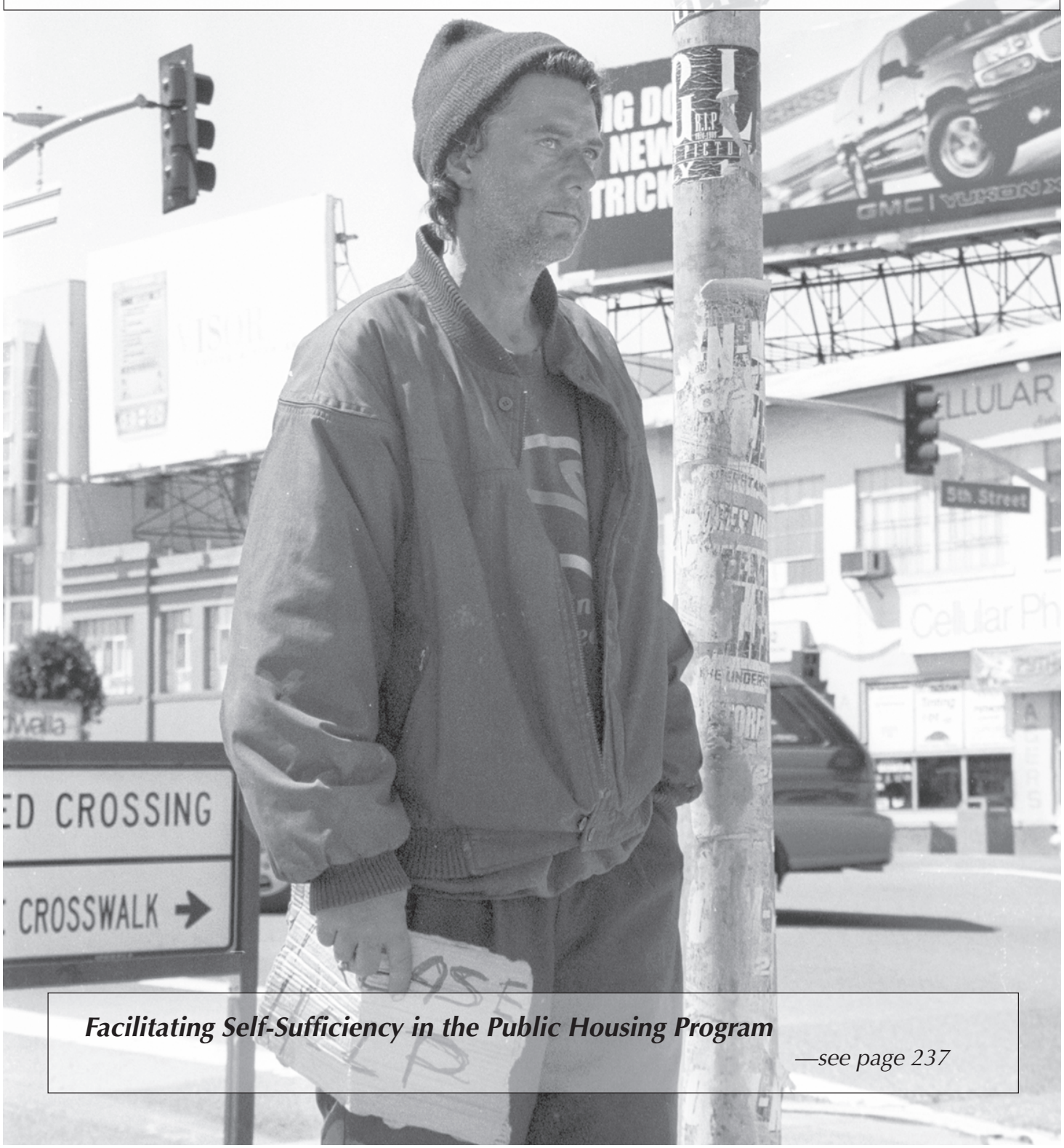
NATIONAL HOUSING LAW PROJECT
advancing housing justice

Housing Law Bulletin

Volume 31 • October 2001
Published by the National Housing Law Project



Facilitating Self-Sufficiency in the Public Housing Program

—see page 237

Housing Law Bulletin

Volume 31 • October 2001

Published by the National Housing Law Project
614 Grand Avenue, Suite 320, Oakland CA 94610
Telephone (510) 251-9400 • Fax (510) 451-2300
www.nhlp.org • nhlp@nhlp.org

Table of Contents

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.

Inquiries or comments should be directed to Robin Fleckles or Eva Guralnick, Editors, Housing Law Bulletin, at the National Housing Law Project, 614 Grand Avenue, Suite 320, Oakland, CA 94610, Tel: (510) 251-9400 or via e-mail to nhlp@nhlp.org

Racial Concentration in the Housing Choice Voucher Program

A Survey of the Racial Aspects of Voucher Use in 39 HUD-Identified Metropolitan Areas*

Introduction

The National Housing Law Project (NHLP) has conducted a survey of data from the Department of Housing and Urban Development (HUD) and the U.S. Census Bureau examining the racial implications of the geographic concentrations of families participating in the Housing Choice Voucher Program (also known as the "Section 8 Voucher Program" or the "Section 8 Existing Housing Program"). The results of this survey show what HUD has failed to acknowledge openly: concentrations of voucher households are also concentrations of households of color.

The Housing Choice Voucher Program

Housing choice vouchers are a form of federal rental assistance for low-income households. Households participating in the program receive vouchers administered by local public housing authorities (PHAs) with funding from HUD that they may use to rent (or in some cases buy) housing on the private market. PHAs subsidize a portion of each voucher household's housing costs based on a payment standard figure, which is, in turn, based on a regional Fair Market Rent (FMR) figure published annually by HUD.

Technically, a household can use a voucher to secure housing anywhere in the United States. In reality, the situation is more complex. Except in very limited circumstances, landlords are not required to accept housing choice vouchers. In some jurisdictions, households that receive vouchers are simply unable to find a dwelling unit in which to use them. In other jurisdictions, households are generally only able to use their vouchers in certain neighborhoods, which predictably has led to the disproportionate concentration of voucher households in these neighborhoods.

HUD's Fair Market Rent Initiative

In an attempt to address the concentration of voucher households in certain areas, HUD announced a new *Fair Market Rent Initiative* in September 2000. This initiative called for an increase in FMRs for certain metropolitan areas experiencing voucher concentration problems.[1]

* This article was written, and the underlying research conducted, by summer National Association of Public Interest Law (NAPIL) fellow Tamera Wong, J.D. candidate, University of California Davis Law School.

[1]HUD Notice No. 00-223, (Sept. 12, 2000) *available* at www.hud.gov/library/bookshelf18/pressrel/pr00-223.html. *See also* 65 Fed. Reg. at 58,870, 58,871 (Oct. 2, 2000)(*Fair Market Rents: Increased Fair Market Rents and Higher Payment Standards for Certain Areas; Interim Rule*).

A metropolitan area's FMRs are described in HUD regulations as "estimates of rent plus the cost of utilities, except telephone." HUD bases its estimates on the rent charged to tenants who are "recent movers."[2] FMRs are intended to estimate the housing costs voucher families searching for housing on the private market will actually encounter. Rents charged to longer-term tenants and public housing tenants are lower than the rents voucher families searching for housing will be charged and are excluded from FMR calculations.[3] Rents charged for newly constructed units and substandard units are also excluded.[4]

FMRs are set within metropolitan areas according to a percentile figure—usually the 40th percentile—intended to represent the proportion of available housing that is affordable to voucher families. For example, HUD has issued a proposed 40th percentile FMR for Albuquerque, New Mexico, of $592 for a two-bedroom unit. According to HUD's estimates, this means that 40 percent of the two-bedroom units that are currently available in the Albuquerque metropolitan area have a cost of $592 per month or less. The 50th percentile FMR for Albuquerque is $632 for two bedroom units. This means that HUD estimates that one-half of the currently available two-bedroom units in this area have a cost of $632 per month or less.

The press release announcing HUD's *Fair Market Rent Initiative* identified 39 areas where households receiving voucher assistance were determined by HUD to be concentrated geographically.[5] Under HUD's new initiative, FMRs in these 39 metropolitan areas (see Chart A: *39 MSAs*, page 226), and in areas later determined to have voucher concentration problems, will be calculated at the 50th percentile, rather than at the 40th percentile.

HUD's interim rule implementing the *Fair Market Rent Initiative* lays out the criteria for a Metropolitan Statistical Area (MSA) to qualify for an FMR increase.[6] There are three main criteria that the MSA must meet, at the time of the annual publication of FMRs, for HUD to increase the FMR to the 50th percentile. These are:

- that the FMR area contains at least 100 census tracts;
- that 70 percent or fewer of the census tracts with at least 10 two-bedroom rental units are census tracts in which at least 30 percent of the two-bedroom rental units have gross rents at or below the two-bedroom FMR set at the 40th percentile rent; and
- that 25 percent or more of the tenant-based rental program households in the FMR area live in the 5 percent of census tracts in the FMR area that have the largest number of participant households.[7]

[2]24 C.F.R. § 888.113(a)(1999)(Basis for setting fair market rents).

[3]*See id.*

[4]*See id.*

[5]*Id.*

[6]*See* 65 Fed. Reg. 58,870, at 58,871 (Oct. 2, 2000)(*Fair Market Rents: Increased Fair Market Rents and Higher Payment Standards for Certain Areas; Interim Rule*).

[7]*Id.*

Race and the Housing Choice Voucher Program

Approaching voucher concentration problems primarily as an economic issue, HUD explains that it has targeted its *Fair Market Rent Initiative* to those areas in which voucher households are restricted to a narrow range of neighborhoods by low subsidy levels. HUD claims that FMR increases will promote residential choice, help move families to areas closer to job growth and deconcentrate poverty.[8] HUD estimates that its initiative will increase the number of available housing units available to voucher households by 1.4 million.[9] HUD's commentary to its interim rules implementing its *Fair Market Rent Initiative* mentions in passing that "other factors" besides subsidy levels may lead to concentrations of voucher households.[10] However, "family choice" is the only example cited in the commentary.[11]

While family choice may indeed be a factor in patterns of voucher household concentration, it is not the only factor, apart from subsidy levels, worth mentioning. Glaringly absent from HUD's Fair Market Rent Initiative materials is any discussion of race, racial discrimination against voucher households, and residential segregation.

While family choice may indeed be a factor in patterns of voucher household concentration, it is not the only factor, apart from subsidy levels, worth mentioning. Glaringly absent from HUD's *Fair Market Rent Initiative* materials is any discussion of race, racial discrimination against voucher households, and residential segregation. This is despite the fact that 10 of the 39 areas HUD has selected for FMR increases have been identified as hyper-segregated by race.[12] Further, according to a HUD report published only six months before the *Fair Market Rent Initiative* was announced,

[8]*See id.*

[9]However, the actual figure appears to be 1,259,400 new units in the 39 areas. *See HUD Announces That it Will Raise Section 8 Fair Market Rent Levels in 39 Metropolitan Areas,* 30 HOUS. L. BULL. 135 (Sept. 2000).

[10]65 Fed. Reg. at 58,870, 58,871 (Oct. 2, 2000)(*Fair Market Rents: Increased Fair Market Rents and Higher Payment Standards for Certain Areas; Interim Rule*).

[11]*Id.*

[12]*See* Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass,* 8th printing (1998). These areas are: Atlanta, Buffalo-Niagara Falls, Chicago, Dallas, Detroit, Fort Worth-Arlington, Kansas City, Newark, Philadelphia and St. Louis.

approximately two-thirds of central city tenant-based Section 8 program participants, but less than one-fourth of the suburban participants, live in census tracts that had at least a 50 percent minority[13] population.[14]

Discrimination against voucher households has been repeatedly documented.[15] A National Low Income Housing Coalition (NLIHC) study reports that public housing tenants who are vouchered-out are moving to poor, predominantly African-American neighborhoods. A Chicago public housing resident is quoted, saying, "You want to go somewhere nice, but landlords know you are from the projects, and they think you're bad."[16] In addition to discrimination in the marketplace, the NLIHC study lists financial barriers, limited time to search for a home, and large family size as reasons for unsuccessful voucher use. Urban Institute researchers have attributed the inaccessibility of units partially to preferential selection of non-minority private market applicants over minority voucher-holder applicants.[17] Even when minority voucher-holders do locate housing in non-minority neighborhoods, residents do not feel part of the community and some fall victim to racially motivated hate crimes. For instance, an African-American Philadelphia woman moved to a Section 8 subsidized property in 1996. Racist graffiti were smeared on her door, she was subject to racial taunts and her family was threatened.[18]

Nevertheless, HUD historically has shown little interest in affirmatively addressing the civil rights implications of the programs it administers, and the Housing Choice Voucher Program is no exception. NHLP's survey indicates that the geographic concentrations of voucher households identified by HUD also involve dramatic concentrations of households by race and national origin. Nonetheless, HUD has failed even to acknowledge this as an issue.

NHLP's Survey of the 39 Voucher Concentration Metropolitan Areas

In conducting its survey, NHLP attempted to reconstruct the analysis HUD performed in identifying the 39 metropolitan areas for FMR increases under its initiative. NHLP drew from data published by HUD and the Census Bureau to determine the extent to which minority voucher households are concentrated in areas with high percentages of minority residents. In preparing to conduct this survey, NHLP requested from HUD the data that it used in identifying the 39 areas, but was not provided this information.

Data Sources and Explanation of Terminology

The bulk of the data used in this survey is taken from HUD's 1998 *Picture of Subsidized Households* dataset.[19] The data

[13]The term "minority" is used in this discussion primarily because of its use in HUD's demographic datasets. With significant hesitation and reluctance, it is used here to refer to individuals who are not non-Hispanic whites and households headed by such individuals. The problems inherent in using this term in an increasingly diverse United States are fully acknowledged.

[14]HUD, *Section 8 Tenant-Based Housing Assistance: A Look Back After 30 Years, available at* www.huduser.org/publications/pdf/look.pdf. (March 2000)(This report also shows that tenant-based Section 8 concentration problems are not limited to the 39 Fair Market Rent Initiative Areas: tenant-based program participants were described as clustering in a small number of neighborhoods in all of the country's 50 largest metropolitan areas).

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

[16]Brian Maney and Sheila Crowley, NLIHC, *Scarcity and Success: Perspectives on Assisted Housing*, *available at* www.nlihc.org/bookshelf/scarcity/chap5.htm (1999).

[17]*See* Margery Austin Turner, Susan Popkin, and Mary Cunningham, Urban Institute, *Section 8 Mobility and Neighborhood Health: Emerging Issues and Policy Challenges, available at* www.urbaninstitute.org/community/sec8_mobility.pdf. (Apr. 2000).

[18]*Id*.

[19]Paul Burke, Div. of Hous. & Demographic Analysis, Office of Econ. Affairs, Office of Policy Dev. & Research, HUD, *A Picture of Subsidized Households in 1998* (Aug. 28, 1998) *available at* www.huduser.org/datasets/assthsg/statedata98/index.html.

Recent Articles and Publications of Interest

Professor Florence Wagman Roisman of the Indiana School of Law–Indianapolis has recently had two articles published that should be of interest to legal services, fair housing and other housing advocates. The first, *The Lawyer as Abolitionist: Ending Homelessness and Poverty in Our Time* appears in 19 *Saint Louis University Public Law Review* 237 (2000). The second, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century* appears in 23 *Western New England Law Review* 65 (2001). Reprints of both articles are available from Ms. Mary Deer at the Indiana School of Law. She can be reached by e-mail at mdeer1@iupui.edu.

Bruce Katz of the Brookings Institution and Margery Austin Turner of the Urban Institute have also published an article of interest to housing advocates entitled *Who Should Run the Housing Voucher Program? A Reform Proposal.* The article, together with three comments from other authors, appears in 12 *Housing Policy Debate* 239 (2001). Copies of the article are available from the Fannie Mae Foundation by e-mail at: fmfpubs@fanniemaefoundation.org.

on households was generated by housing agencies and landlords and sent to HUD via the Multifamily Tenant Characteristic System (MTCS) and the Tenant Rental Assistance and Certification System (TRACS). Data on the number of assisted households was generated from HUD's administrative records.[20] Almost 5 million subsidized housing units are covered by the data file; about one-fourth of these are units in which a household resides with a Section 8 certificate or voucher.[21] About 87 percent of the household data on Section 8 certificate and voucher holders was reported.

The *Picture of Subsidized Households* attributes race and ethnicity to households based on the race and ethnicity of the head of the household.[22] The data on the total minority population is a component of the 1998 *Picture of Subsidized Households* and was derived from the 1990 Decennial Census data.

This survey focuses on data at the census tract and MSA level. As defined by the Census Bureau, census tracts are small, semi-permanent subdivisions within a county.[23] There are generally 1,500 to 8,000 people in each tract. Their initial designation is based upon homogeneity of population characteristics, economic status and living conditions. The tracts are meant to be permanent so that statistical comparisons can be made. However, due to changes in street patterns, highway construction and new developments, the boundaries are sometimes revised.[24] Boundaries are also split as a result of population growth or decline.

An MSA[25] is a designation of a large population nucleus that contains adjacent communities with a high degree of economic and social integration. These areas are defined by the Office of Management and Budget (OMB). Each MSA contains either a place with a minimum population of 50,000 or a U.S. Census-defined urbanized area. The total MSA population is at least 100,000 and contains one or more central cities. The boundaries of the MSAs have been re-drawn as Decennial Census data and population estimates are published, as new areas qualify as MSAs and as cities qualify as central cities for MSAs.[26]

Chart A: 39 MSAs Subject to Increased FMRs

MSA	State	MSA No.
Albuquerque	New Mexico	200
Atlanta	Georgia	520
Austin-San Marcos	Texas	640
Baton Rouge	Louisiana	760
Bergen-Passaic	New Jersey	875
Buffalo-Niagara Falls	New York	1280
Chicago	Illinois	1600
Cleveland-Loraine-Elyria	Ohio	1680
Dallas	Texas	1920
Denver	Colorado	2080
Detroit	Michigan	2160
Fort Lauderdale	Florida	2680
Fort Worth-Arlington	Texas	2800
Grand Rapids-Muskegon-Holland	Michigan	3000
Houston	Texas	3360
Kansas City	Missouri	3760
Las Vegas	Nevada-Arizona	4120
Miami	Florida	5000
Minneapolis-St. Paul	Minnesota-Wisconsin	5120
Newark	New Jersey	5640
Norfolk-Virginia Beach-Newport News	Virginia	5720
Oakland	California	5945
Oklahoma City	Oklahoma	5880
Orange County	California	5945
Philadelphia	Pennsylvania	6160
Phoenix-Mesa	Arizona	6200
Richmond-Petersburg	Virginia	6760
Sacramento	California	6920
Salt Lake City	Utah	7160
San Antonio	Texas	7240
San Diego	California	7320
San Jose	California	7400
St. Louis	Missouri	7040
Tampa-St. Petersburg-Clearwater	Florida	8280
Tulsa	Oklahoma	8560
Ventura	California	8735
Washington	DC-Maryland-Virginia-West Virginia	8840
West Palm Beach-Boca Raton	Florida	8960
Wichita	Kansas	9040

[20]HUD, General Description of the Data and Bibliography, *A Picture of Subsidized Households in 1998* (Aug. 1, 2001), *available at* www.huduser.org/datasets/assthsg/statedata98/descript.html.

[21]*Id.*

[22]E-mail from Robert Gray, Office of Policy Dev. & Research, HUD, to Tamera Wong, NAPIL Fellow, NHLP (June 13, 2001, 04:22:55 PM PST)(on file at NHLP).

[23]Economics and Statistics Administration, U.S. Department of Commerce, U.S. Census Bureau, *Census 2000 Redistricting Data* (PL 94-171) Summary File: Technical documentation. Appendix 11 (Geographic Definitions), *available at* www.census.gov/prod/www/abs/p194-171.pdf.

[24]*Id.*

[25]The designated term for MSA has been changed to Metropolitan Area (MA). *See Census 2000 Redistricting Data*.

[26]OMB Bulletin No. 99-04, *Revised Statistical Definitions of Metropolitan Areas (MAs) and guidance on Uses of MA Definitions available at* www.whitehouse.gov/omb/inforeg/msa-bull99-04.html (1999).

Survey Methodology

Data from the *Picture of Subsidized Households* for each of the 39 Fair Market Rent Initiative MSAs were examined to determine whether the MSAs met the size and concentration criteria set out by HUD. The data was further analyzed to determine the minority composition of the census tracts in which minority and non-minority voucher households reside.

Qualifying the 39 Metropolitan Areas Based on HUD Criteria

HUD set forth three criteria for FMR increases under the Fair Market Rent Initiative.[27] NHLP's analysis confirms that all 39 MSAs qualify for the increase at least with respect to the number of census tracts and the degree of voucher household concentration based on the data reported in the 1998 *Picture of Subsidized Households*. Data on housing afford-ability, needed for analysis of the second Fair Market Rent Initiative criterion, is not reported in the *Picture of Subsidized Households* and was not addressed in NHLP's survey.

Number of Census Tracts

All of the 39 MSAs satisfied the first criterion of having at least 100 census tracts to qualify for a FMR increase. The Wichita, Kansas MSA had the least number of tracts (109 tracts) and the second lowest number of tracts was Baton Rouge, Louisiana (118 tracts). The MSAs with the greatest number of tracts were Detroit, Michigan and Chicago, Illinois (1,878 tracts and 1,459 tracts, respectively). The MSAs selected for increase to the 50th percentile FMR represent a wide range of population sizes.

Percentage of Voucher Households in the Census Tracts with the Greatest Number of Voucher Households

All of the 39 MSAs except for Sacramento, California contained at least 25 percent of the voucher-users living in the 5 percent of tracts with the most concentrated program use.[28] The MSAs closest to the 25 percent requirement were San Jose, California (26 percent) and Las Vegas, Nevada (27 percent). The greatest percentages of voucher units in the 5 percent of tracts with concentrated voucher use are Miami, Florida (49 percent), Bergen-Passaic, New Jersey (48 percent), and Fort Lauderdale, Florida (47 percent).

Analyzing Race Data

Analysis of the racial aspects of voucher concentrations in each of the 39 MSAs was based on census-tract level data from the *Picture of Subsidized Households*, supplemented to the extent possible with MSA-wide data from the 2000 Census.

Determining the Average Percent Minority of the Tract Where Minority and Non-Minority Voucher Households Reside

Using tract-level *Picture of Subsidized Households* data, the average[29] percent minority of the tract where the minority and non-minority voucher households reside was calculated by totaling the number of minority voucher households and dividing the sum by the total number of households in each MSA. This calculation provided a picture of the minority population where voucher holders in the 39 areas reside. In Detroit, for instance, minority-headed voucher households reside in census tracts that are 68 percent minority on average, while non-minority-headed households reside in census tracts that are 14 percent minority on average. However, the 1998 *Picture of Subsidized Households* is not complete. In some instances, tract-level data for Section 8 Certificate and Voucher households are not reported. For the purposes of this survey, the tracts for which figures were not reported were excluded in determining the percent minority of the tract where the average minority and non-minority household lives.[30]

Minority Population for Census 2000

2000 Census data on minority populations of the 39 MSAs from the American FactFinder Web site[31] was included in the analysis to the greatest extent possible. However, at the time this survey was conducted, sufficiently detailed 2000 Census race data was available only on the MSA level, and not available at the tract level.[32] For data on the percent minority of individual census tracts, 1990 Census figures as reported in the *Picture of Subsidized Households* were used. This data was used to compare the percent minority of the overall population of each MSA with the percent minority of the population of voucher households in the MSA. The percentage of minorities in each MSA was calculated by subtracting the percentage of the population categorized as "white alone" in the relevant FactFinder report from 100 percent.

Findings

In the 39 metropolitan areas HUD identified in its *Fair Market Rent Initiative* there are large disparities between where minority voucher holders reside, where non-minority voucher-holders reside and the overall minority population in the MSAs. See Chart B on page 228 for data about each MSA.

---

[27] *See* n. 7 and accompanying text, *supra.*

[28] Sacramento, California had 21 percent of the available units in the 5 percent of tracts with the most concentrated program use. However, 291 tracts did not report or did not have enough tracts to have their report published. It is likely that, with the numbers from the excluded or underreporting tracts, that Sacramento does satisfy the 25 percent requirement.

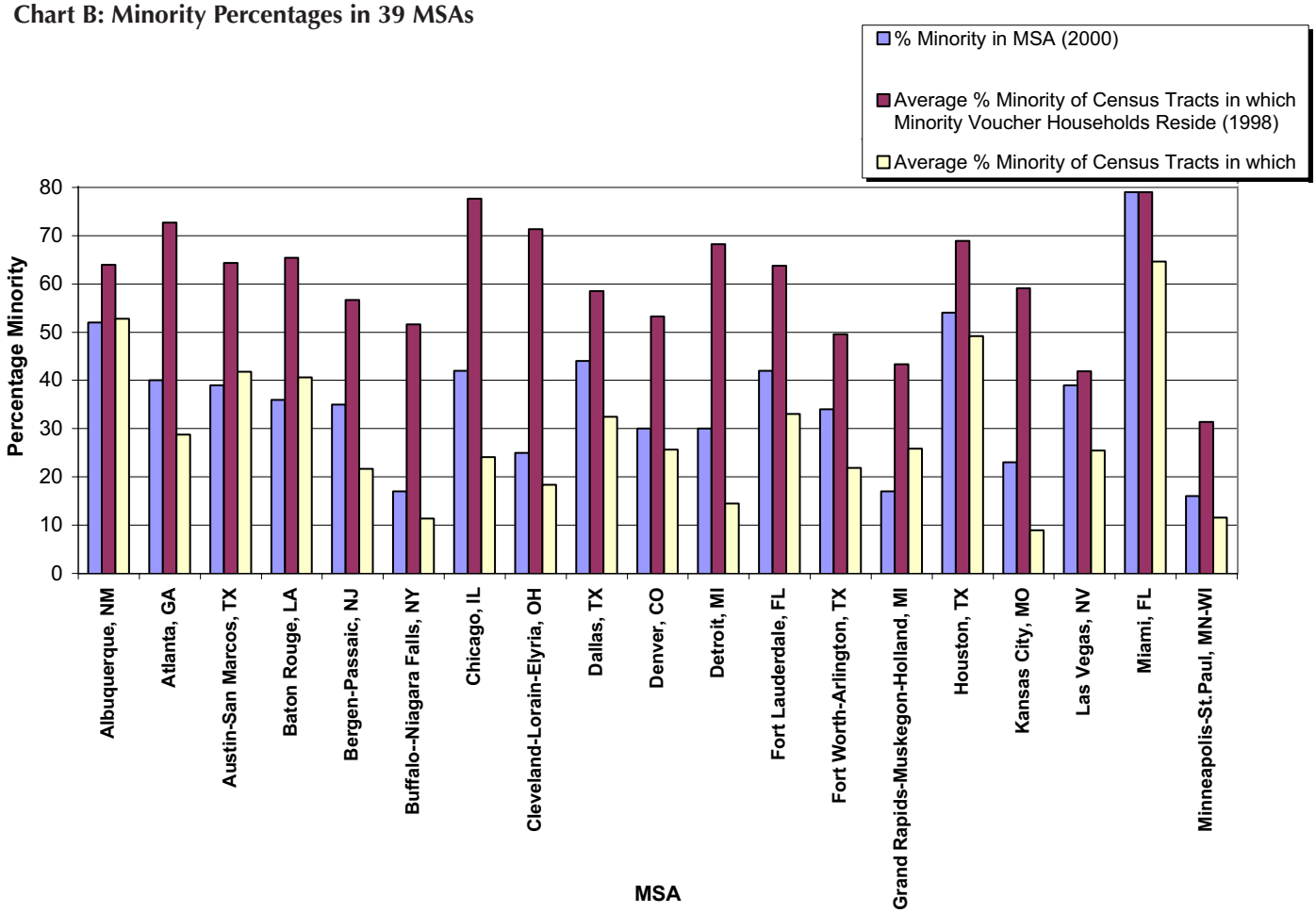
[29] "Average" as used in this discussion always refers to the mean value.

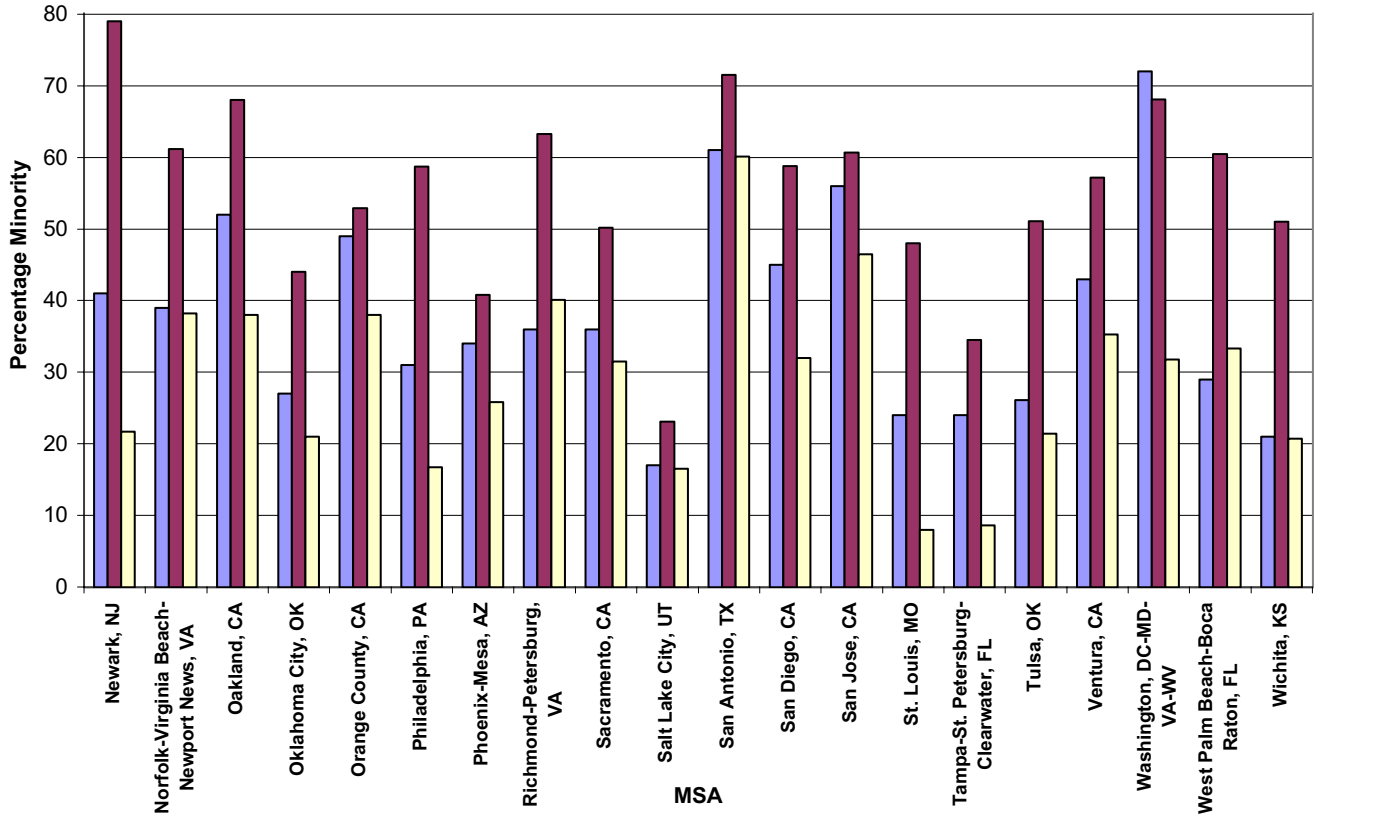
[30] While a large proportion of the tracts in each of the 39 MSAs are excluded as a result of underreporting or not reporting at all, the data generated provide a good picture of the characteristics of the areas where there is the most voucher use.

[31] *At* http://factfinder.census.gov.

[32] The Census Bureau cautions the comparison of 2000 Census data on race and 1990 Census data on race because the question on race was asked differently. Most significantly, in 2000 respondents were given the option to select one or more categories to identify their race. Elizabeth M. Grieco, Rachel C. Cassidy, U.S. Dept. of Commerce, U.S. Census Bureau, *Overview of Race and Hispanic Origin 2000,* (Mar. 2001), *available at* www.census.gov/prod/2001pubs/c2kbr01-1.pdf. However, for the purposes of this project the percentage of non-minority and minority populations will provide an accurate view of the general MSA population for comparison purposes.

Chart B: Minority Percentages in 39 MSAs





Percent Minority of Census Tracts with High Concentrations of Voucher Households

In all 39 MSAs, there is overall a disproportionately high percentage of minorities residing in the top 5 percent of census tracts with the greatest number of voucher households.[33] In some MSAs, the percent minority of the top five percent is two to three times as high as the percent minority of the MSA as a whole.[34] For instance, in Wichita, Kansas there are three times as many minorities living in the top five percent than in the entire MSA: there is a 55 percent minority population living in the top five percent, while only an 18 percent minority population in the MSA overall. Similarly, in Buffalo-Niagara Falls, New York there is a 50 percent minority population in the top five percent and a 17 percent minority population in the MSA overall. Other areas with particularly high disparities in percent minority include: Chicago, Illinois; Minneapolis-St. Paul, Minnesota-Wisconsin; Kansas City, Missouri; and West Palm Beach, Florida.

Disparities in the Percent Minority of Census Tracts in which Minority and Non-Minority Voucher Households Reside

There is a large disparity in the racial composition of the tracts in which non-minority voucher households and minority voucher households reside. The five metropolitan areas that have the greatest disparity between the average percent minority of census tracts in which non-minority voucher households reside and average percent minority of census tracts in which minority voucher households reside are: Kansas City, Cleveland-Loraine-Elyria, Chicago, Detroit and Newark. Taking Chicago as an example, the average percent minority of census tracts in which minority voucher households reside is 77 percent. In contrast, the average percent minority of census tracts in which non-minority voucher holders reside is 24 percent.

In all but six of the 39 MSAs, the average percent minority of the census tracts in which non-minority voucher holders reside is lower than the overall percent minority of the MSA. The greatest disparities exist in the Washington D.C. and Newark MSAs. Approximately 72 percent of the population living in the Washington D.C. MSA is minority. However, on average, only 32 percent of the populations living in census tracts in which non-minority voucher households reside are minority.

In all but two of the MSAs the average percent minority of census tracts in which minority voucher households reside is greater than the overall percentage of minorities in the MSA. The greatest disparity exists in Cleveland-Loraine-Elyria. In Detroit and Newark, the average percent minority of census tracts in which minority voucher households reside is markedly greater than the percent minority of the MSA as a whole. The trend in the data is that the minority population where minority voucher holders reside is higher than the percentage of minorities in the overall MSA. In three-fourths of the MSAs, the average percent minority of census tracts in which minority voucher households reside exceeds 50 percent. There are seven MSAs out of the 39 in which the MSA-wide minority population is greater than 50 percent.

There is a large disparity in the racial composition of the tracts in which non-minority voucher households and minority voucher households reside.

Recommendations: Effective Use of the PHA Plan Process and the Section 8 Management Assessment Program to Increase Voucher Utilization Outside Areas of Poverty and Minority Concentration

The 1998 *Quality Housing and Work Responsibility Act* (QHWRA) granted PHAs wide discretion in the administration of the voucher program.[35] In conjunction with increased local authority, Congress required PHAs to set forth their policies regarding the voucher program in Five-Year and Annual Plans. One element of the Annual Plan relates to PHAs' civil rights obligations and requires that each submit a certification that it will affirmatively further fair housing.[36] A PHA is considered in compliance with the requirement to affirmatively further fair housing if it has:

- examined its programs;
- identified any impediments to fair housing choice;
- addressed those impediments in a reasonable fashion; and
- worked with the local jurisdiction to implement any of the jurisdiction's initiatives to further fair housing.[37]

Records of the PHA's efforts regarding fair housing must be maintained and made available to the public as supporting documents to the PHA's Annual Plan.[38]

Many PHAs have adopted five-year strategic goals that include ensuring equal opportunity and affirmatively furthering fair housing.[39] In addition, PHAs have adopted annual strategies that include providing counseling to

[33]For convenience, the top 5 percent of census tracts with the greatest number of voucher households for each MSA will be referred to as "the top 5 percent."

[34]The data is based on comparing the average percentage minority per census tract in the Top 5 percent of census tracts with the average percentage minority per census tract in the entire MSA.

[35]*Quality Housing and Work Responsibility Act of 1998*, Title V, Pub. L. No. 105-276, 112 STAT. 2519 (1998).

[36]42 U.S.C.A. § 1427c-1(b)(15)(West Supp. 2001). This provision is considered so important that it is one of three elements out of a total of 18 elements that HUD must review and cannot exempt any PHA from submitting. *Id.* at § 1437c-1(i)(2).

[37]24 C.F.R. § 903.7(o)(2001).

[38]*Id.* and PHA Plans, HUD Template at 2, www.hud.gov/pih/pha/plans/phaps-templates.html.

[39]*Id.*, HUD Template.

voucher participants as to locations outside areas of minority concentration and marketing to landlords in areas outside minority concentration.

The Section 8 Management Assessment Program (SEMAP) establishes a system for HUD to measure the PHA performance in key voucher program areas and to assign performance ratings. PHAs may use SEMAP to analyze and improve their own programs.[40] There are 16 SEMAP indicators; indicator seven is "expanding housing opportunities," indicator eight is a deconcentration bonus indicator.[41] Both of these indicators are applicable to PHAs that have jurisdiction in metropolitan FMR areas.[42] A PHA may receive five points for indicator number seven and another five for the bonus.

To obtain the five points for indicator seven, "expanding housing opportunities," a PHA must document for areas outside poverty and minority concentration that it has:

- developed a written policy in its Section 8 administrative plan that includes actions that it will take to encourage participation by owners in these areas and that it has delineated areas that it considers poverty or minority concentration;
- taken action to encourage participation by owners in these areas; and
- prepared maps showing the locations of housing opportunities, jobs, schools, transportation and other services in these areas and that it uses these maps when briefing voucher holders.[43]

The PHA must also document that it has an information packet for voucher holders, which contains a list of owners willing to accept vouchers in areas outside poverty and minority concentration. Alternatively, the PHA must document that the information packet has a list of organizations that will assist families in finding units and that operate in areas outside those of poverty and minority concentration. The voucher participant information packets must also contain information regarding portability. Finally, the PHA must demonstrate that it has analyzed whether voucher-holders have difficulty finding housing in areas outside poverty and minority concentration. If difficulties were found, the PHA must have analyzed whether it is appropriate to increase its payment standard and sought HUD approval for an exception standard when necessary.[44]

Housing advocates should use the PHA planning process to focus the PHA's attention on the issues relating to whether vouchers are used by minorities in areas outside of minority concentration. Each year PHAs must submit a brief statement of their progress in meeting the mission and goals described in the PHA's Five-Year Plan. PHAs should be urged to live up to their mission statement and goals relating to affirmatively furthering fair housing including the utilization of vouchers in areas outside areas of poverty concentration. Moreover, PHAs should be challenged to analyze the voucher program for compliance with the fair housing obligations and to devise plans to address any impediments.[45] PHAs have the information regarding the location of the homes where each of the voucher participants live. Information regarding the minority status of the census tract where each of these homes is located may be obtained from the Census data. If a PHA fails to conduct the analysis, advocates should file a complaint with HUD challenging the PHA's certification of compliance. As noted above, each PHA must submit to HUD a certification signed by the PHA Board Chair, or an authorized PHA official, stating that it will examine its programs, and identify and address impediments to fair housing choice.[46] Finally, advocates should work with PHAs to ensure that they fulfill the six requirements of the SEMAP indicator for "expanding housing choice."[47] Compliance with this indicator will improve the PHA's score and substantially improve the chances for a minority family to find a dwelling unit in an area outside poverty and minority concentrations.

Conclusion

Residential segregation continues to exist nationally in large metropolitan areas. Residential segregation has the effect of perpetuating segregation and discrimination in education, employment, health care, transportation and other social aspects of life.[48] This survey shows that where there are geographic concentrations of housing choice voucher use, there are also large concentrations of people of color, both in the general population and in the areas where the average minority voucher holder resides. HUD's *Fair Market Rent Initiative* proposes limited increases in rent as a solution to the geographic concentration of voucher use, but it fails to acknowledge or address issues relating to the concentration of minority voucher families in minority impacted areas. ■

---

[40] 24 C.F.R. § 985.2 (2001).

[41] *Id*. §§ 985.3(g) and (h). The bonus indicator is mandatory for a PHA using a payment standard that exceeds 100 percent of the published FMR, which is set at the 50th percentile rent in accordance with 24 C.F.R. § 888.113 (c). In other words, the bonus indicator is applicable to any of the 39 jurisdictions that set their payment standard above 100 percent of the 50th percentile FMR.

[42] *Id*. §§ 985.3(g) and (h).

[43] *Id*.

[44] *Id.*

[45] A PHA may request that HUD produce a Section 8 Deconcentration Analysis Report, which provides information about the number of current and new families who move into each area and statistics on the poverty levels of each area. www.hud.gov:80/pih/systems/mtcs/webusr/decon/decon.html. These reports, however, do not provide any information regarding minority issues with respect to the jurisdiction or the voucher holder.

[46] *PHA Certifications of Compliance with the PHA Plans and Related Regulations Board Resolution to Accompany the PHA Plan available at* www.hud.gov:80/pih/pha/plans/plancert1299.pdf.

[47] 24 C.F.R. § 985.3(g)(2001).

[48] Florence Wagman Roisman and Philip Tegeler, *Improving and Expanding Housing Opportunities for Poor People of Color*, 24 Clearinghouse Review 312, 317-18 (1990).

Tools for Improving Low Section 8 Voucher Utilization Rates

Program Overview

Under the current Section 8 tenant-based voucher program, the Department of Housing and Urban Development (HUD) makes rental assistance funds available to local public housing authorities (PHAs) that, in turn, make payments to landlords on behalf of eligible families so they can obtain safe, decent and affordable housing.[1] Generally, eligible families must be "low-income," earning less than 80 percent of the area median household income (AMI).[2] After receiving a Section 8 voucher from a PHA, the family is required to locate a home to rent in the private rental market from a landlord willing to accept Section 8 assistance. Unlike the conventional public housing program and Section 8 "project-based" housing, where assistance is tied to particular units, the Section 8 voucher program provides tenants with increased mobility by providing them with the opportunity to move into decent housing in neighborhoods and communities of their choice.

Since the Section 8 voucher program protects participating tenants from initially paying more than 40 percent of their income toward rent, voucher assistance is a valuable and much sought-after commodity. That portion of the tenant's rent not paid from income is paid to the landlord by the PHA on behalf of the tenant, ensuring that the rental unit is affordable for the family. Thus, it is not unusual for a family to wait as long as 10 years or more on PHA waiting lists in order to receive a voucher and secure an affordable housing unit that has a rent that is consistent with its monthly income. Likewise, once a family finds a home to rent with Section 8 assistance, it is not unusual for participants to maintain strong rental relationships with the landlord in an effort to ensure continued receipt of their valuable subsidy.

Program Weaknesses

Unfortunately, the current Section 8 voucher offers little stability and no real guarantee of affordable housing. Not only do voucher recipients seeking homes frequently find themselves unable to find suitable housing in the neighborhood or city of their choice, many are simply unable to lease any unit with their voucher. Therefore, in certain high-cost areas such as the San Francisco Bay Area, it is not unusual for PHAs to issue 10 or more vouchers to families coming off the PHA waiting list. These authorities anticipate that only one of these families will actually successfully "lease-up" a unit with their Section 8 voucher. As a result, and despite years of waiting for Section 8 assistance, the nine unsuccessful families end up losing their vouchers and remain in their unaffordable or overcrowded housing situations.

The inability of Section 8 voucher-holders to utilize their subsidy effects more than just new participants in the program. Longtime participants are being forced to move from their existing homes for a variety of circumstances, including escalating rent increases. These families are in the same situation as new voucher recipients, searching for a new home to rent on the private market. Both the new and existing participant-family are in jeopardy of losing their Section 8 voucher simply because they may not find a landlord willing to participate in the program within the PHA-designated time frame.[3] The loss of the Section 8 subsidy is devastating to low-income families, often resulting in their having to make rental payments that reach absurdly high percentages of their household income or, living with friends or relatives in overcrowded or inadequate housing, and in many cases, homelessness.

Moreover, families lucky enough to secure a voucher and then use it to lease a rental unit often do not find "choice" and stability in housing. Many are forced to seek housing in places far away from their established community, employment, children's schools and family support networks. This contributes to the continued gentrification of neighborhoods, the concentration of poverty and the forced migration of poorer families to segregated areas. Low-income families striving for self-sufficiency are forced to deal with longer commutes to jobs, less access to support services and transportation, and greater isolation.

PHAs across the country are struggling with decreased voucher utilization and a lack of landlord participation in the Section 8 program. More often than not, PHAs are failing to obtain high enough success rates to ensure that voucher participants have a fair opportunity to access the private rental market. Obviously, in areas with extremely high rents and low rental vacancy, it may be particularly challenging to find ways to ensure that the Section 8 voucher program is effective and successful.

There is evidence, however, that higher "lease-up" success rates are not necessarily reliant upon more affordable and accessible housing markets. In fact, it may depend to a large extent upon the competent administration of the program by PHAs.[4] To ensure the complete expenditure of its Section 8 funds and to enable successful leasing practices, PHAs are required to budget their funds appropriately while

---

[1] *See generally* 24 C.F.R. Part 982 *et seq.* (2001). In October 1999, HUD implemented the statutory merger of the Section 8 certificate and voucher programs into one Section 8 tenant-based voucher program. 64 Fed. Reg. 56,894 (Oct. 21, 1999), as amended by 64 Fed. Reg. 59,620 (Nov. 3, 1999) and corrected by 65 Fed. Reg. 16,819 (Mar. 30, 2000). Hereinafter, the Section 8 voucher and certificate programs will be referred to as the "Section 8 voucher program."

[2] 24 C.F.R. § 982.201(b)(1)(2001).

[3] The PHA designates the length of time the family has to lease a unit which may include any allowable extension provided to the family. *Id.* § 982.303.

[4] *Scarcity and Success: Perspectives on Assisted Housing,* National Low Income Housing Coalition (1999), *available at* www.nlihc.org/bookshelf/scarcity/.

monitoring their utilization rates,[5] which are expected to be maintained at 95 percent or higher. PHAs with utilization rates below 90 percent are in danger of losing a portion of their Section 8 funding.[6] Thus, by effectively administering and complying with monitoring techniques, PHAs can identify and mitigate under-utilization problems in their jurisdictions.

It is imperative that HUD, Resident Advisory Boards (RABs), social service organizations, housing attorneys and advocates work in collaboration with local PHAs to increase Section 8 voucher lease-up success rates. Increasing success rates will ensure the ability of lower-income families to find suitable and affordable housing in their neighborhood of choice and prevent families from declining further into poverty and homelessness. Utilization rates can be increased in a variety of ways. For example, PHAs can expand the ways in which they utilize their Section 8 vouchers. This may include "project-basing" a portion of the vouchers or adopting new programs, such as a Section 8 homeownership option. Other approaches can increase private owner participation and portray the positive aspects of the program within the community. These approaches may include creative landlord incentive campaigns, additional financial assistance and supportive services to voucher tenants and effective utilization of the media. Yet other simple administrative strategies, such as increasing the payment standards, can broaden housing opportunities for Section 8 participants. The following is an overview of the different approaches PHAs can draw upon to increase their utilization success rates and make their Section 8 programs more effective.

Project-Basing of Vouchers

For the past decade, PHAs have had the option to "project-base" a portion of their voucher funding.[7] Under this option, PHAs essentially contract with private owners to use Section 8 vouchers in specific housing developments. However, because of onerous and infeasible program conditions (including requirements that the owner of the development rehabilitate the property), many PHAs and private landlords have chosen not to take advantage of the project-basing option.

Consequently, Congress made significant changes last year to the statutory authority governing the project-basing of Section 8 vouchers.[8] Congress increased the PHAs' authority to project-base units from 15 percent of their voucher funding to 20 percent. More significantly, PHAs can now offer project-based vouchers to owners solely to increase voucher utilization and to provide additional choice for the Section 8 participant. As a result, owners are no longer required to spend money on rehabilitation or construction in order to receive project-based vouchers. In fact, PHAs now have the option to extend several other financial incentives to owners who agree to participate in the program. These include increased rents for certain Low Income Housing Tax Credit (LIHTC) developments, vacancy payments, or any other incentive that the PHAs choose to provide to owners. Consequently, by using the project-based option, PHAs can now create a substantial number of "reserved" units to which new voucher holders can be referred when the units become vacant. This can liberate families from the difficult, desperate and frequently unsuccessful search for landlords who are willing to accept their Section 8 vouchers.

PHAs can now offer project-based vouchers to owners solely to increase voucher utilization and to provide additional choice for the Section 8 participant.

Offering Additional "Special Housing Types," Including Section 8 Homeownership

PHAs may allow Section 8 participants to use voucher assistance for "special types of housing" as defined in the regulations.[9] These include cooperatives and mutual housing, single room occupancy (SRO) units, congregate housing, group homes and shared housing structures.[10] In addition, PHAs can permit vouchers to be used for manufactured housing—either when the participant rents both the manufactured home and the underlying land or when the participant owns the manufactured home but leases the space where it sits. Each of the special housing type options can offer additional choices for Section 8 participants searching for rental units, especially for seniors or disabled persons.[11]

---

[5] *Housing Choice Voucher Guidebook* 7420.10G, § 20.5 (Apr. 2001). *See also* 66 Fed. Reg. 50,004 (Oct. 1, 2001)(*Interim Rule: Revisions to SEMAP Lease-Up Indicator*).

[6] *Id.* at § 24.3.

[7] 24 C.F.R. Part 983, *et seq* (2001).

[8] For an in-depth discussion of the statutory changes regarding the project-basing of Section 8 vouchers, *see Congress Passes Major Revisions to the Project-Based Voucher Statute*, 30 HOUS. L. BULL. 186 (Nov./Dec. 2000).

[9] Generally, PHAs are not required to permit Section 8 voucher participants to use their federal subsidies for any certain special housing type. However, it is worth noting that PHAs are required to offer all housing types to a disabled family as a reasonable accommodation, if such an accommodation is necessary to make the special program accessible and usable by the family. 24 C.F.R.§ 982.601(b)(3)(2001).

[10] *Id*. § 982.601 *et seq*.

[11] The ability to take advantage of certain special housing types may be limited to persons with certain characteristics. For example, congregate housing and group home options are limited to the elderly or to persons with disabilities and/or their live-in aides. *Id.* §§ 982.606(a) and (b)(1), 982.610(a) and (b)(1). Similarly, SROs are limited to single persons. *Id*. § 982.602.

The Section 8 homeownership option is also a "special housing type" under the Section 8 voucher program.[12] The homeownership option is a new program that allows voucher-holders to convert their traditional rental subsidy into a mortgage subsidy to buy a new home.[13] If the local PHA chooses to adopt a Section 8 homeownership program, eligible families are not limited to searching only for available rental housing. Rather, they may elect to focus their efforts on finding a home to purchase. Understandably, escalating housing prices in some parts of the country may make it more difficult for PHAs to develop successful Section 8 homeownership programs. However, by using creative financing tools and drawing upon other funds to support the program, such as the Community Development Block Grant (CDBG), local redevelopment funds and first-time homebuyer programs, the Section 8 homeownership option can be successful in almost every community. Accordingly, PHAs should consider creating a Section 8 homeownership program to increase voucher utilization rates by providing greater choices in housing options and neighborhoods to Section 8 participants.

Increasing Payment Standards

HUD recently provided PHAs with the discretion to increase their housing payment standards up to 110 percent of the published fair market rent (FMR) for each specific unit size and to reimburse the authority for the increased payments.[14] This is a departure from past practice, under which HUD provided each PHA with a fixed amount of funds to cover all voucher subsidies administered by the PHA. Under the old practice, if the PHA increased the subsidy amount it paid to landlords, it usually served fewer families. For this reason, PHAs were extremely reluctant to raise the housing payment standard.[15]

Recently, HUD changed its funding formulas so that PHAs can raise their payment standards (and, thereby, increase the amount of the subsidy paid to the landlord) to 110 percent without serving fewer eligible families. Under the new renewal formula, PHAs will be reimbursed for increased costs brought about by an increase in voucher payment standards, provided that the increase is made for specified reasons, including an effort to promote deconcentration of poverty and expand housing opportunities—both of which can be used to address Section 8 landlord utilization problems.[16]

PHAs have other opportunities to increase their payment standards to promote Section 8 participation. HUD has approved a temporarily higher exception payment standard of up to 120 percent of the FMR for PHAs operating in areas that are adversely impacted by increased energy costs.[17] The increased exception payment standard, which does not require HUD approval, must be used to mitigate the adverse impact of increased energy costs on Section 8 applicants or participants.

Every PHA can request that HUD consider granting the PHA an exception payment standard of up to 120 percent for all, or a portion, of its jurisdiction or for a specific unit type.

PHAs may also obtain exception payment standards in a variety of other ways with the approval of their HUD Field Office. First, every PHA can request that HUD consider granting the PHA an exception payment standard of up to 120 percent for all, or a portion, of its jurisdiction or for a specific unit type.[18] A PHA may make such a request if the PHA determines that it cannot meet the current local market rents by increasing its payment standard to 110 percent. Such a request must be supported by specific documentation set out in the HUD regulations.[19] PHAs can also request approval from the HUD Field Office to provide an exception payment standard of up to 120 percent as a reasonable accommodation for a disabled family.[20] Such a request does not require supporting documentation.

HUD may also permit a "success rate payment standard" which allows the PHA to raise its payment standard up to 110 percent of FMRs for the community calculated at the 50th percentile of rents for that community.[21] This is a substantial increase over the customary 40th percentile used to calculate the HUD FMR.

[12]*Id.* §§982.601(a)(7) and 982.625.

[13]For more information about the Section 8 Homeownership Program, *see Community Participation and Program Flexibility Are Key to Creating a Successful Section 8 Homeownership Program*, 31 HOUS. L. BULL. 101 (May 2001).

[14]*See* 24 C.F.R. § 982.503(b)(1)(i)(2001). The payment standard is the amount used to calculate the monthly housing assistance payment made on behalf of the tenant. The payment standard is based on the FMR published annually by HUD. *See Id.* § 887.351(a).

[15]For an overview and history of HUD-renewal funding, *see Tenant-Based Section 8 Renewal Rule*, 30 HOUS. L. BULL. 4 (Jan. 2000).

[16]*See* 24 C.F.R. § 982.102(g)(4)(2001).

[17]*See* 66 Fed. Reg. 30,566 (June 6, 2001)(*Interim Rule: Exception Payment Standard to Offset Increase in Utility Costs in the Housing Choice Voucher Program*). The Interim Rule applied only to FY 2001, which ended on September 30, 2001. The new proposed FMR for FY 2002 should reflect any increased costs of utilities. *See Id*. at 23,770 (May 9, 2001)(*Fair Market Rents for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program: Fiscal Year 2002*).

[18]*See* 24 C.F.R. § 982.503(c) (2001).

[19]*Id.* Moreover, in certain other circumstances, PHAs can request HUD approval for payment standards higher than 120 percent of FMR. *See Id*. § 982.503(c)(3).

[20]*Id.* § 982.503(c)(2)(ii).

[21]*Id.* § 982.503(e).

A PHA can request a success-rate payment standard from its local HUD Field Office if it can demonstrate that:

- fewer than 75 percent of the families issued vouchers during the past six-month period were successful in becoming program participants;
- the PHA has already established a payment standard at 110 percent for all unit sizes for at least six months; and
- the PHA has a policy of granting automatic extensions to provide families with additional search time to locate suitable housing.[22]

Lastly, PHAs may request "payment standard protection," if necessary, to meet deconcentration objectives. To receive this protection, the requesting PHA must be in an area where the FMR was previously set at the 50th percentile but has been returned to the 40th percentile and the higher FMRs are needed to provide a broad range of housing opportunities.[23] PHAs should consider each of these payment-standard increases to market the Section 8 voucher programs to local landlords.

In Seattle, the PHA gives new Section 8 landlords one-half of the total monthly rent as a "signing bonus" for each unit that is rented to a family with a Welfare-to-Work voucher.

Landlord Incentive Programs

Some PHAs are successful in increasing voucher utilization rates through a variety of landlord incentive programs. The incentives provided under these programs may be substantial or may be simply symbolic. In either case, the goal of the program is to provide a mechanism for encouraging landlords to participate in the Section 8 program without harming voucher participants or exposing tenants to financial risk. Housing advocates and PHAs should evaluate whether these incentive programs will increase landlord participation in the Section 8 voucher program in their areas.

Some PHAs are finding that simply providing a landlord with a cash incentive when they accept Section 8 tenants is very effective. This includes hard to place "Welfare-to-Work" voucher recipients.[24] In Seattle, for example, the PHA gives new Section 8 landlords one-half of the total monthly rent as a "signing bonus" for each unit that is rented to a family with a Welfare-to-Work voucher.[25] The Seattle PHA also provides a $100 finder's fee for referrals that result in new landlords participating in the Section 8 program.[26] Similarly, the Massachusetts Department of Housing & Community Development (MDHCD) recently launched an owner incentive program to encourage the "lease-up" of its Section 8 vouchers. MDHCD distributes between $50 and $500 to each landlord agreeing to accept a Section 8 tenant and thereby participate in the program.[27]

Faced with large waiting lists and low rental vacancy rates, other PHAs are combining several incentive programs to encourage Section 8 landlord participation. The Vallejo Housing Authority (VHA) in California has approximately 2,300 people on its Section 8 voucher waiting list. The waiting time for a family to receive a voucher can be up to six years. Currently, the VHA has 500 vouchers issued to families who are in the process of searching for homes. The VHA has created several incentive programs to increase the number of Section 8 units in its voucher program. It provides a list of these incentives to Section 8 tenants searching for units who are instructed to distribute the information to prospective landlords. The landlord programs offered by VHA include the Section 8 $8,000 Loan Program which provides up to $8,000 in deferred interest loans for improvements and rehabilitation to landlords agreeing to participate in the Section 8 program for at least eight years. The loan is secured by a lien against the landlord's property. At the end of the eighth year, the loan is forgiven if the landlord has remained in the Section 8 program. The program is funded by a $160,000 set-aside from the City of Vallejo's HOME funds.[28] The Paint Grant Program is another landlord program which provides up to $3,500 in paint loans to new landlords agreeing to participate in the Section 8 voucher program. In exchange, landlords agree to remain in the program for a negotiated term, usually three years. The Paint Grant Program is funded through a $100,000 set aside of CDBG funds. The VHA also minimizes administrative burdens for participating landlords by arranging for direct deposits of the monthly Housing Assistance Payments (HAP).[29]

In addition, the VHA is currently investigating a national program called the Buyer Access Program (BAP). Under this program, the PHA will purchase memberships to BAP for landlords new to the Section 8 program. The membership

[22]*Id.*

[23]*Id.* § 982.503(f).

[24]For more information about the difficulties of the Welfare-to-Work voucher, *see PHAs Challenged by Implementation of Section 8 Welfare-to-Work Vouchers,* 31 HOUS. L. BULL. 38 (Feb. 2001).

[25]Quadel Consulting Corporation, *Welfare-to-Work Monthly Narrative Report* (Dec. 18, 2000) at 4; Seattle Daily Journal of Commerce, *City Needs Section 8 Housing* (Dec. 20, 2000).

[26]*Id.*

[27]*Id.*

[28]The VHA recently received *Best Practices* awards from the National Asssociation of Housing and Redevelopment Officials (NAHRO)—including its National Award—for its Section 8 $8000 Loan Program.

[29]Conversation with Guy Ricca, VHA (Aug. 17, 2001).

will entitle the landlords to discounts on materials for repair and rehabilitation purchased at local stores. The cost of each membership is $7.30 per year for each unit. The VHA anticipates that its housing commission will approve the use of $5,000 of its Section 8 reserves to participate in this program in the near future.

Establishing and maintaining strong communications and relationships between PHAs and landlords also operates as an incentive for landlords and will help to maintain high utilization rates in the future. PHAs should encourage landlords to notify them when a unit becomes vacant so that the PHA can maintain a current list of available rentals to ease the search for voucher participants. PHAs should also provide consistent and expeditious housing quality standard (HQS) inspections, facilitate resolution of issues and problems arising between tenants and landlords, alleviate onerous paperwork requirements, and as mentioned above, establish a direct deposit system for monthly housing assistance payment.[30]

PHAs should expand search times to coincide with realistic estimates of the time it takes to find a unit in the given private market and, as an added measure, extend it to provide the participant a cushion.

Marketing Campaigns

Campaigns to market and promote the Section 8 program can counteract a negative image of the program among landlords and boost voucher utilization rates. These efforts can be particularly successful if outreach programs are aimed at recruiting landlords in specific neighborhoods where there are low concentrations of voucher-holders. These outreach programs may also afford low-income renters greater employment and educational opportunities and discourages the geographical concentration of voucher-holders in certain neighborhoods.

In California, the Alameda Housing Authority (AHA) advertises in local newspapers to promote the Section 8 program and targets real estate agents for the early identification of potential rental vacancies. To reward private landlords for participating in the Section 8 program, the AHA also gives each owner or landlord a $50 gift certificate for each new rental contract executed by the owner or landlord.[31] Likewise, the VHA participates in landlord outreach by writing and submitting articles regarding its new landlord incentive programs to local newspapers.[32] It also maintains a Web site, accessible through the City of Vallejo's home page, that includes photos and descriptions of Section 8 families and discusses the advantages of participating in the Section 8 program.[33] Finally, the VHA addresses the myths and concerns about the Section 8 program and its participants by including information and positive facts about both by broadcasting informational slides on the local cable access channel.

Assistance to Voucher-Holders

As noted earlier, PHAs are now given the discretion to determine the amount of time Section 8 applicants or participants are given to conduct their housing search.[34] However, many PHAs continue to follow old HUD regulations that limit the tenant's search time to only 60 days. In areas with low utilization rates, it is nearly impossible to find a Section 8 unit within this time period. Since voucher-holders are subject to a "use it or lose it" policy, many will lose their Section 8 assistance if they cannot find an appropriate housing unit within the allowable time.[35] If tenants lose the opportunity to participate in the Section 8 program, they are often unable to return to the PHA waiting list because these lists are frequently closed for extended periods of time. In consideration, PHAs should expand search times to coincide with realistic estimates of the time it takes to find a unit in the given private market and, as an added measure, extend it to provide the participant a cushion.

PHAs should use available community resources to teach families landlord interviewing techniques and to assist in credit counseling and credit repair. PHAs can help the family's search process by maintaining lists of available units owned by landlords who accept Section 8 vouchers and, if necessary, by providing telephone access for making search-related calls. PHAs should also consider providing transportation for families to attend initial meetings with landlords and inspect potential units.[36]

[30]*See generally* Housing Choice Voucher Guidebook 7420.10G, § 24.5 (Apr. 2001).

[31]The Alameda Housing Authority also raised its payment standard to 110 percent of the FMR to be more competitive with the private rental market. *See* Quadel Consulting Corporation, *Welfare-to-Work Leasing Report: All PHAs Reporting to Date for the Month of December 2000* at 1; *Id.*, *Welfare-to-Work Monthly Narrative Report* (Dec.18, 2000) at 4.

[32]Vallejo Times-Herald, *Free Paint Offered to Section 8 Landlords, Grant Program* (Aug. 17, 2001).

[33]*See* www.ci.vallejo.ca.us.

[34]24 C.F.R. § 982.303 (2001).

[35]*Id.* § 982.301(b)(1).

[36]*See supra,* note 30.

In addition, PHAs can relieve the economic pressures on lower-income families who may have difficulty obtaining the funds necessary to cover move-in costs, including security deposits, utility deposits and relocation costs. PHAs can access funds from a variety of sources to help new Section 8 families to secure rental housing. For example, the Perth Amboy (New Jersey) Housing Authority, which operates in a tight rental market, uses state TANF funds to pay move-in costs, utilities, and security deposits for Section 8 families.[37] The housing authority also pays the security deposit immediately after the unit passes the HQS inspection. It also makes a pro-rated housing assistance payment to the landlord as soon as the housing assistance payment contract is signed. These practices help to simplify the process, keep landlords in the program and hold the unit for the family.

Discrimination can be a significant factor in why Section 8 voucher-holders cannot secure housing. Typically, discrimination is based on race, national origin, family size or simply the fact that the family is receiving Section 8 assistance. In many instances, Section 8 has become a "code word" to avoid renting to certain people of color or families with children.

Last year, the City of Vallejo designated $150,000 in HOME funds to provide security deposit loans to Section 8 participants of up to $1,000 per family. The loans are paid back to the VHA in monthly installments of $50. Due to the severe need for this type of assistance, the security deposit loan program fund was depleted within nine months after inception. The PHA is considering working with the city to reinstate the program.[38]

Preventing Discrimination Against Section 8 Voucher Holders

Discrimination can be a significant factor in why Section 8 voucher holders cannot secure housing. Typically, discrimination is based on race, national origin, family size or simply the fact that the family is receiving Section 8 assistance. In many instances, Section 8 has become a "code word" to avoid renting to certain people of color or families with children. Therefore, it is not surprising that a recent Chicago study declared that "discriminating against Section 8 has become a more 'socially acceptable' way to discriminate against low-income, minority families."[39]

PHAs should take affirmative measures to curb discrimination against Section 8 voucher holders and to educate tenants about their rights under existing fair housing laws. If local or state jurisdictions have adopted legislation or ordinances to protect against discrimination based on the source of a tenant's income or the receipt of a housing subsidy, PHAs should ensure that landlords are advised of the possible consequences of refusing to accept Section 8 tenancies.[40] In addition, discrimination against Section 8 voucher holders is prohibited in HOME projects as well as LIHTC developments.[41] Accordingly, PHA staff should also be fully informed of the possible discrimination faced by Section 8 voucher-holders as they attempt to locate housing and make concerted efforts to eradicate such discrimination in their community.[42]

Conclusion

The Section 8 tenant-based program is essential for helping lower-income families obtain safe, decent and affordable housing. If utilized successfully, Section 8 vouchers can help tenants obtain stable housing and, if desired, move to areas with greater employment opportunities and better schools. However, without considerable participation by landlords in the private rental market, the Section 8 voucher program is impotent. Accordingly, it is essential that HUD, PHAs, RABs, housing attorneys and advocates continue to work together to increase Section 8 voucher "lease-up" success rates in an effort to prevent increased poverty and homelessness among lower-income families. ■

[37]Quadel Consulting Corporation, *Welfare-to-Work Monthly Narrative Report* (Dec.18, 2000) at 41 .

[38]Conversation with Guy Ricca, VHA (Aug. 17, 2001).

[39]Poplin, Susan J. & Cunningham, Mary K., *CHAC Section 8 Program: Barriers to Successful Leasing Up* (Urban Institute, Washington, DC; Apr. 1999) at 23.

[40]Federal regulations governing the Section 8 voucher program are not intended, in any way, to preempt state or local laws that prohibit discrimination against a Section 8 voucher-holder. 24 C.F.R. § 982.53(d)(2001).

[41]*See Prohibition of Discrimination Against Families with Housing Choice Vouchers by Owners of Low- Income Housing Tax Credit and HOME Developments*, HUD PIH Notice 2001-2 (HA)(Jan. 18, 2001).

[42]For example, the City of Vallejo issued a press release to advise landlords of recent changes in California fair housing laws prohibiting discrimination against Section 8 tenants based on source -of-income anti-discrimination. *See* Vallejo Times-Herald, *Fighting for Fair Housing, Law: Landlords Can't Discriminate Against Section 8 Tenants* (Aug. 18, 2001)(on file at NHLP).

Steps That HUD and PHAs Should Take to Facilitate Self-Sufficiency in the Public Housing Program: A Brief Overview

Introduction

As welfare time-limits expire and the nation almost certainly faces economic recession, it is perhaps more imperative than ever that the Department of Housing and Urban Development (HUD) and public housing authorities (PHAs) undertake concerted efforts to increase the economic opportunities and self-sufficiency of public housing residents. Indeed, PHAs and HUD already have a number of tools at their disposal that can be used to these ends. Unfortunately, in most cases, these tools have not been fully utilized and HUD and most PHAs have not shown a focused commitment to establishing the programs and opportunities that can promote residents' self-sufficiency. In some cases, they have failed to enforce and meet the statutory and regulatory requirements that are specifically designed to promote economic opportunity for residents.

This article is adapted from NHLP's recommendations on this issue to the Millennial Housing Commission.[1] It describes the kinds of efforts that can be conducted by PHAs in relation to their conventional public housing programs and makes recommendations on the kind of actions that should be taken by HUD and PHAs to more effectively promote resident self-sufficiency. Though the focus of this article is the public housing program, many of the issues that are addressed are also relevant to the Section 8 voucher program.

Self-Sufficiency Programs Funded by HUD

HUD funds a number of programs that are specifically designed to increase resident self-sufficiency. Key among these programs are the Family Self Sufficiency (FSS)[2] program, HOPE VI and the Resident Opportunity and Self-Sufficiency (ROSS) programs.[3] The FSS program was created in 1990. It provides case management services for residents who are seeking to become self-sufficient and establishes individual escrow accounts for participants into which the PHA deposits the increased rental charges that a family pays as its income from earnings rises. Families that complete the program may withdraw funds from these accounts for any purpose after five years. They are also allowed to withdraw funds for work-related purposes during the period of their participation. As of November 2000, about 48 percent of FSS participants who had been enrolled in FSS for 12 months or more had positive escrow balances.[4] These families had an average escrow balance of about $2,400 and were adding to their accounts at the average rate of about $300 per month.

Most PHAS are not required to operate the FSS program but running the program can have numerous benefits for a PHA, including improving relations with residents, improving its standing with HUD and, in the long term, helping to increase its income from operations by increasing the income of its current tenants.[5] Despite these benefits, only 40 percent of PHAs are operating an FSS program and most agencies that do offer FSS sharply limit the size of the program.[6]

HOPE VI is a grant program to improve the living environment for public housing residents through the demolition, rehabilitation or replacement of severely distressed public housing projects.[7] Each applicant for HOPE VI funds must include a Community and Supportive Services (CSS) component. If more than five percent of the HOPE VI funds are used for CSS, the PHA must provide for a dollar-for-dollar match.[8] Up to 15 percent of grant funds can be used for associated community and supportive services. CSS may include job readiness, retention and training, case management, literacy, transportation, child care or economic development activities.[9] In Fiscal Year (FY) 2001, $565 million was awarded in HOPE VI grants. Factoring in a match for any expenditures above 5 percent, there is potentially more than $141 million[10] available annually for support services that can promote economic opportunities for residents affected by HOPE VI.

ROSS is a grant program that provides funds for work-promoting and other supportive services for public housing residents.[11] Funding categories include technical assistance

---

[1]Pub. L. No. 106-74, § 206 (West, WESTLAW, through P.L. 107-19, approved July 10, 2001)(establishing the Millennial Housing Commission).

[2]For a more thorough description of the FFS program, *see Promoting Implementation of the Family Self-Sufficiency Program,* 31 HOUS. L. BULL. 193 (Sept. 2001).

[3]There are other programs with self-sufficiency components that are not discussed in this article, including the Public Housing Drug Elimination Program (PHDEP), 42 U.S.C.A. § 11,903 (West, WESTLAW through P.L. 107-19, approved July 10, 2001) and 24 C.F.R. § 761 (2001).

[4]Barbara Sard, *The Family Self-Sufficiency Program*, Center on Budget and Policy Priorities, at 14 (Apr. 2001).

[5]According to the Center for Budget and Policy Priorities, data for individual FSS programs indicate that a substantial portion of families experience a large increase in earnings while participating in FSS.

[6]*See Promoting Implementation of the Family Self-Sufficiency Program*, 31 HOUS. L. BULL. 193 (Sept. 2001), *supra* note 2.

[7]42 U.S.C.A. § 1437v (West Supp. 2001).

[8]HOPE VI Revitalization and Demolition NOFA–FY 2001, ¶IV(D)(3)(b), pg. 35 *at* www.hud.gov/offices/pih/programs/ph/hope6/grants/fy01. Similar funding limitations were applicable for FYs 2000 and 1999. For grants in prior years, the amounts varied. *See, e.g.*, 63 Fed. Reg. 15,579 (Mar. 31, 1998).

[9]42 U.S.C.A. § 1437v(j)(3)(West Supp. 2001)(defining CSS).

[10]($56,500,000 * 2) + $28,250,000 = 141,250.

[11]42 U.S.C.A. § 1437z–6 (West Supp. 2001).

for resident organizations designed to provide development opportunities for resident-led businesses or cooperatives, grants to fund supportive services for residents to become self-sufficient, and job and business development training. A total of $55 million was made available for programs under ROSS in the most recent funding round. Of that amount, $6 million was available for tenant management and business development and $24 million was made available for grants for family self-sufficiency and independent living for the elderly and persons with disabilities.[12]

At least 30 percent of any new hires supported by public housing funds should go to low-income households, with a preference for public housing residents.

Required Measures to Promote Self-Sufficiency

In addition to these grant programs, HUD also requires all PHAs to implement measures that promote employment and economic opportunities for residents. The Earned Income Disregard (EID), originally enacted in 1990 and subsequently expanded, requires public housing authorities to disregard, for purposes of calculating a household's rent, a portion of the family's income for a limited period when a household's income increases as a result of an increase in earned income. Families are eligible for the EID if a member of the household was previously unemployed for a year or more, received welfare in the prior six months or if the household member's income increased during participation in a training program. The EID is applicable to public housing tenants and Section 8 voucher recipients with disabilities.[13] In effect, the legislation allows the family to retain a greater percentage of its earnings by not adjusting its rent upwards immediately as family income increased through earnings. For eligible families, all increases in income due to earnings are disregarded for 12 months and 50 percent of the increase is disregarded for a subsequent 12 months.

Section 3 requires that public housing and other low-income residents of areas where housing and community development funds are spent should receive priority "to the greatest extent feasible" for employment, training and contracting opportunities so created.[14] Originally enacted in 1968, the requirements of Section 3 are applicable not only to PHAs but to all recipients of federal funds for housing and community development (including recipients of Community Development Block Grants (CDBG), HOME, project-based vouchers, project-based Section 8 and McKinney homeless programs). The regulations provide that at least 30 percent of any new hires supported by public housing funds should go to low-income households, with a preference for public housing residents. The regulations also specify that a certain portion of the contracting opportunities deriving from public housing funds (generally 10 percent) should go to businesses controlled by (or that provide significant employment opportunities to) public housing residents or other low-income households. For public housing funds, these numerical goals apply to administrative and service jobs funded with operating subsidy funds, such as janitorial, word processing, maintenance, security and social services positions, as well as construction-related jobs. Moreover, Section 3 applies to PHA hiring as well as that of outside contractors.

Obstacles to Implementation and Enforcement

Lack of Focus and Overall Coordination by HUD

Though HUD's Strategic Goal number 3 includes "Self-Sufficiency and Asset Development of Families and Individuals," the agency appears not to have made it clear on an institution-wide level that this goal continues to be part of it's core mission.[15] Moreover, there has been a failure to coordinate its resident self-sufficiency efforts. Within HUD, there is no individual, department or group of individuals responsible for the oversight and coordination of these efforts, nor anyone monitoring how these various programs and regulations can best be implemented and coordinated to achieve the most positive results. Within HUD for example, implementation of the FSS program, HOPE VI and EID is in the office for public housing and responsibility for the implementation of Section 3 rests with HUD's Office of Fair Housing. Perhaps as a result, PHAs uniformly are not using the HOPE VI CSS program to prepare tenants so that they may obtain jobs created as a result of the HOPE VI funding. NHLP has proposed the formation of a working group within HUD, consisting of representatives from the offices of Public Housing, Multifamily Housing, Policy, Research and Development and Fair Housing and Equal Opportunity, that would focus on how HUD can promote best practices and increase compliance with legislation and regulations designed to promote self-sufficiency. This group should report to the Secretary or his designee.

[12]66 Fed. Reg. 12,081, 12,082 (Feb. 26, 2001)(*Funding Availability for Public Housing Resident Opportunities and Self Sufficiency (ROSS) Program*).

[13]42 U.S.C.A. § 1437a(d)(West Supp. 2001); 24 C.F.R. § 960.255 (2001); *The Final Rule on Determining Adjusted Income in HUD Programs Serving Persons With Disabilities*, 66 Fed. Reg 6,218 (Jan. 19, 2001)(requiring mandatory deductions for certain expenses and earned income disregards); *Id.* at 8,174 (Jan. 30, 2001)(effective Apr. 20, 2001).

[14]12 U.S.C.A. § 1701u (West 2001); 24 C.F.R. § 135 (2001).

[15]*Department of Housing and Urban Development, FY 2000–FY 2006 Strategic Plan* (Sept. 2000) *at* www.hud.gov/reform/strpln.cfm.

Lack of Implementation and Failure to Enforce

Though it is clear that large numbers of PHAs are failing to follow regulations or implement the required self-sufficiency programs, there are no HUD-imposed consequences that are designed to remedy these failures.

In the case of the EID, the program is not being implemented nationally in a uniform manner. Some PHAs have implemented the program, others have resisted[16] and still others are providing the benefit sporadically or only when requested.[17] If a uniform and effective program is to be put in place, HUD must develop a strategy to ensure implementation of the various rent schedules and income disregards. PHA staff is often not aware of who qualifies and under what circumstances. While HUD has compiled a list of Frequently Asked Questions (FAQs) on the EID and ceiling and flat rents,[18] there is no guide on how to administer the EID at the local level. Such a guide needs to be developed and should be in a form that asks questions that lead the reader through the complexities of the EID or other income disregards and enables the reader to determine whether an individual qualifies for an income disregard and, if so, for how much.

Another obstacle to the implementation of the EID is that the current operating subsidy rule rewards PHAs that do not implement the EID. If, due to noncompliance, rent collections increase, PHAs may retain more revenues since they may keep up to 50 percent of rent increases without an offset from operating subsidies.[19] To address this issue, the operating subsidy rule should be revised to account for the EID and reward PHAs for its full implementation.

Some PHAs are required to implement an FSS program. The largest mandatory program is for the Section 8 voucher program. Approximately 7,000 (or 12 percent) of the 54,000 FSS participants are public housing residents—a mere 1.2 percent of the 564,000 public housing residents with children.[20] Many PHAs have not enrolled the required number of families to comply with the mandatory FSS program without any apparent consequences or enforcement efforts by HUD. In addition, HUD is not doing enough to encourage PHAs to implement an FSS program for public housing residents or to expand an existing program.

Currently, despite the enormous potential impact of Section 3 on employment and sufficiency rates among public housing residents and other low-income households, HUD does little to enforce compliance with Section 3 nationally. It is generally agreed that few PHAs have realized the potential of Section 3. This lack of implementation has resulted in an enormous loss for residents: public housing construction and rehabilitation funding has exceeded $3 billion annually in recent years and, additionally, nearly $3 billion is made available each year to PHAs to cover public housing operating expenses. The construction and rehabilitation funds alone could generate more then 16,000 jobs annually for public housing residents.[21] More jobs should also be available through positions supported by public housing operating subsidies.

Lack of Information on Self-Sufficiency and Work Promotion Requirements

There is not enough information available at the national level from HUD or at the local level through PHAs regarding the programs that are designed to increase self-sufficiency. The following information should be posted on the HUD Web site and made available to PHAs to distribute to tenants, staff and other interested agencies:

- a simple description, including mathematical examples, of what the EID deduction is and how one qualifies for it;
- complete explanations of other rent schedules and deductions, such as flat rents and income disregards related to training programs and discretionary earned income disregards,[22] that will lead to a better understanding of how public housing tenants' rents are calculated and how working tenants may take advantage of the rules and not be penalized by rent policies;
- a description of the FSS program, including information for tenants on how they can participate in the program or advocate for its establishment locally and information for PHAs on the benefits of the program including how they can obtain funds, as an add-on to the operating subsidies, to pay for a case manager; and[23]
- a detailed explanation of the Section 3 program which includes examples of best practices.

---

[16] *Watts v. Columbus Metropolitan Housing Authority* (SD Ohio) (Clearinghouse Number: 52,890)(Class action complaint); *Phillips v. Philadelphia Housing Authority*, (ED Pa.)(Class action complaint)(Clearinghouse Number: 53,484).

[17] In 1998, NHLP surveyed PHAs to discover how many were aware of and implementing the EID rule. Sixty percent of the responding PHAs indicated that they had not implemented the EID and many were unaware of the rule's existence. Now, in 2001, the situation has improved slightly in that it appears that many PHAs have written the program into their regulations. However, according to advocates and tenant groups throughout the country, it appears that most PHAs do not inform their tenants of their right to the EID, nor have they developed an appropriate screening mechanism to ensure that eligible tenants receive this mandated benefit. Instead, most authorities are leaving it up to tenants to ask for the benefit, a process that puts the onus on residents, most of whom are either ill-informed or not informed at all of their right to the EID.

[18] *Admissions and Occupancy Frequently Asked Questions*, Feb. 5, 2001, *Available at* www.hud.gov:80/offices/pih/phr/about/ao_faq2.cfm.

[19] 24 C.F.R. § 990.109(b)(1)(iii)(2001).

[20] *See Promoting Implementation of the Family Self-Sufficiency Program*, 31 HOUS. L. BULL. 193 (Sept. 2001), *supra* note 2.

[21] Barbara Sard, *Outline of How Federal Housing Programs Can Help Provide Employment and Training Opportunities and Support Services to Current and Former Welfare Recipients,* Center on Budget and Policy Priorities (June 18, 2001). Moreover, noncompliance is not due to impracticality of the goals, since some PHAs far exceed the hiring and contracting requirements, hiring residents for up to 75 percent of jobs.

[22] All of these rent incentives to increase income and promote work should be simply described and widely publicized.

[23] *See Promoting Implementation of the Family Self-Sufficiency Program*, 31 HOUS. L. BULL. 193 (Sept. 2001), note 48 and accompanying text, *supra* note 2.

This should be accompanied by a HUD handbook for PHAs and other recipients of federal housing and community development funds on how to implement Section 3. Such a handbook should include examples and applicable legal forms (for example, the handbook could provide examples of successful training programs, contract language for agreements on how to determine and report on the number of public housing residents hired, and language for bid packages that sets forth Section 3 requirements in a manner that ensures that program goals are effectively monitored and achieved).

Self-Sufficiency Efforts and the PHA Planning Process

The PHA Plan process was intended to create a framework for PHA accountability and to make available to tenants and the public information about basic PHA policies and rules. HUD sought to achieve these goals by requiring PHAs to undergo a process for completing a document called the PHA Plan Template.[24] Unfortunately, the current Plan Template does little to promote compliance with existing self-sufficiency program requirements or to encourage PHA promotion of self-sufficiency efforts. The PHA plan requirements and PHA Plan Template should therefore be revised to require PHAs to account more effectively for the self-sufficiency programs, their requirements and PHAs' implementation efforts.

The Plan Template should require PHAs to report on their implementation of the EID. HUD takes the position that the PHA need only report discretionary, as opposed to mandatory, policies in the Plan Template. Thus, because the EID is mandatory, PHAs do not need to report on their compliance with the EID program. That policy should be changed. In the plan and PHA Template, PHAs should be required to report on the implementation and execution of their EID programs including the number and percent of tenants who are benefitting from them. Such information will enable Resident Advisory Boards (RADs) and the public to evaluate whether the EID programs are being effectively implemented.

The PHA Plan Template currently requires standard performing and troubled PHAs—but not high performing PHAs—to report on the size of their FSS program. PHAs that are required to adopt an FSS program but have failed to do so must also explain the barriers to full implementation. The Template should also ask those PHAs that have not adopted the program why they have not done so. For those that have adopted the program, the Plan Template should require the PHA to explain the steps that it will take to expand the program and/or the barriers to its expansion. Reporting on the status of the FSS program should be required for all PHAs, including the high performers.

The PHA Plan Template should also be revised to require reporting on Section 3 compliance. Such a reporting requirement is set forth in current regulations but was not incorporated into the Plan Template.[25] The Template should ask the PHA to provide numbers relating to the Section 3 program goals showing that 30 percent of any new hires supported by public housing funds be low-income persons, and that 10 percent of contracting opportunities go to businesses that are controlled by (or that provide significant employment opportunities to) public housing residents or other low-income households. It would be useful if PHAs were required to report, for each grant and contract, the total number of new hires and contract opportunities that were provided, as well as the actual numbers of Section 3 residents hired and the number of contracts entered into with Section 3 businesses. It should also require PHAs to attach to the PHA Plan, and make available locally, any forms submitted to HUD regarding compliance with Section 3 program.

PHAs should make concerted and ongoing efforts to ensure that the jobs that become available within a PHA should be used for employment or training opportunities of residents.

PHAs as an Employment Resource

PHAs should make concerted and ongoing efforts to ensure that the jobs that become available within a PHA should be used for employment or training opportunities of residents. This is particularly true for every PHA that receives HOPE VI and Public Housing Drug Elimination Program (PHDEP) funding.

Assessing PHA Performance in Enhancing Residents' Self-Sufficiency

In the new Public Housing Assessment System (PHAS), the Management Operations economic self-sufficiency sub-indicator is worth seven out of 100 points.[26] However, only PHAs that have funding for a self-sufficiency program, such as FSS, are scored on this criterion; those that have chosen not to seek funding or not to implement a program do not lose points. A commitment on the part of HUD to the promotion of self-sufficiency programs among PHAs would extend the self-sufficiency sub-indicator to all PHAs, as is currently required by statute,[27] and not be limited to PHAs

[24]HUD Template *at* www.hud.gov/pih/pha/plans/phaps-templates.html.

[25]24 C.F.R. § 903.7(l)(2001)(PHA should report in Annual Plan on Section 3 compliance).

[26]*Id.* § 902.43(a)(5).

[27]42 U.S.C.A. § 1437d(j)(1)(H)(i)(West Supp. 2001).

that receive special funding for economic self-sufficiency programs. Also, unlike the performance evaluations of PHAs operating the voucher program, conventional public housing programs are not evaluated on the basis of whether they have accurately established rents.[28]

This is particularly troubling given that HUD estimates that approximately 60 percent of subsidized households are paying incorrect rents. Failure to assess PHAs on their ability to accurately determine rent virtually precludes any HUD efforts to evaluate PHAs for compliance with rent-setting procedure and the EID. HUD should also promote efforts by PHAs to establish goals for increasing the percentage of families who have earned income and for increasing the levels of families' earned incomes. In establishing such goals, care should be taken to account for elderly and disabled families and to ensure that PHAs that disproportionately serve these populations are not penalized by any standards that are established for measuring implementation of such goals. Moreover, consideration should be given to awarding incentives to PHAs that are successful in increasing the percentage of earned income or the level of earned income among families who are long-term residents of public housing or whose units are located in areas of high poverty concentration.

HUD should also include an assessment of how PHAs use their public housing funds (including operating subsidy, capital fund and any other formula or special grants) to hire and train public housing residents and the extent to which PHAs contract with Section 3 businesses. These assessments should be based on the success that PHAs have in meeting the Section 3 program goals. If a PHA has not met the required goals, it should be penalized.

Conclusion

There are numerous measures that HUD and PHAs can take to help ensure that public housing residents are provided with a full range of opportunities to increase their income and achieve self-sufficiency. Many of those measures are already mandated by statutes and regulations while others are easy to implement. The fact that HUD and local PHAs have not had greater success in achieving self-sufficiency, and indeed have implemented few incentives or effective measures of compliance or achievement, suggests that these institutions have no commitment to this issue. Stronger oversight, improved communications and effective enforcement are needed to make a significant difference in the lives of tens of thousands of public housing residents who face the prospect of time-limited benefits and a very uncertain economic future. ■

[28]24 C.F.R. §§ 985.3 (c) and(k) (2001)(SEMAP indicator for the determination of adjusted rent).

National Low Income Housing Coalition Releases 2001 *Out of Reach* Report: Disparity Between Rents and Minimum Wage Keeps Growing

For millions of low-wage, working Americans, even working two full-time jobs won't pay the rent because wages are falling farther behind as housing prices skyrocket. The National Low Income Housing Coalition's annual report on income and rental housing costs, *Out of Reach*, reveals that in no single jurisdiction in the United States can minimum- wage workers afford the Fair Market Rent (FMR) for homes in their communities. To afford the U.S. Median FMR for a two-bedroom rental house or apartment, a worker would have to earn a Housing Wage[1] of $13.87 per hour or 269 percent of the federal minimum wage, according to the 2001 edition of the report. In 33 states and 1,237 cities and counties, the FMR is more than twice the prevailing minimum wage, the Coalition reported.

The federal minimum wage has remained at $5.15 per hour since 1997. During the same four years, rents have increased significantly nationwide. Today, a worker earning minimum wage would have to work 108 hours per week to afford the median FMR for a two-bedroom rental unit, or a household must have the equivalent of two-and-a-half minimum wage workers. In more expensive areas of the country, housing is even less affordable to low-wage workers. The Housing Wage needed to afford a two-bedroom unit in San Francisco is $33.60 per hour. A San Francisco family with two minimum wage workers would be unable to afford a two-bedroom apartment even if each worked two full-time jobs.

In Boston, the Housing Wage is $20.21 per hour and a minimum wage worker would have to work 157 hours per week to afford a two-bedroom apartment. Although Massachusetts and California have enacted higher minimum wage laws than the federal standard, minimum wages still fall far short of making housing affordable for low-wage workers. And in most areas of the country the gap is growing. Of the 3,779 local jurisdictions examined—every county in the 50 states (in New England states, data was analyzed at the town level), plus the District of Columbia and Puerto Rico—the Housing Wage increased in all but one of them by an average of about 4.6 percent from 2000 to 2001. Five hundred local jurisdictions experienced increases of $1 per hour or more, and 99 of those saw increases of $2 or more. The one jurisdiction where the Housing Wage declined was Madison County,

[1]The Housing Wage refers to the hourly wage needed to afford a two-bedroom apartment at the local HUD-approved FMR and keep housing costs at 30 percent of income.

Missouri, where it dropped from $7.37 per hour last year to $7.13 per hour this year. Those amounts are substantially greater than the $5.15 per hour minimum wage.

Far worse is the gap between income and housing costs for elderly and disabled people who depend on Supplemental Security Income (SSI) as their main source of income. In Florida, for example, an SSI recipient receiving $512 monthly can afford a monthly rent of no more than $154, while the FMR for a one-bedroom home in Florida is $566. "Our annual *Out of Reach* reports have drawn a stark picture of housing affordability in America today," said Sheila Crowley, president of the National Low Income Housing Coalition. "Sound and affordable housing is the key to improving the lives of millions of people." The entire report, *Out of Reach: America's Growing Wage-Rent Disparity*, is available from NLIHC at 202-662-1530 and on the organization's Web site at www.nlihc.org. ■

Texas Adopts Affordable Housing Preservation Law

Introduction

Earlier this year, the Texas Legislature passed long-sought legislation addressing the challenge of preserving privately owned, federally assisted affordable housing. The bill, SB-322, was signed by Governor Rick Perry on June 16, 2001. The preservation provisions were contained in the must-pass bill, dealing with the pending sunset of the authority for the Department of Housing and Community Affairs, the state-level agency responsible for housing and community development policy and many of the state's programs. The law represents years of work, the tireless efforts of tenant and housing advocates, and the leadership of key state legislators to establish a state preservation policy and program confronting the issues resulting from the shrinking federal role in preserving federally assisted housing. The bill's enactment provides another important boost to state and local initiatives to complement the remaining federal tools.[1]

In brief, the Texas housing preservation law (Article 3 of SB 322) requires:

- the Texas Department of Housing and Community Affairs (TDHCA) to treat housing preservation as a priority in the allocation of state funds or state-controlled funds, and, in its preservation activities, TDHCA must accord first priority to properties currently receiving federal subsidies;
- owners receiving state funding to agree to long-term use restrictions and to renew available rental subsidies;
- owners seeking to terminate existing federal restrictions or subsidies to provide one-year's prior notice to TDHCA, which then must attempt to find a preservation purchaser, as well as other notices in certain circumstances; and
- that tenants have a voice in the future of preserved properties, such as enforcing use restrictions or supporting purchasers seeking state funding.

The following is a more detailed explanation of each of these components, almost all of which are codified in various subchapters of Chapter 2306 of the Texas Government Code. This article will refer to the codified subsections.

The Preservation Priority

The law establishes two categories of priority for the state's preservation efforts and several duties for the responsible state agency, TDHCA. First priority (Class A) properties are those which receive federal subsidies that maintain affordability. These include:

- Section 8 or other rental assistance contracts nearing expiration;
- HUD-subsidized mortgages under Sections 221(d) or 236 of the *National Housing Act*,
- Section 202 of the *Housing Act of 1959*, or
- Rural Housing Services rural rental or farm labor housing under Sections 514 and 515 of the *Housing Act of 1949* that are eligible for prepayment or nearing the end of the mortgage term.[2]

Class B properties are those which have other rent and use restrictions that provide affordable housing, such as federal tax credit properties or properties sold with restrictions through the Resolution Trust Corporation.

Collecting and Maintaining Information

For the Class A federally subsidized properties, TDHCA must prepare a list of the names, locations and number of units in those developments that are at risk of losing their federal restrictions and subsidies and maintain this information on the agency's Web site, as well as estimating preservation and rehabilitation costs.[3] The first list must be prepared by January 1, 2002.

[1]For background on other state and local initiatives, *see Preserving Federally Assisted Housing at the State and Local level: A Legislative Tool Kit*, 29 HOUS. L. BULL. 183 (Oct. 1999)(survey of state and local preservation initiatives); *New Studies Assessing Risk of Opt-Outs Enable Advocates to Target Preservation Efforts*, 30 HOUS. L. BULL. 82 (June 2000); *Denver Adopts Preservation Ordinance*, 30 HOUS. L. BULL. 164 (Oct. 2000); *California Adopts Improved Notice Requirements for Federal Housing Conversions*, 31 HOUS. L. BULL. 14 (Jan. 2001).

[2]§§ 2306.801 and 2306.802.

[3]§ 2306.803.

Contacting Owners About Preservation

TDHCA must contact owners of Class A developments, presumably to determine their plans, and negotiate to preserve affordability where possible.[4] This outreach may become an important component of targeting preservation efforts and resources, since the list alone cannot provide this essential information.

Allocating State Resources for Preservation

TDHCA must use available state resources for the purpose of preserving and rehabilitating both Class A and Class B preservation-eligible properties.[5] TDHCA must set aside at least 15 percent of the annual amount of Low-Income Housing Tax Credits (LIHTC) available for allocation in Texas to federally subsidized developments nearing the end of their current affordability restrictions.[6] In addition, TDHCA must allocate credits to Class A developments in both urban and rural communities in proportion to the housing needs of each "uniform state service region" (subregions of the state defined elsewhere in Texas law).[7] Reportedly these requirements should result in a significant increase in the level of tax credits and other state funds allocated to housing preservation activities. With respect to other state funds or state-controlled resources, including grants, loans or loan guarantees, the law requires TDHCA to develop a housing preservation incentives program, including loans underwritten in accordance with TDHCA guidelines, HUD Section 108 loan guarantees (up to $10 million total until the end of 2004), and grants for the capital costs of acquisition or rehabilitation or for transaction costs. While the final version of the law failed to provide any additional funds for this purpose in the face of a $300 million proposal, it effectively requires TDHCA to consider allocating other resources which it controls, aside from tax credits, including HOME and CDBG, and state housing trust funds.

Use Restrictions for State-Funded Properties

Starting in 2002, where state-allocated or controlled resources such as loans, grants or tax credits are used for preservation incentives, the law requires long-term use and affordability restrictions commensurate with the financing terms.[8] Owners or purchasers of state-funded developments must agree to maintain both affordable rents for low-income tenants for the longest period that is economically feasible and decent, safe and sanitary conditions. TDHCA must ensure that the benefits of longer-term affordability restrictions and below-market rents are adequately considered in developing any underwriting or application-scoring criteria used to process loans or distribute incentives. The law requires specific restrictions for preservation transactions where TDHCA is providing loans, loan guarantees or grants that are more than 33 percent of the value of the development (but not a loan backed by 501(c)(3) bonds), or tax credits (presumably of any amount). The required restriction for these transactions is at least the remaining term of the federal assistance or a minimum of 30 years.

Another of the law's significant restrictions furthers the purpose of ensuring that preserved developments remain affordable to a wide range of extremely low-income families. Owners must agree to renew rental subsidies if they are available and sufficient to maintain the economic viability of the development.

Starting in 2002, where state-allocated or controlled resources such as loans, grants or tax credits are used for preservation incentives, the law requires long-term use and affordability restrictions commensurate with the financing terms.

These restrictions are enforceable not only by the state, but also by the tenants or private parties—against both the owner accepting the funds and subsequent owners—and must be included in a required land-use restriction agreement permitting the recovery of reasonable attorneys' fees for successful enforcement actions. TDHCA must adopt the required policies and procedures to implement these restrictions by November 1, 2001.

Beyond these use and affordability restrictions, owners receiving state assistance starting in 2002 must comply with TDHCA-established standards for tenant and management selection, which include nondiscrimination against Section 8 voucher holders, and proscribe use of any minimum-income standard for voucher-holders that requires the applicant to have a monthly income greater than 2.5 times the tenant's share of the rent.[9] The nondiscrimination and minimum-income provisions concerning voucher-holders also apply to non-preservation developments supported with tax credits, and generally apply to any development where state funding or administration first occurs after the law's effective date (if earlier than January 1, 2002).[10] These nondiscrimination and minimum-income provisions concerning voucher-holders also apply to properties which received tax credits during much of the past decade.[11]

---

[4] *Id.*

[5] § 2306.804(a).

[6] § 2306.6714, as added by Article 8, Subchapter DD, of the bill.

[7] § 2306.804(b).

[8] § 2306.185. The commencement date for applying these restrictions is established at Section 3.08(b) of the bill.

[9] § 2306.269.

[10] § 3.09(a) of the bill.

[11] *Id.*, where tax credit applications were received by TDHCA on or after August 10, 1993.

Notice Requirements

Starting in 2002, owners of federally assisted developments will be subject to new duties.[12] Those who intend to prepay the loan, opt-out of the Section 8 assistance contract or intend to sell, lease or otherwise dispose of the development must provide at least 12 months' advance notice to TDHCA so that the agency can try to find a preservation purchaser.[13] Note that this notice period is longer than that required by federal law in the case of prepayments (which requires notice of at least 150 but no more than 270 days), and applies to the proposed transfer or sale of all developments, even if no termination of federal subsidy is currently threatened. In addition, other provisions of the law similarly restrict an owner's ability to sell, lease or otherwise dispose of federally assisted or subsidized properties, or to take other action that would disrupt or discontinue federal insurance or assistance to the development or the residents, unless the owner provides prior written notice by mail to the tenants and TDHCA.[14] This latter notice must indicate the owner's intention to prepay the federally subsidized loan or that the subsidy contract will expire, as applicable, and must be provided at least 90 days before the applicable triggering event, and meet other federal requirements. For Section 8 opt-outs, the notice is deemed sufficient if it meets the federal notice requirements,[15] but the advantage is that it must be provided to the state agency as well.

Tenant Participation in Preserved Properties

In addition to the notice requirements and enforcement powers, the law recognizes the importance of tenant participation in the state preservation program by requiring TDHCA to give priority in providing preservation funds to purchasers that are supported or approved by the residents' association of a property.[16]

Conclusion

To begin implementing the law, Texas advocates and state and federal agency representatives held a "preservation summit" meeting on August 17, 2001. That meeting initiated a collaborative process to move the state's program forward, which hopefully will develop into a model for other states to follow. ■

[12]The effective date of the new duties imposed by the law is established by § 3.08(f) of the bill.

[13]§ 2306.185(f).

[14]§ 2306.852 and § 2306.853. These provisions do not apply to certain involuntary dispositions, transfers by gift or devise, or to properties included in the federal "Mark to Market" restructuring program. § 2306.851.

[15]42 U.S.C.A. §1437f(c)(8)(West Supp. 2001).

[16]§ 2306.804(c).

California Tenants Have No Constitutional Right to Distribute Newsletter

Introduction

The California Supreme Court has held, in a 4-3 decision, that landlords do not violate tenants' state or federal constitutional rights by prohibiting the distribution of a tenant newsletter.[1] The court declined to expand the free speech rights found more than 20 years ago with respect to commercial property[2] to include a privately owned residential apartment complex with controlled access to common areas. However, both the lead and concurring opinions explicitly note that the ruling does not limit any other tenant or tenant association rights that may be created by other property law principles or statutory and contractual protections. Instead, the ruling is limited to the facts presented.[3]

Golden Gateway Center, a retail and residential apartment complex in downtown San Francisco, consists of four high-rise buildings and a group of townhouses, totaling 1,254 residential units. Golden Gateway emphasizes privacy and security, providing doormen during the daytime, 24-hour roving security patrols, and limiting access to tenants and their invitees. Although house rules incorporated into tenant leases have consistently banned all solicitation in the building, for the first 11 years of the operation of the Golden Gateway Tenants Association ("Association"), the management made no objection to the distribution of the association's newsletter. In 1993, however, the manager requested that the Association cease distributing the newsletters on or under apartment doors, citing the prohibition against "soliciting within the building" found in the house rules then in effect. This dispute was resolved with management's permission to continue newsletter distribution under doorways "in a reasonable manner." Soon after a change in the building's manager in 1995, another dispute arose over an increased amount of leafleting activity, and the new manager asked the Association to scale back its leafleting and to limit its distributions to newsletters. The Association refused, citing its constitutional rights. Management than revised its house rules governing solicitation to make them more specific, broadly defining solicitation to include commercial and political activity, whether oral or written, and banned it completely. The policy specifically targeted leafleting activity, including "sliding leaflets or other papers underneath tenants' doors, placing leaflets or other papers on or about

[1]*Golden Gateway v. Golden Gateway Tenants' Association*, 29 P.3d 797, 111 Cal. Rptr. 2d 336 (Ca. Aug. 30, 2001).

[2]*Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1979)(upholding the state constitutional right of high school students to solicit signatures at shopping center).

[3]111 Cal. Rptr. 2d 354, 358.

tenants' doors, or leaving multiple copies of leaflets or other papers in any common areas."[4]

When the Association refused to halt distribution activities, Golden Gateway filed suit seeking to enjoin the activity. The trial court initially enjoined the leafleting, but after trial held that the Association had a binding contractual right (based on management's earlier assent to reasonable distribution) to distribute the newsletter, declining to decide the constitutional issue. The Court of Appeal reversed on the grounds that the first manager's representation was not a binding contract, and held that the Association had no right to leaflet in the complex under the Constitutions of the United States or California.

The Decision

The issue addressed by the state Supreme Court was whether the free speech clause of California's Constitution conferred upon the tenants association of "a large apartment complex" the right to distribute its newsletter and other leaflets concerning residence in the complex to tenants. Based on earlier U.S. Supreme Court cases, the parties agreed that the leaflet distribution on private property was not protected under the United States Constitution because there was no governmental action.[5] Thus, the lead opinion for the court, signed by only three of seven justices, reviewed the "more definite and inclusive"[6] free speech clause of the California Constitution,[7] especially its own 1979 holding in *Robins* that found a protected right to free expression at a privately owned shopping center, despite the apparent inconsistency with the U.S. Supreme Court's holding concerning the federal constitution. In so doing, it criticized the lack of guidance the decision provided for applying the public-forum analysis outside of the large shopping center context and described its critical treatment by some commentators and other courts.[8]

Reviewing the history of California's free speech clause, the lead opinion for the court concluded that, despite its ambiguous silence, the clause requires state action and that private actions to restrict speech are not covered. The opinion referenced the lack of debate on the clause during the adoption of the California Constitution in 1849, looking instead to its historical connections in the adoption of the free speech clause of the substantially similar 1846 and 1821 New York Constitutions. New York courts—like most state courts interpreting similar state constitutional provisions—have interpreted that clause to require state action, thus protecting speech only against incursions sufficiently related to the government. By holding that its *Robins* decision (with its public forum character) is consistent with requiring a state action limitation, the court avoided overturning any portion of *Robins*, further limiting that ruling to its facts.

Under the court's newly clarified interpretation, private property must take on a public character before California's free speech clause may apply. In applying the state action requirement to the facts of the Golden Gateway dispute, the court found state action lacking because of the private character of this apartment complex, with restricted public access and exclusive admission for tenants and their invitees.[9] The court contrasted *Robins*, where the large public shopping center with unrestricted public access served as the functional equivalent of a traditional public forum of a downtown or central business district, where speech should properly be protected due to the location's public character. While also noting that the judicial effectuation of a private, racially restrictive covenant constitutes state action,[10] the court declined to extend that rationale, reasoning instead that here "the private property owner merely seeks judicial enforcement of a neutral lease provision."[11]

In conclusion, the lead opinion emphasizes that "our decision today does not give apartment owners carte blanche to stifle tenant speech," citing law review articles detailing the alternative sources for tenants' rights to expression.[12] Finally the court cited several statutory sources of rights in California, such as Civil Code §§ 1942.5, 1942.6, and 1953, which, among other things, protect tenant organizers from civil or criminal penalties for trespass while engaging in organizing activity, prohibit retaliation for the exercise of enumerated tenants' rights, including the right to participate in a tenants' association, and make void as contrary to public policy any lease provision which purports to waive rights to participate in a tenants' association (unless the lease is presented and signed prior to actual occupancy).[13] However, while tenants may retain these legislatively recognized rights, alone they are apparently insufficient to support claims of infringement by an owner's distribution limitations in an apartment complex with restricted access. Tenants are free to obtain further specific legislative protection for their distribution activities.

Chief Justice Ronald George wrote separately to limit his concurrence to the narrow holding that tenants have no constitutional distribution rights on private, restricted access property, refusing to join the lead opinion's holding requiring state action to trigger any coverage under California's free speech clause. In addition, even if the apartment had been

---

[4] *Id*. at 339.

[5] *Hudgens v. National Labor Relations Bd.* (1976) 424 U.S. 507, 519-520, 96 S.Ct. 1029, 47 L.Ed. 2d 196 (union has no federal constitutional right to picket in a shopping center because the actions of the private owner did not constitute state action).

[6] 111 Cal. Rptr. 2d at 341.

[7] "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const., Art. I, § 2, subd. (a).

[8] 111 Cal. Rptr. 2d at 341-43.

[9] *Id.* at 352.

[10] *Shelly v. Kraemer*, 334 U.S. 1 (1948).

[11] 111 Cal. Rptr. 2d at 352.

[12] *Id*. at 353. Lobsenz & Swanson, *The Residential Tenant's Right to Freedom of Political Expression*, 10 U. Puget Sound L.Rev. 1, 45 (1986); Kelso, *California's Right to Privacy*, 19 Pepperdine L.Rev. 327, 409 (1992).

[13] 111 Cal. Rptr.2d 353-54.

publicly owned, the concurrence suggests that the free speech clause does not protect unsolicited distribution of pamphlets in the interior hallways which are not generally open to the public.[14] Echoing the lead opinion, he emphasized that the decision does not address the issues of whether tenants have such distribution rights under other laws or general principles of landlord-tenant law. He also recited numerous rights which were not at issue in the case: "Tenants remain free to speak with each other in the hallways or elsewhere about anything they wish. Tenants may knock on the doors of other tenants and speak with them. They may telephone or fax each other, or correspond by letter or e-mail."[15]

The Dissent

The lengthy and scholarly dissent by Justice Werdegar, joined by two other justices, argues that the "unambiguous language" of California's free speech clause (every person "may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right") contains no state action requirement, running "against the world,"[16] and that therefore none should be read into it. In her view, the court's earlier *Robins* decision was not based upon the public character of the use of the property, but on this plain language of the free speech clause that requires no state action. Thus, she strongly disagreed with the lead opinion's revisionist view of that decision's analytical basis. Finding constitutional protection for the distribution, the dissent proceeded to analyze whether management's policy was a reasonable "time, place and manner" restriction, and concluded that it was not.

Conclusion

Finally, it is important to note that for government-subsidized multifamily housing and conventional public housing, the result should be quite different. In many cases, the state or governmental action requirement of the Federal Constitution and the lead opinion can be satisfied, and other sources of tenant rights may exist. For example, specific statutes and Department of Housing and Urban Development (HUD) regulations guarantee the right to organize and distribute leaflets in privately owned HUD-assisted developments.[17] In fact, one such regulation specifically protects the very act at issue in this case, "[p]lacing leaflets at or under tenants' doors; [d]istributing leaflets in common areas."[18] These important rights remain unaffected by this decision. ■

[14] *Id.* at 355.

[15] *Id.* at 358.

[16] *Id.* at 361-362.

[17] 24 C.F.R. Parts 245 and 964 (2001).

[18] *Id.* § 245.115.

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.

Broward Garden Tenants Association v. United Stated Environmental Protection Agency, et al., 2001 WL 939,078, ___ F. Supp.2d___, (S.D. Fl., August 9, 2001). The court dismissed the suit brought by residents of Broward Gardens—a Department of Housing and Urban Development (HUD)-subsidized development located directly next to a Superfund site that is 90 percent occupied by African-Americans—against the Environmental Protection Agency (EPA), HUD and others. The plaintiffs sought declaratory and injunctive relief on the grounds that the defendants, by failing to establish an adequate clean-up plan for the Superfund site, had caused the establishment and maintenance of a racially segregated system of low-income housing. Finding that the plaintiffs' claims were a veiled challenge to the clean-up plan, the court held that the *Comprehensive Environment Response Compensation and Liability Act* (CERCLA) divested it of jurisdiction over all of the plaintiffs statutory claims—violation of the Titles VI, VII, and VIII of the *Civil Rights Act of 1964*, and violation of the *Fair Housing Act* (FHA)—because of a specific provision denying federal court jurisdiction to review any challenges to remedial actions taken by the EPA. The court also dismissed the plaintiffs Fifth, Thirteenth and Fourteenth Amendment claims on the ground that CERCLA prohibits any constitutional challenges to clean-up plans at least until the plan has been completed. The court also noted that the plaintiffs' complaint did not adequately tie the environmental conditions to the alleged effect of racial segregation. Concluding that CERCLA does not differentiated between municipalities and federal agencies in its jurisdictional bar, the court dismissed all claims against the remaining defendants. However, the court did note that state remedies might still be available to the plaintiffs.

Stark Metro Housing Authority v. Dorsey, 2001 WL 951,699 (Ohio App. 5 Dist., August 20, 2001). A divided appeals court reversed the lower court's decision granting judgement to the public housing authority (PHA) in a "one-strike" eviction action. The PHA sought to evict the tenant after her ex-boyfriend, who frequently came by the tenant's apartment despite her making it clear to him and others that he was not

[1] www.westlaw.com

[2] www.lexis.com

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

welcome, was found to be in possession of marijuana in the tenant's apartment after having been let in by the tenant's babysitter in order to drop off diapers and formula while the tenant was out of the apartment. Invoking the "one-strike" clause of her lease, the lower court reluctantly upheld the tenant's eviction. The court of appeals reversed and remanded, holding that the trial court was required to find that the tenant could only be evicted for her ex-boyfriend's behavior if he was either her guest or her invitee. Absent such a finding, the judgment could not stand. The dissent argued that the babysitter was the person authorized to make the ex-boyfriend an invitee under the circumstances, and thus the tenant could be evicted for his behavior.

Rodgers v. Garland Housing Agency, 2001 WL 1,029,516 (N.D. Tx, August 21, 2001). The court granted the defendant housing authority's motion to dismiss a *pro se* suit by two tenants who claimed that the termination of their Section 8 benefits, on the grounds that one of them was an ineligible for the program, violated their due process and civil rights and otherwise caused them injury. The case arose when one of the plaintiffs, Ms. Rodgers, attempted to add her husband to her Section 8 lease and the housing authority rejected the application due to his criminal record. Mr. Rodgers' continued presence in the household led to termination of Ms. Rodgers' Section 8 benefits which, eventually, led to their eviction for failure to pay rent. Finding that the plaintiffs did not have a private right of action under the Section 8 statutory framework or that they were third-part beneficiaries to the Section 8 contract between the PHA and the owner, the court held that the plaintiffs' complaint against the PHA failed to state a federal claim upon which relief could be granted. It also dismissed their civil rights claim for failure to exhaust administrative remedies. Similarly, the court held that the plaintiffs had no private right-of-action against their landlord under the federal statutory framework and that all their other claims were adjudicated by the state court in the eviction action. Lastly, the court dismissed the plaintiff's due process claims against the PHA and its employees on the basis that the plaintiffs had failed to properly plead in the complaint any violation of the Fourteenth Amendment.

City of Country Club Hills v. HUD, 2001 WL 111,7276 (N.D. Ill., September 17, 2001). The court enjoined the City of Country Club Hills from issuing building code violation citations to HUD, the owner of several single-family homes in the city, on the ground that the *National Housing Act* (NHA) preempts the city's building code. The city alleged that the properties, which HUD acquired through foreclosure, were poorly maintained, and commenced to repeatedly cite the buildings and HUD for violations of the city's building code. The mayor of the city also commenced a media campaign against HUD, including calling HUD a "slumlord" in an interview and producing a video entitled "HUD, Unwanted Neighbor." When the city attempted to enforce its numerous citations in state court, HUD removed the case to federal court and counterclaimed for an injunction preventing the city from further undermining HUD's resale program of the foreclosed properties though the issuance of citations. The city voluntarily dismissed its citations because the properties had been brought into compliance with the city's building code. Ruling on the HUD counterclaims, the court agreed that the city's efforts violated the Supremacy Clause of the Constitution because the issuance of the building code citations "impede[d], burden[ed], and interfere[d] with the operation of constitutional federal law." It found that the citations hindered HUD's ability to resell the properties under its "as-is" resale policy which is intended to facilitate the resale of the property and save HUD's financial resources by not making repairs to such buildings itself. Thus, the court permanently enjoined the city from seeking to cite, fine or penalize HUD for any actions taken in carrying out the NHA and its regulations.

Walker v. City of Lakewood, 2001 WL 994,980, ___F. 3d___, (9th Cir., August 31, 2001). The Court of Appeals for the Ninth Circuit upheld the right of an independent fair housing services provider, contracted by the City of Lakewood, to sue that city for retaliating against the provider for its advocacy efforts, under a FHA cause of action, but not a Section 1983 claim. The Fair Housing Foundation (FHF) contracted with the city to be the city's sole provider of fair housing counseling and services. In response to a complaint, FHF alleged that a privately owned apartment complex in the city practiced a pattern of discrimination and harassment and advised the city that it would hold a press conference, secure attorneys for the aggrieved tenants, and sue the owners and managers of the complex. After suit was filed, an officer of the owner company—a major developer in the city—contacted the city and asked that it review FHF's policies. In response, the city started to investigate and criticize FHF's handling of the tenants' complaints, and allegedly withheld payments to FHF "until it apologized." The city also issued a request for bids for its 1994 fair housing services contract and did not invite FHF to participate, even though the city had renewed FHF's contract from 1990-1993 without requiring a new bid. The city, which had been joined as a defendant in the discrimination lawsuit by the tenants, filed a third party complaint for breach of contract against FHF. FHF counterclaimed against the city, alleging interference and retaliation under the FHA and the *California Fair Employment and Housing Act* (FEHA), and seeking relief under Section 1983 for the city's violation of FHF's First Amendment rights. The district court granted summary judgement to FHF on the city's contract claims and to the city on FHF's state and federal fair housing claims because FHF did not have standing to sue. It also granted summary judgment to the city on FHF First Amendment claim on the ground that confidential and policymaking position in relation to the city did not grant it First Amendment protections. FHF appealed the decision.

The Ninth Circuit reversed the district court decision and held that the FHF had standing under the FHA because: the city's alleged retaliation interfered with FHF's efforts to help tenants obtain fair housing; FHF alleged suffering an injury-in-fact (non renewal of its contract and delayed payments); and, there was a causal connection between that injury and

the city's conduct. Concluding that standing requirements would be identical for the state FEHA claim, the Ninth Circuit held that FHF had standing to sue under that statute as well. The court also concluded that FHF had stated a cognizable claim under the FHA and FEHA because, even though the contract between the city and FHF could be terminated at any time, public policy dictates that retaliation claims survive the at-will nature of the contract. The court also held that there is a private right of action under the FHA that permits FHF to go forward with its suit, even where it is essentially challenging how the city uses HUD funds. It found that FHF had properly pled injury and causation and that issues of material fact remained. Thus, it reversed the granting of summary judgement on the FHA and FEHA claims and remanded for further proceedings.

As for the Section 1983 claim, the court reviewed nine factors that led it to conclude that FHF held a confidential and policymaking position as an independent contractor of the city. Accordingly, the court upheld the lower court's ruling that the city could terminate its relationship with FHF for purely political reasons without violating FHF's First Amendment rights. Summary judgement against FHF on its Section 1983 claim was therefore affirmed.

Chambers v. The Habitat Company, 2001 WL 1,104,615 (N.D. Ill., September 18, 2001). A resident of a project-based Section 8 development brought an action under Section 1983 to enjoin an eviction secured by the landlord in state court alleging violations of due process. In addition, the tenant sought damages under several other theories of liability. The action was brought after the landlord had secured an eviction in state court proceedings and the resident had exhausted state appellate remedies. The court granted the defendant-owner's motion to dismiss the action on the ground that the court lacked jurisdiction under what is known as the *Rooker-Feldman* Doctrine, which precludes federal courts from exercising subject matter jurisdiction over claims that review of a state court's judgement. The court concluded that virtually all of the plaintiff's claims were inextricably intertwined with state law claims and defenses that were available to her in the underlying eviction action. Additionally, the court held that a claim brought under the *Fair Debt Collection Practices Act* was inappropriately brought against the owners and was also barred by the statute of limitations.

Peoria Area Landlord Association v. City of Peoria, Illinois, 2001 WL 1,094,996 (CD. Ill., September 18, 2001). The court granted the city's and the PHA's motions for summary judgement in a Section 1983 and FHA suit brought against them by a landlord association challenging the city's nonowner occupied inspection ordinance. The ordinance essentially required owners of rental property built prior to 1961 to register their property with the city and have it inspected. The owners also needed either to consent to a warrantless search of their property for purposes of this inspection, or inform the city that it must obtain an administrative search warrant. The city kept a list of those who requested the warrant. In addition, the local PHA instituted a policy by which it would not approve its Section 8 voucher holders to rent from an owner who was on the denial list, whether or not the particular property had been inspected. The owners sued both the city and the PHA under a disparate impact theory, claiming the inspection ordinance coupled with the PHA's policy had a discriminatory effect of precluding persons of color, who compose a majority of the Section 8 voucher holders in the city, from renting property in the city. The court found that the owners did not present any credible evidence as to how many, if any, individuals were prevented from securing rental housing due to the ordinance and the PHA policy. Further, it concluded that any alleged disparate impact would be caused by the PHA's policy of not permitting lease-ups to owners on the denial list, rather than by the ordinance, either on its face or as applied. Thus, the court granted the city's motion for summary judgement. As to the PHA, the court also ruled that the owners lacked standing because they were not harmed by the PHA policy. The court suggested that, notwithstanding the owners commitment to fair housing compliance, the appropriate persons to bring such an action would be persons of color who were turned down for housing because of the PHA's policy. The court thus granted the PHA's motion for summary judgement.

Cienega Gardens v. United States, 2001 WL 1,084,987, ___ F.3d___ (Fed. Cir., September 18, 2001). The United States Court of Appeals for the Federal Circuit held that the claims of four representative owners of HUD-subsidized housing who, together with an additional 38 owners, challenged their right to prepay their mortgages were ripe for adjudication despite the owners' failure to seek HUD's prior approval. At the same time, however, the court held that the federal statutes preventing prepayment did not result in a *per se* taking of property under the Fifth Amendment. All of the owners in this long-running litigation[4] had entered into contracts with HUD that permitted them to prepay their mortgages and to be relieved of certain affordability restrictions after they had operated the projects for 20 years. Fearing a significant drop in the availability of low-income housing, Congress passed the *Low-Income Housing Preservation and Resident Homeownership Act of 1990* (LIHPRHA), which prohibited such prepayment without HUD's preapproval, obtainable only upon a written finding that the current tenants would not suffer economic hardships or be involuntarily displaced, and that there would not be a material decrease in the availability of low-income housing in the community. When some owners' challenge of the statute failed, these 42 owners sued HUD for damages under a breach of contract and Fifth Amendment takings clause theory. At this stage of the case, the only substantive issue remaining involved the takings claim and four representative owners who submitted evidence to the district court that their residents would suffer economic hardships in the form of substantial rent increases. Notwithstanding, the district court dismissed the owners' claims for failure to exhaust administrative remedies because the owners never requested permission from HUD to prepay the mortgages. The court of appeals, noting that under

the circumstances presented by the four owners HUD would have no discretion to permit prepayment of the mortgages, invoked the futility exception to the exhaustion doctrine and held that the takings claims were ripe for adjudication at least with respect to the four owners. It insisted that the remaining owners would have to make a similar showing of tenant hardship to the district court before the futility exception could be made applicable to them. Next, the court of appeals addressed the remaining substantive issue and held that passage of LIHPRHA did not subject the owners to a *per se* taking. Since LIHPRHA did not give rise to a physical occupation of the owners' property—but instead merely enhanced the tenants' possessory interest—there was no *per se* taking. The court therefore remanded the case for further proceedings on the takings claims. ■

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD), and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued through September 30, 2001. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

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

HUD Regulations

66 Fed. Reg. 49,787 (September 28, 2001)
Revision to Cost Limits for Native American Housing

Summary: This rule revises HUD's regulations regarding the way construction costs are controlled in the Indian Housing Block Grant (IHBG) program administered by IHBG grantees, who are Indian tribes or their tribally designated housing entities (TDHEs).

Effective Date: October 29, 2001.

---

[4]For background on this case, *see Court of Appeals Reverses Damage Award to Owners of HUD Rental Housing Whose Prepayment Rights Had Been Restricted*, 28 HOUS. L. BULL. 218 (Dec. 1998).

[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.

HUD Federal Register Notices

66 Fed. Reg. 49,032 (September 25, 2001)
Notice of Extension of Application Due Dates for Third Round Designation of Seven Urban Empowerment Zones and Designation of Forty Renewal Communities

Summary: This notice extends by 15 business days the application due date for the designation of seven Round III Empowerment Zones (EZs), from September 28, 2001 to October 22, 2001. This notice also extends the application due date for the designation of 40 Renewal Communities (RCs) by 15 business days, from October 12, 2001 to November 2, 2001.

66 Fed. Reg. 47,265 (September 11, 2001)
Statutorily Mandated Designation of Difficult Development Areas and Qualified Census Tracts for Section 42 of the Internal Revenue Code of 1986

Summary: This document designates "Difficult Development Areas" and "Qualified Census Tracts" for purposes of the Low-Income Housing Tax Credit (LIHTC) under section 42 of the *Internal Revenue Code of 1986*. HUD makes new Difficult Development Area designations annually and makes Qualified Census Tract Designations at this time due to changes in section 42 of the Code enacted in the *Community Renewal Tax Relief Act of 2000*.

66 Fed. Reg. 49,783 (September 28, 2001)
Tribal Government-to-Government Consultation Policy

Summary: Through this notice, HUD advises the public of its tribal government-to-government consultation policy. The purpose of the consultation policy is to enhance communication and coordination between HUD and federally recognized Indian tribes, and to outline guiding principles and procedures under which all HUD employees are to operate with regard to federally recognized Indian or Alaska Native tribes.

Effective Date: June 28, 2001.

HUD Notices

Notice PIH 2001-34 (HA) (September 20, 2001)
Performance Reporting Requirements and Grant Closeout Procedures for the Public Housing Drug Elimination Program (PHDEP)

Summary: This notice extends Notice PIH 2000-38 (HA) of the same subject, which expired August 31, 2001 for another year until September 30, 2002.

Expires: September 30, 2002.

Notice PIH 2001-33 (HA) (August 24, 2001)
Housing Choice Voucher Program - Conversion of Certificate Assistance to Voucher Assistance

Summary: This notice is to remind public housing agencies (PHAs) administering the certificate program that all certificate tenancies should be converted to voucher tenancies under the housing choice voucher program by September 30, 2001. Technically, PHAs should complete the conversions

by September 1, 2001, because most PHA reexaminations are effective on the first of the month.

Expires: February 28, 2002.

Notice PIH 2001-32 (HA) (August 24, 2001)
Submission of Operating Subsidy Eligibility Requests for FY 2001, Proration Factor, and Other Special Notes

Summary: The purpose of this notice is to provide PHAs with information needed to complete and submit their FY 2001 operating subsidy eligibility requests to HUD. The information includes the proration factor to be used in determining subsidy eligibility and other special notes related to the operating subsidy calculation.

Expires: August 31, 2002.

Notice H-2001-09 (HUD) (September 14, 2001)
Reinstatement/Extension of Notice H 99-7 Subordinate Financing by Federal Home Loan Banks Section 202 Supportive Housing for the Elderly and Section 811 Supportive Housing for Persons with Disabilities Programs

Summary: Notice H 99-7 (HUD), which was issued April 30, l999 and expired on April 30, 2000, is being reinstated and extended to September 30, 2002.

HUD Mortgagee Letters

Mortgagee Letter 2001-20 (September 7, 2001)
Underwriting Section 8 Homeownership Vouchers on FHA Insured Mortgages

Summary: This Mortgagee Letter advises lenders of the manner in which they are to underwrite FHA insured mortgages when the homebuyer is to receive subsidies under the housing choice voucher homeownership option program from a PHA.

RHS Notices

RD AN No. 3673 (1930-C) (August 20, 2001)
Allowable Administrative Expenses

Summary: The purpose of this notice is to clarify what constitutes an allowable project administrative expense.

RD AN No. 3678 (3570-B) (September 11, 2001)
Community Facilities Grant Program - Maximum Eligible Federal Grant Assistance

Summary: This notice provides clarification on the use of federal grant assistance (the federal share) toward the cost of developing essential community facilities under the Community Facilities grant program.

RD AN No. 3679 (1940-L) (September 27, 2001)
2000 Census Data

Summary: This notice is being issued to identify the population data that should be used for eligibility determinations for direct loan, loan guarantee, and grant programs in the Rural Development mission area and to clarify when 2000 census data should be utilized.

RHS Unnumbered Letters

Results of Fiscal Year 2001 Fair Housing Occupancy Survey August 22, 2001

Summary: The letter includes the results of some of the first reports on Multi-Family Housing (MFH) including both Rural Rental Housing (RRH) and Farm Labor Housing (FLH) tenant demographics. These results are based on January 2001 data from the consolidated Multi-Family Housing Tenant File System (MTFS). ■

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	_____	$ _____
Housing Law Bulletin (annual subscription, 10-12 issues)	$150.00*	_____	$ _____
Welfare and Housing—How Can the Housing Assistance Programs Help Welfare Recipients? (2000)	$5.00*	_____	$ _____
Congress' New Public Housing and Voucher Programs (1998)	$10.00**	_____	$ _____
Housing for All: Keeping the Promise (1995)	$5.00*	_____	$ _____
The Family Self-Sufficiency Program: An Advocate's Guide (1994)	$10.00*	_____	$ _____
Let's Choose a New Owner! What Residents Need to Know When an Owner Wants to Sell an Expiring-Use Project Under Title VI (1993) (master for duplicating)	$10.00*	_____	$ _____
A Passage from Poverty: Self-Sufficiency Policies and the Housing Programs (1991)	$10.00*	_____	$ _____

*Includes postage and handling **$5.00 each additional copy
All materials are mailed book rate. Allow four weeks for delivery.
For more information on first-class mailing and large quantity discounts, call (510) 251-9400 x108.

Subtotal: _____ **$** _____

Tax (California residents only): **(Subtotal, excluding Bulletin x 8%):** **$** _____

Postage and Handling: **Number of books _____ x $3.00 per book:** **$** _____

TOTAL AMOUNT ENCLOSED: **$** _____

PLEASE TYPE OR PRINT

Name_____

Organization_____

Address_____

_____

_____ Zip_____

ALL ORDERS MUST BE PREPAID

Please do not send cash. Make check or money order payable to the NATIONAL HOUSING LAW PROJECT, attach to a copy of this form and send to:

NATIONAL HOUSING LAW PROJECT • Attn: Publications Clerk
614 Grand Avenue, Suite 320 • Oakland, CA 94610

❑ I want to charge my credit card. ❑ Visa ❑ Mastercard

Card #_____ Exp. date _____

Name on card: _____

Credit card billing address _____

_____

Signature (required for credit card) _____

National Housing Law Project
614 Grand Avenue, Suite 320
Oakland, California, 94610

First Class Mail