to have deprived federal courts of jurisdiction of *constitutional* claims. The court of appeals weighed the purpose of §113(h)—of protecting the public from undue delay in the disposal of hazardous waste—against citizens' ability to challenge a cleanup which itself is alleged to cause harm to human health. Finding that CERCLA allows for public review and comment prior to the adoption of a cleanup plan, the court joined the Sixth and Tenth Circuits in holding that the prohibition of all challenges to a cleanup plan until its completion included a bar on constitutional claims. The court affirmed the district court's dismissal of the case for lack of jurisdiction.

Smith v. Mission Associates, 25 F. Supp. 2d 1293 (D. Kansas 2002). A federal district court allowed in part and denied in part summary judgment addressing alleged racial discrimination against a white couple and biracial children in a privately owned apartment complex. Richard Smith, a white maintenance worker, received as part of his compensation a rent-free apartment in the complex, where he lived with his white girlfriend and her bi-racial children. The on-site property manager directed a series of racially charged verbal remarks to Smith and one of the children; someone wrote racial remarks about Smith on the on-site leasing office's

blackboard; and a groundskeeper made racial epithets directed to Smith and struck and injured Smith. After being involved in the altercation with the groundskeeper, Smith received workers' compensation but eventually was evicted from his apartment.

The plaintiffs brought hostile housing environment claims in violation of the *Fair Housing Act* (FHA) and §§1981 and 1982. The defendants argued that the claim failed for lack of familial status, as Smith was not legally related to his girlfriend or her children. However, the court held that familial status was irrelevant to the hostile environment claims, given that all plaintiffs were members of a protected class: the biracial children because of their race and status as aggrieved parties (met by allegations that they were injured by a discriminatory housing practice), and the white adults based on their association with the biracial children and their allegations of injury. Plaintiffs' allegations were sufficient to meet the requirement that they furnish evidence that harassment was based on race, and that the conduct complained of was sufficiently severe to alter their living conditions and create an abusive environment. The court found Smith's unique situation—living at his workplace—meant that his housing and work environments were coexistent, and that comments made while Smith was on the job at the apartment complex, in the common areas and in the leasing office, could constitute a hostile housing environment. A state defamation claim based on the same conduct survived summary judgment. However, a claim that the defendants' conduct constituted outrageous conduct (intentional infliction of emotional distress) failed under the state's requirement that plaintiff show physical symptoms of distress.

An additional claim that the eviction constituted racially discriminatory disparate treatment was analyzed under the *McDonnell Douglas* burden-shifting framework. The court found plaintiffs' evidence insufficient to show pretext where the defendants claimed that the eviction was due to Smith's failure to return to work after his injury.

Lancaster v. Martinez, 749 N.Y.S.2d 71 (N.Y. A.D., Oct. 28, 2002). The court upheld an administrative finding that the plaintiff resident is not a remaining family member entitled to occupy a public housing apartment, because she did not show that she occupied the apartment continuously or that she obtained the management's approval to become a permanent member of the tenant family. The court also rejected the resident's claims that her infant son was a remaining family member as no separate grievance proceeding was brought on his behalf. The finding that she was otherwise ineligible for a public housing lease based on a prior felony conviction was upheld despite the resident's claims that such a decision was onerous and against public policy. ■

Recent Housing-Related Regulations and Notices

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

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

HUD Rules

67 Fed. Reg. 61,752 (Oct. 1, 2002)
HOME Investment Partnerships Program

Summary: This final rule makes several streamlining and clarifying amendments to the regulations for the HOME Investment Partnerships Program (HOME Program). Specifically, it incorporates a number of statutory changes to the HOME Program; updates the regulations to reflect the provision of housing assistance to Indian tribes under the Native American Housing Assistance and Self-Determination Act of 1996; clarifies the consortia requalification requirements by codifying the streamlined approach adopted beginning with the Fiscal Year (FY) 1999 grant cycle; adjusts the HOME allocation formula to reflect the use of 2000 Census data, and requests public comment on this amendment; increases the flexibility of participating jurisdictions in using program income to pay administrative costs; and makes several other non-substantive corrections and clarifications to the regulations.

Effective Date: October 31, 2002.

67 Fed. Reg. 63,198 (Oct. 10, 2002)
FHA Inspector Roster

Summary: The purpose of this proposed rule is to establish the Federal Housing Administration (FHA) Inspector Roster, and to provide placement, recertification and removal procedures for Roster applicants. The rule also identifies when a mortgagee must use an inspector listed on the Roster.

Comment Due Date: December 9, 2002.

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

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

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

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

67 Fed. Reg. 64,484 (Oct. 18, 2002)
Section 8 Homeownership Program: Downpayment Assistance Grants and Streamlining Amendments

Summary: This final rule implements section 301 of the American Homeownership and Economic Opportunity Act of 2000, which amends the "homeownership option" under the Housing Choice Voucher Program. Under section 301, a Public Housing Agency (PHA) may, in lieu of paying a monthly homeownership assistance payment on behalf of a family, provide homeownership assistance for the family in the form of a single grant to be used toward the downpayment required in connection with the purchase of the home. Implementation of these downpayment assistance grants is anticipated for Federal Fiscal Year 2003. In addition to implementation of section 301, this final rule also clarifies and streamlines several regulatory requirements applicable to both downpayment grants and monthly homeownership assistance payments provided under the homeownership option. This final rule follows publication of a June 13, 2001, proposed rule, and takes into consideration the public comments received on the proposed rule.

Effective Date: November 18, 2002.

67 Fed. Reg. 65,272 (Oct. 23, 2002)
Clarification of Eligibility of Citizens of Freely Associated States for Housing Assistance

Summary: Recently enacted law provides that citizens of the Freely Associated States (the Marshall Islands, the Federated States of Micronesia, and Palau) are eligible to receive housing assistance under Section 8, public housing and other programs while lawfully residing in the United States, its territories and possessions. However, while residing in Guam, such aliens are not entitled to a preference over United States citizens or nationals. This rule makes conforming changes to HUD's regulations concerning restrictions on assistance to noncitizens.

Effective Date: November 22, 2002.

67 Fed. Reg. 65,276 (Oct. 23, 2002)
Testimony of Employees in Legal Proceedings

Summary: This final rule amends HUD regulations to delegate authority to the General Counsel to authorize, for good cause shown, an employee to testify as an expert or opinion witness in both matters in which the United States is a party as well as in matters exclusively among non-federal litigants.

Effective Date: November 22, 2002.

67 Fed. Reg. 65,864 (Oct. 28, 2002)
Housing Choice Voucher Program Homeownership Option: Eligibility of Units Owned or Controlled by a Public Housing Agency

Summary: This interim rule provides that units owned or substantially controlled by a public housing agency (PHA) are eligible for purchase under the Housing Choice Voucher Program homeownership option. The inclusion of PHA-owned or controlled properties among properties eligible for purchase under the homeownership option will expand the availability of housing and affordable homeownership opportunities for voucher families participating in the homeownership option. The interim rule also establishes procedures to remove potential conflicts of interest where the PHA is the seller. Specifically, the interim rule provides that an independent entity must perform certain administrative duties for which the PHA would normally be responsible. These provisions are modeled on the requirements for PHA-owned units in the voucher rental program.

Effective Date: November 27, 2002.

Comments Due Date: December 27, 2002.

67 Fed. Reg. 67,522 (Nov. 6, 2002)
Housing Choice Voucher Program Homeownership Option: Eligibility of Units Owned or Controlled by a Public Housing Agency; Correction

Summary: On October 28, 2002, HUD published an interim rule establishing the eligibility of units owned or substantially controlled by a public housing agency (PHA) for purchase under the Housing Choice Voucher Program homeownership option. The interim rule inadvertently provided an incorrect designation for the paragraph being added to the voucher program regulations. This document makes the necessary technical correction.

Effective Date: This correction is effective on November 27, 2002.

Comment Due Date: The public comment period for the October 28, 2002 interim rule is unchanged. Comments on the interim rule are due on or before December 27, 2002.

HUD Notices

67 Fed. Reg. 62,073 (Oct. 3, 2002)
Notice to Further Extend Availability of Revised Public Housing Occupancy Guidebook and Period for Comments

Summary: This notice advises the public that HUD is extending the comment period for the revised Public Housing Occupancy Guidebook (Occupancy Guidebook) and making available a copy of the draft, revised Occupancy Guidebook on the HUD Web site and inviting interested parties to comment or provide additional comments on HUD's revised Occupancy Guidebook.

67 Fed. Reg. 64,905 (Oct. 22, 2002)
Announcement of Funding Award—FY 2001; Healthy Homes Grant Program

Summary: This announcement notifies the public of additional funding decisions made by the Department in a competition for funding under the Healthy Homes Demonstration and Education Notice of Funding Availability (NOFA). This announcement contains the name and address of the award recipient and the amount of award.

67 Fed. Reg. 64,906 (Oct. 22, 2002)
Announcement of Funding Award—FY 2001; Lead-Based Paint Hazard Control; Tides Foundation

Summary: This announcement notifies the public of a funding decision made by the Department to the Tides Foun-

dation. This announcement contains the name and address of the awardee and the amount of the award.

67 Fed. Reg. 64,906 (Oct. 22, 2002)
Announcement of Funding Award—FY 2001; Lead Hazard Control 2001

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

67 Fed. Reg. 64,907 (Oct. 22, 2002)
Announcement of Funding Award—FY 2001; Lead-Based Paint Hazard Control; Alliances to End Childhood Lead Poisoning

Summary: This announcement notifies the public of a funding decision made by the Department to the Alliance to End Childhood Lead Poisoning. This announcement contains the name and address of the awardee and the amount of the award.

67 Fed. Reg. 64,908 (Oct. 22, 2002)
Fair Market Rents for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program Fiscal Year 2003; Correction

Summary: This notice corrects final FY 2003 Fair Market Rents for nine areas: San Francisco, CA, PMSA; Binghamton, NY, MSA; Elmira, NY, MSA; Jamestown, NY, MSA; Utica-Rome, NY, MSA; Oklahoma City, OK, MSA; Altoona, PA, MSA; Henderson County, TX, and Culpeper County, VA, as published in the Federal Register on September 30, 2002 (67 Fed. Reg. 61,382).

Effective Date: October 1, 2002.

67 Fed. Reg. 65,139 (Oct. 23, 2002)
Notice of Funding Availability for Revitalization of Severely Distressed Public Housing, HOPE VI Revitalization Grants, Fiscal Year 2002; Notice of Technical Corrections

Summary: This notice makes a number of technical corrections to HUD's Fiscal Year (FY) 2002 Notice of Funding Availability for Revitalization of Severely Distressed Public Housing, HOPE VI Revitalization Grants.

Application Due Date: Revitalization grant applications are due to HUD Headquarters on or before 5:15 p.m., Eastern Time, on December 6, 2002.

67 Fed. Reg. 66,038 (Oct. 29, 2002)
Notice of FHA Accelerated Claim Disposition Demonstration

Summary: This notice announces HUD's establishment of the Accelerated ClaimDisposition (ACD) Demonstration. Under the ACD Demonstration, HUD will pay accelerated claims on certain defaulted FHA-insured mortgages. HUD intends to select up to nine mortgagees to participate in the ACD Demonstration. The demonstration will have a limited initial duration and will include mortgage loans secured by properties located within the jurisdiction of HUD's Philadelphia, Pennsylvania and Atlanta, Georgia Homeownership Centers (HOCs). At the conclusion of the demonstration, HUD will assess its success and determine whether to implement the ACD process, on a permanent basis, throughout the country. This notice follows publication of a February 5, 2002 Federal Register notice proposing the establishment of the ACD Demonstration, and takes into consideration the public comments received on the earlier notice.

67 Fed. Reg. 67,638 (Nov. 6, 2002)
Announcement of Funding Awards for Fiscal Year 2002 Alaska Native/Native Hawaiian Institutions Assisting Communities Program

Summary: This document notifies the public of funding awards for FY 2002 Alaska Native/Native Hawaiian Institutions Assisting Communities Program. The purpose of this document is to announce the names, addresses and the amount awarded to the winners to be used to assist Alaska Native/Native Hawaiian institutions of higher education to expand their role and effectiveness in addressing communities in their localities, consistent with the purpose of title I of the Housing and Community Development Act of 1974, as amended.

67 Fed. Reg. 67,861 (Nov. 7, 2002)
Notice of Funding Availability for Revitalization of Severely Distressed Public Housing HOPE VI Revitalization Grants Fiscal Year 2002; Notice of Technical Corrections

Summary: This notice makes two technical corrections to HUD's FY 2002 Notice of Funding Availability for Revitalization of Severely Distressed Public Housing, HOPE VI Revitalization Grants.

Application Due Date: Revitalization grant applications are due to HUD headquarters on or before 5:15 p.m., Eastern Time, on December 6, 2002.

67 Fed. Reg. 68,677 (Nov. 12, 2002)
Privacy Act of 1974; Notice of Amended Systems of Records

Summary: Pursuant to the provisions of the Privacy Act of 1974, as amended (5 U.S.C. 552a), the Department is amending eight Privacy Act systems of records. The major revisions to these systems are the addition of new routine use disclosures. Additionally, the revisions expand the description of the categories of records and individuals in the systems and reflect changes in the systems' name, location and new system managers resulting from organizational changes and restructuring. The eight amended systems are: HUD/Dept-46, HUD/H–7, HUD/H–5, HUD/Dept-10, HUD/H–6, HUD/Dept-20, HUD/Dept-43 and HUD/Dept-4. The specific revisions made in each system of records are:

- HUD/H–7 was revised to amend the name of the system, change the storage and retrievability policies and to indicate a new system manager.
- HUD/Dept-46 was amended to revise the system name and location, expand the categories of individuals and records in the system, and to add four new routine use disclosures.

- HUD/H–5 was revised to expand the categories of individuals and records covered by the system, change the location of the system, change the retention and disposal, reflect a new system manager and to add four new routine use disclosures.
- HUD/H–6 has been amended to change the system's name and location, to add 10 new routine use disclosures and to reflect the name of the new system manager.
- HUD/Dept-20: seven new routine use disclosures were added, the system name and location was changed, revised the categories of records, a new system manager was added, and changes were made to the retention and disposal.
- HUD/Dept-10 reflects changes in the system's name and location, a new system manager, and the addition of five new routine use disclosures.
- HUD/Dept-43 has been amended to include a new routine use disclosure, changes were made to the system's name, storage and retention practices, and the name of the system manager was revised.
- HUD/Dept-4 was revised to change the name and location of the system, to add a new routine use disclosure, and to add the name of the new system manager.

Effective Date: This action shall be effective without further notice on December 12, 2002 unless comments are received during or before this period that would result in a contrary determination.

Comment Due Date: December 12, 2002.

67 Fed. Reg. 69,642 (Nov. 18, 2002)
HUD Final Information Quality Guidelines

Summary: This notice announces HUD's final guidelines for ensuring and maximizing the quality, objectivity, utility and integrity of information disseminated to the public by HUD (''Information Quality Guidelines''). The notice follows publication of a May 30, 2002, Federal Register notice inviting public comment on HUD's draft Information Quality Guidelines, and takes into consideration the public comments received on the earlier notice.

Effective Date: November 18, 2002.

67 Fed. Reg. 70,090 (Nov. 20, 2002)
Manufactured Housing Construction and Safety Standards: Notice Appointing the Nonvoting Member and DFO for the Manufactured Housing Consensus Committee

Summary: Section 604(a)(3) of the National Manufactured Housing Construction and Safety Standards Act of 1974 provides that the Secretary appoint a Consensus Committee for manufactured housing consisting of 21 voting members and one nonvoting member. The voting members have been previously announced. William W. Matchneer III, Administrator of the Department's Manufactured Housing Program, is appointed as the nonvoting member and Designated Federal Officer (DFO) of the Manufactured Housing Consensus Committee.

67 Fed. Reg. 70,447 (Nov. 22, 2002)
Notice of Proposed Information Collection for Public Comment: Quality Control for Rental Assistance Subsidy Determinations

Summary: HUD is conducting under contract a study to update its estimate of the extent and type of errors associated with income, rent and subsidy determinations for the 4.4 million households covered by Public Housing and Section 8 housing subsidies. The quality control (QC) process involves selecting a nationally representative sample of assisted households to measure the extent and types of errors in rent and income determinations, which in turn cause subsidy errors. On-site tenant interviews, file reviews, third-party income verifications and income matching with other federal data are conducted. The data obtained are used to identify the most serious problems and their associated costs. HUD program offices are then responsible for designing and implementing corrective actions. In addition to providing current estimates of error, results will be compared with those from the 2000 study. These comparisons will indicate whether corrective actions initiated since the 2000 study have been effective and if changes in priorities are needed. The first QC study found that about one-half of the errors measured using on-site tenant interviews and file reviews could not be detected with the 50058/50059 form data collected by the Department, which is why HUD and other agencies with means-tested programs have determined that on-site reviews and interviews are an essential complement to remote monitoring measures. The 2000 study showed that the calculation errors detectable with 50058/50059 data had further decreased, probably because these data were increasingly subject to automated computational checks. This study will provide current information on the quality of tenant interviewing (e.g., whether they are they being asked about all sources of income) and the reliability of eligibility determinations and income verifications. It is anticipated successive studies will be done on a one- or two-year cycle. Legislation that has been approved by the House and the Senate (H.R. 4878) may required annual updates.

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including if the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology that will reduce respondent burden. The proposed information collection requirement will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Comment Due Date: January 21, 2003.

67 Fed. Reg. 70,448 (Nov. 22, 2002)
Announcement of Funding Awards for Fiscal Year 2002 Community Outreach Partnership Centers

Summary: This document notifies the public of funding awards for Fiscal Year 2002 Community Outreach Partnerships Centers (COPC). The purpose of this document is to announce the names, addresses and the amount awarded to the winners to be used to establish and operate Community Outreach Partnership Centers that will: (1) Conduct competent and qualified research and investigation on theoretical or practical problems in large and small cities; and (2) facilitate partnerships and outreach activities between institutions of higher education, local communities and local governments to address urban problems.

HUD Housing Notices

Notice H 2002-21 (HUD) (October 2, 2002)
Extension of Notice H 2001-10 (HUD): Cost Not Attributable to Dwelling Use and Site Not Attributable to Dwelling Use in Underwriting FHA Multifamily Mortgages

Summary: Notice H 2001-10 (HUD) , which expires October 31, 2002, is hereby extended to October 31, 2003.

Expires: October 31, 2003.

Notice H 2002- 22 (HUD) (October 29, 2002)
Screening and Eviction for Drug Abuse and Other Criminal Activity – Final Rule

Summary: This Notice provides clarification and guidance for Multifamily Housing Programs on the requirements mandated by the Screening and Eviction for Drug Abuse and Other Criminal Activity, Final Rule, published at Federal Register, Vol. No. 66, No. 101 on May 24, 2001. The rule became effective on June 25, 2001.

Expires: October 31, 2003.

HUD PIH Notices

Notice PIH 2002-21 (HA) (October 2, 2002)
Submission and Processing of Public Housing Agency (PHA) Applications for Housing Choice Vouchers for Relocation or Replacement Housing Related to Demolition or Disposition (Including HOPE VI), and Plans for Removal (Mandatory Conversion) of Public Housing Units Under Section 33 of the U.S. Housing Act of 1937, As Amended.

Summary: The purpose of this Notice is to advise PHAs that they may apply for funding for housing choice vouchers to assist with relocation or replacement housing needs resulting from the demolition, disposition or mandatory conversion of public housing units. In addition, this Notice advises PHAs and local HUD Field Offices of the procedures for submitting a request for housing choice vouchers and the processing requirements.

Expires: Indefinite.

Notice PIH 2002-22 (HA) (November 1, 2002)
Units with Low-Income Housing Tax Credit Allocations Combined with Housing Choice Voucher Assistance under the Tenant-Based and Project-Based Programs

Summary: This Notice provides instructions to Public Housing Agencies (PHAs) for calculating rent amounts under the tenant-based and project-based housing choice voucher programs when a project has been allocated a low-income housing tax credit (LIHTC).

Expires: November 30, 2003.

Notice PIH 2002-23 (HA) (November 6, 2002)
Extension – Notice PIH 2001-38 (HA), Demolition/ Disposition Processing Requirements under the New Law

Summary: This Notice extends Notice PIH 2001-38 (HA) which extended Notice PIH 99-19 (HA), for another year until October 31, 2003. A proposed Notice is currently in Departmental clearance that will update Notice PIH 99-19 (HA).

Expires: October 31, 2003.

Notice PIH 2002-24 (TDHEs) (November 29, 2002)
Reinstatement-Notice PIH 2001-30 (TDHEs), Native American Housing Assistance and Self-Determination Act (NAHASDA)–Indian Housing Block Grant (IHBG) Program–Performance Measure for the Obligation of Funds

Summary: This Notice reinstates Notice PIH 2001-30 (TDHEs) , same subject, indefinite. The Notice expired August 31, 2002.

Expires: Indefinite.

RHS Rules

67 Fed. Reg. 66,308 (Oct. 31, 2002)
Farm Labor Housing Technical Assistance

Summary: The Rural Housing Service (RHS) is amending its regulations for the Farm Labor Housing (FLH) program. The Housing Act of 1949 authorizes the RHS to provide financial assistance to private and public nonprofit agencies to encourage the development of domestic and migrant farm labor housing projects. The nonprofit agencies that receive this financial assistance, in turn, provide ''technical assistance'' to other organizations to assist them in obtaining loans and grants for the construction of farm labor housing. The intended effect of this action is to amend the regulations to establish the eligibility requirements that nonprofit agencies must meet to receive technical assistance grants and how the financial assistance will be made available by the RHS.

Effective Date: December 2, 2002.

67 Fed. Reg. 69,670 (Nov. 19, 2002)
Servicing and Collections

Summary: This rule explains the procedures used by certain Rural Development Agencies and the Farm Service Agency, Farm Loan Programs to refer accounts to the Department of the Treasury for administrative offset (TOP) and

cross-servicing as required by the Debt Collection Improvement Act (DCIA), and by the Treasury Department's rules regarding the Federal Claims Collection Standards concerning administrative offset, cross-servicing procedures, and Treasury Offset of Internal Revenue Service (IRS) tax refund payments.

Effective Date: December 19, 2002.

RHS Administrative Notices

RD AN No. 3804 (1930-C) (Nov. 22, 2002)
Allowable Administrative Expenses

Summary: The purpose of this Administrative Notice (AN) is to clarify what constitutes an allowable project administrative expense for a Rural Rental Housing (Section 515) development. This AN replaces RD AN No. 3673(1930-C) dated August 20, 2001, and includes an increase in the percent of Administrative Expense subtotal that the Agency will be required to review. It is expected that only typical and reasonable expenses be incurred for the services rendered. Consequently, methods to inflate, duplicate, obscure, or failure to disclose the true nature and cost of work performed for the services rendered will cause the Agency to deny budget requests for the services or issue a demand for recovery and reimbursement for unauthorized actions. Agency officials should review budgets for reasonableness, taking into consideration the manner in which the project is managed as described in the management plan and management.

RD AN No. 3805 (1980-D) (Nov. 26, 2002)
Single Family Housing Guaranteed Loan Program Appraisals in Remote Rural Areas and on Tribal Lands

Summary: The purpose of this Administrative Notice (AN) is to establish the use of replacement cost for new construction located in remote rural areas and on Tribal lands. This AN addresses the needs of remote areas which contain scattered or small pockets of substandard housing and there is no market data available to support the cost of new construction. Areas typical of this situation include: Tribal lands, Appalachia, the Great Plains and the Delta. ■

Publication Order Form

National Housing Law Project
614 Grand Avenue, Suite 320 • Oakland, California, 94610
(510) 251-9400; fax: (510) 451-2300

	PRICE	QTY.	TOTAL
HUD Housing Programs: Tenants' Rights (2d ed. 1994)	$165.00	_____	$ _____
HUD Housing Programs: Tenants' Rights (1998 Supplement)	$120.00	_____	$ _____
Combined HUD Housing Programs: Tenants' Rights and 1998 Supplement (add $6.00 postage/handling)	$220.00	_____	$ _____
RHCDS (FmHA) Housing Programs: Tenants' and Purchasers' Rights (2d ed. 1995)	$55.00	_____	$ _____
Combined HUD Housing Programs (2d ed.), 1998 Supplement and RHCDS (FmHA) Housing Programs (add $9.00 postage/handling)	$250.00	_____	$ _____
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