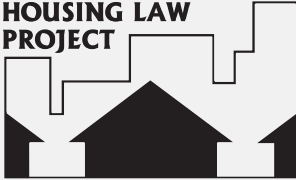


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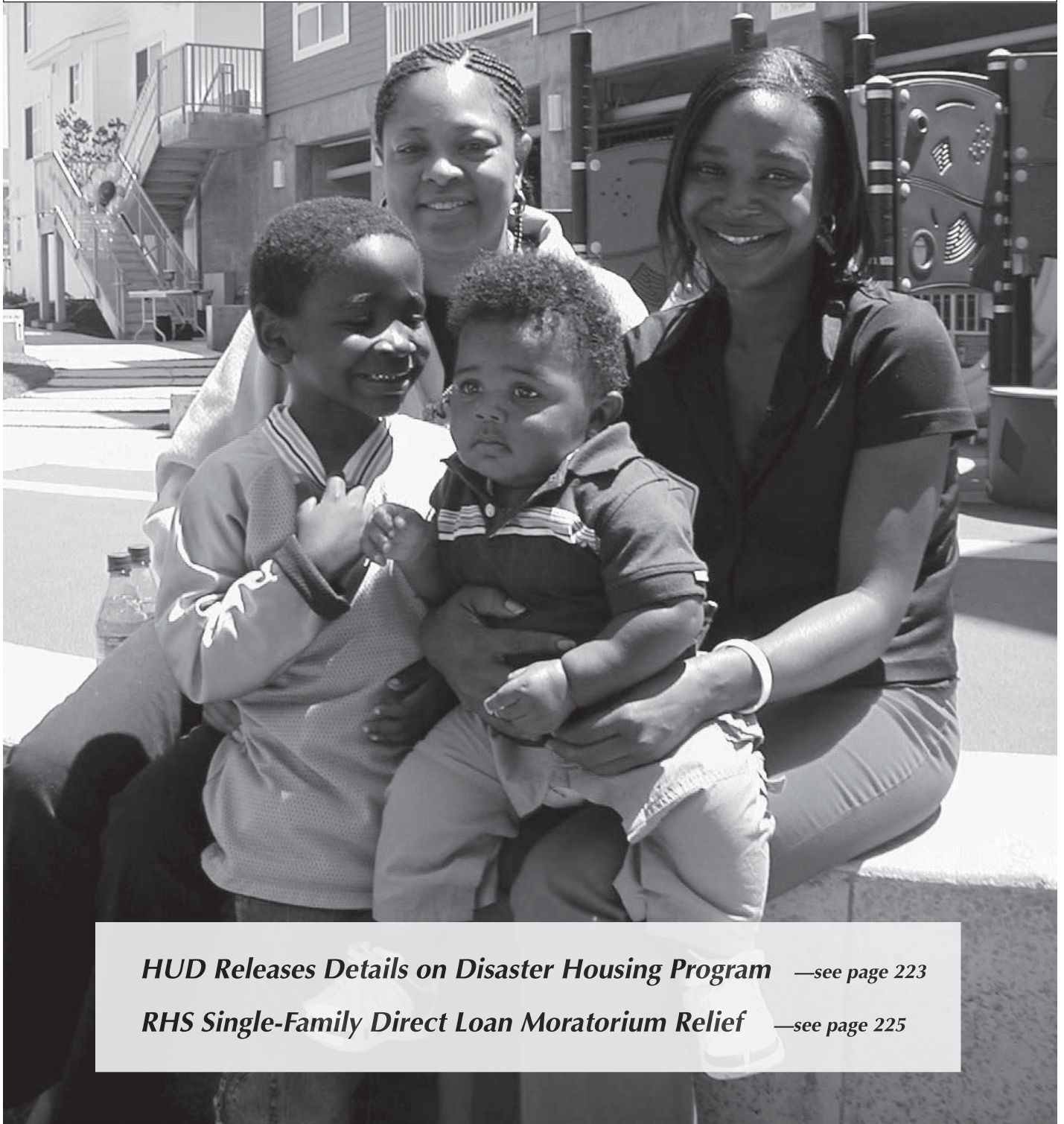


advancing housing justice

# Housing Law Bulletin

Volume 35 • October 2005

Published by the National Housing Law Project



*HUD Releases Details on Disaster Housing Program* —see page 223

*RHS Single-Family Direct Loan Moratorium Relief* —see page 225

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**HUD  
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AN ESSENTIAL RESOURCE FROM THE NATIONAL HOUSING LAW PROJECT

# Housing Law Bulletin

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**Cover:** Residents at Mandela Gateway, a 168-unit mixed-income, mixed-use development completed in 2005 by the Oakland Housing Authority and BRIDGE Housing, a California developer of affordable housing. Photo courtesy of the Oakland Housing Authority.

The *Housing Law Bulletin* is published 10 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 of policy of any funding source. A one-year subscription to the *Bulletin* is \$175.

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## HUD Releases Details on Disaster Housing Program

In late September, both the Department of Housing and Urban Development (HUD) and the Federal Emergency Management Agency (FEMA) unveiled separate programs to provide temporary housing assistance to Katrina displacees, each targeted at a different group. FEMA's Transitional Housing Assistance program is a variant of its long-authorized Individuals and Households Program (IHP).<sup>1</sup> HUD's program, the Katrina Disaster Housing Assistance Program (KDHP), uses FEMA funds to assist those who were HUD-assisted renters or homeless. HUD announced interim operating guidelines on October 4.<sup>2</sup> The following is a brief summary of HUD's KDHP program.<sup>3</sup>

KDHP offers rental assistance at up to 100% of the local fair market rent (FMR) for up to eighteen months through the local public housing authorities (PHAs) operating in the area chosen by the displacee. However, PHAs must already administer the regular housing choice voucher program and decide to undertake KDHP administration.

Eligible recipients include those who, immediately before Katrina, were residing in some form of HUD-assisted housing (public housing, vouchers or HUD-subsidized or assisted multifamily properties, such as project-based Section 8, Section 236, Section 202 or 811), or who were homeless. Eligibility requires a FEMA number (registration by December 31, 2005), and proof of a

<sup>1</sup>FEMA's program can provide lump sum payments of \$2358 to cover temporary housing assistance to qualified displacees, without income eligibility requirements, whose homes were made uninhabitable or inaccessible by the hurricane, so long as those displacees meet certain FEMA requirements (e.g., not residing in other FEMA-supplied temporary housing). The lump sum, usable for housing anywhere, represents three months' worth of assistance (calculated at the national average monthly FMR of \$789). After three months, or possibly sooner if necessary, FEMA will recertify the family and may recalculate the subsidy based on local market rents. Receipts will be required for this assistance, which will count toward the overall household limit of \$26,200 for all IHP benefits and the overall temporary housing benefit period of eighteen months. For a few more details, see <http://www.fema.gov/press/2005/katrinatranshousing.shtm>.

<sup>2</sup>HUD's guidelines are available at <http://www.hud.gov/offices/pih/index.cfm> (hereinafter Operating Guidelines). Also see HUD's webcast on KDHP, which is available at [http://www.femaanswers.org/index.php/FEMA\\_Policies#KDHP\\_Information](http://www.femaanswers.org/index.php/FEMA_Policies#KDHP_Information). According to HUD, families who need housing assistance under KDHP can call 1-866-373-9509.

<sup>3</sup>A chart comparing the FEMA and HUD programs can be found at <http://www.nlihc.org/news/093005.html>. The Center on Budget and Policy Priorities has recently released a report on shortcomings of the Katrina federal housing transition plan. BARBARA SARD & DOUGLAS RICE, CHANGES NEEDED IN KATRINA TRANSITIONAL HOUSING PLAN TO MEET FAMILIES' NEEDS (2005), available at <http://www.cbpp.org/10-13-05hous.htm>.

prior residence in the federally declared disaster area that was destroyed or made uninhabitable, as determined by FEMA. Families that have been permanently re-housed in a HUD-assisted unit or FEMA-provided unit will be excluded from KDHAP.<sup>4</sup> Those temporarily housed in such units (including those with leased-up vouchers) can receive KDHAP if they can legally terminate their tenancy by December 31, 2005.

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*How HUD will determine eligibility of pre-disaster homeless people will likely prove problematic.*

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How HUD will determine eligibility of pre-disaster homeless people will likely prove problematic. HUD plans to include those identified through HUD's Continuum of Care programs, including the homeless information systems or other records. HUD has subsequently stated that identification might also include those accounted for in FEMA manifests developed during evacuation of the affected areas.

Apparently, additional PHA screening of eligible families is impermissible.

Under KDHAP, the tenant's maximum FMR subsidy is determined using a unit size that is the lesser of the unit size permitted the family under the PHA's voucher program or the actual size of the leased unit. A family must pay the difference out of pocket if the actual rent exceeds the local FMR. There is no other required family contribution towards rent. Tenants renting units costing less than the FMR receive none of the saved subsidy. The family is responsible for all tenant-paid utilities not included in the rent. KDHAP will also cover some or all of a family's security and utility deposits.<sup>5</sup>

PHAs will determine if rent is reasonable and meets Housing Quality Standards. PHAs will receive administrative fees of \$1,000 per household plus 15% of the subsidy for coordinating housing search assistance, including providing transportation and temporary shelter during the search.

The tenant's written KDHAP lease must be for between at least six, but not more than twelve months. Rents are fixed for the initial term. The total term, including any extensions or renewals, cannot exceed eighteen months. A form lease addendum is required.<sup>6</sup> Terminations must be in accordance with the lease, the addendum and state law, although the lease terminates upon any termination of the KDHAP subsidy.

To maintain KDHAP assistance, any subsequent moves during the eighteen months must be within the jurisdiction of the administering PHA.

A major change announced in the operating guidelines is HUD's policy to allow former voucher holders who are not yet under a portability lease to choose to retain their voucher or switch to KDHAP. Retaining housing choice vouchers may provide more assistance to some families, since the value of KDHAP vouchers is capped at 100% of the FMR, less than the potential payment standard of up to 110% of FMR (with exceptions for even higher levels). Also, some vouchers adequately cover some or all of a tenant's reasonable utility costs, whereas KDHAP subsidies will cover utility costs only when they are included in the rent payment, not when they are directly metered to the tenant.

On the flip side, those who stay with a housing choice voucher will lose out on KDHAP's lack of a rent contribution and its coverage of security and utility deposits—costs not covered by vouchers. PHAs will receive the same one-time placement and ongoing administrative fees regardless of the tenant's election. Because no later switching is permitted, assessment of these factors, along with the PHA's voucher payment standard, actual rents and utility costs, and the tenant's adjusted income will be vital to an informed decision.

When KDHAP ends on April 1, 2007, the guidelines state that former voucher holders will resume normal voucher program rules, public housing households may return to their former PHA or receive vouchers from their former PHA if the public housing unit has been demolished or disposed of, and former HUD-assisted multifamily tenants will have the first right of refusal to return to their home if repaired. Neither HUD nor FEMA has yet addressed what will happen to homeless individuals receiving KDHAP upon expiration. ■

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<sup>4</sup>Operating Guidelines, *supra* note 2, at 4.

<sup>5</sup>The KDHAP security deposit is capped at 100% of the FMR for the family's bedroom size; utility deposits can be covered up to a total of \$325.

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<sup>6</sup>This addendum is available at <http://www.hud.gov/katrina/proguidance.cfm>.

## NHLP Welcomes Two New Staff Members

**Alaric Degrafinried** joins NHLP as a two-year Equal Justice Works Fellow, a fellowship funded by *The American Lawyer*. Alaric is a recent graduate of Santa Clara University School of Law. He was an intern with the East Bay Community Law Center during the summer of 2004 and interned with NHLP in the summer of 2003. While at law school, Alaric was very active in a number of extra-curricular activities including acting as the West Regional Treasurer at the National Association of Black Law Students.

At NHLP, Alaric will be working on a special project focusing on the compliance/effectiveness of HUD's Section 3 regulations. HUD's Section 3 program requires recipients of certain forms of HUD funding to provide job training, employment and contracting opportunities to very-low and low-income residents and eligible businesses. Specifically, the regulations state that the recipients must provide these employment opportunities "to the greatest extent feasible." Consequently, Alaric will be promoting employment opportunities for low-income individuals by providing community advocates with the necessary training and transactional documents to ensure and/or improve the overall Section 3 compliance rate.

Alaric can be reached at NHLP's Oakland office. His email address is [adegrafinried@nhlp.org](mailto:adegrafinried@nhlp.org).

**Susan Stern** has joined NHLP as the Director of Development. Prior to starting with NHLP, Susan worked for three years in Springfield, MA at the Institute for Community Economics (ICE), a national non-profit focused on the creation of affordable housing and land stewardship through the community land trust model. At ICE, she focused on raising investment capital for their revolving loan fund, donor fundraising and institutional funds development.

Prior to her tenure with ICE, Susan also served as the Regional Director of the Massachusetts Association for the Blind, a campaign fundraiser for the United Way of Pioneer Valley and as the director of a local community-based arts festival in East Longmeadow, Massachusetts. In the for-profit world, she was a regional distribution manager for American Honda Corporation and worked as a residential mortgage originator for Empire Equity Group.

Susan attended the University of Massachusetts in Amherst, MA and American International College, Springfield, MA, with dual majors in Accounting and Economics. ■

## RHS Single-Family Direct Loan Moratorium Relief:

### A Survey of Recent National Appeals Division Decisions

#### I. Introduction\*

In September 2004, the United States Department of Agriculture's (USDA) National Appeals Division (NAD) began to post to its Web site<sup>1</sup> redacted appeal decisions<sup>2</sup> made by NAD staff with respect to various USDA programs, including the Rural Housing Service's (RHS) single-family housing programs. As of October 2005, several thousand decisions appear on the site, many of them involving the single-family direct loan program, also known as the Section 502 loan program.<sup>3</sup> The posted decisions date back to 2002 and include both initial hearing decisions as well as subsequent appeals to the NAD director.

The National Housing Law Project (NHLP) has recently begun to review decisions posted on the NAD Web site that relate to the single-family home loan programs in order to determine the types of decisions that are appealed and to discern how the NAD staff interprets RHS regulations and resolves appeals filed by borrowers who are adversely affected by decisions made by RHS and Rural Development (RD) staff.<sup>4</sup> This article is based on our review of nearly 400 decisions that deal with the RHS moratorium relief program, a foreclosure avoidance mechanism available to borrowers whose homes are financed under the RHS single-family direct home loan programs.<sup>5</sup> NHLP expects that it will publish additional articles in the future that deal with other significant issues relating to the administration of the RHS single-family home loan programs.

\*This article is based on research and writing undertaken by Jessica Ritter, a law clerk at NHLP in the summer of 2005. Ms. Ritter is a J.D. Candidate at the University of Connecticut School of Law. She holds an undergraduate degree from Trinity College. The National Housing Law Project is grateful to Ms. Ritter for her excellent work on this article.

<sup>1</sup>[http://www.nad.usda.gov/public\\_search.html](http://www.nad.usda.gov/public_search.html).

<sup>2</sup>The decisions omit the names and geographic locations of borrowers in order to protect their privacy.

<sup>3</sup>42 U.S.C.A. § 1472 (West 2003).

<sup>4</sup>RHS' single-family direct loan programs are originated in the field by USDA Rural Development staff. However, loans are serviced by RHS' Centralized Servicing Center (CSC), located in St. Louis, Missouri. The decisions that are the subject of the appeals in this article all appear to have been made by RHS' CSC staff.

<sup>5</sup>See also NHLP, *Successfully Appealing RHS Single-Family Servicing Decisions*, 35 HOUS. L. BULL. 125, 136 (2005).

Advocates are urged to review NAD decisions to support their clients' positions when dealing with RHS or RD staff or when appealing decisions to NAD. Advocates should be aware, however, that NAD decisions are only applicable to the case in which they are raised and do not bind RHS or RD staff with respect to other borrowers.<sup>6</sup> Nor do they have any precedential value with respect to future NAD decisions; the decisions have only persuasive authority with respect to RHS, RD, or NAD staff. Moreover, advocates should be aware that NAD staff are bound by RHS regulations.<sup>7</sup> They do not have authority to ignore or overturn them. That role is restricted to the courts. Nonetheless, NAD decisions should be useful in persuading RHS, RD, and NAD staff to make consistent decisions and in assisting advocates or clients in formulating their arguments when dealing with them.

## II. The Moratorium Program

The moratorium program is one of several special servicing tools available to RHS to assist single-family home loan borrowers who are facing financial difficulties due to circumstances beyond their control and who are likely to default on their home loans unless they receive additional assistance. Authorized by Section 505 of the Housing Act of 1949,<sup>8</sup> the moratorium program authorizes RHS to forgo the collection of mortgage payments whenever Section 502 or Section 514 borrowers are unable to continue making their loan payments without impairing their standard of living due to circumstances beyond their control.

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*Advocates should be aware that NAD decisions are only applicable to the case in which they are raised and do not bind RHS or RD staff with respect to other borrowers.*

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Under RHS regulations, a moratorium of up to two years may be granted to these borrowers. To qualify for a moratorium, borrowers must: (1) apply for assistance, (2) show that their standard of living has been impaired due to circumstances beyond their control, (3) show that the impairment is temporary and not permanent, (4) live in the RHS financed home, and (5) not have had their loan accelerated.<sup>9</sup>

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<sup>6</sup>See 7 C.F.R. § 11.10 (2005).

<sup>7</sup>*Id.* § 11.10(c).

<sup>8</sup>42 U.S.C.A. § 1475 (West 2003).

Each of these eligibility criteria has been the subject of one or more appeal decisions. The balance of this article is devoted to a recitation and discussion of those decisions.

### A. Initial Eligibility Issues

#### 1. *The Borrower's Standard of Living Must Be Unduly Impaired*

RHS uses two criteria for determining whether a borrower's standard of living has been unduly impaired. For borrowers who have suffered a loss in income, the agency takes the position that the borrower does not qualify for a moratorium unless the reduction in household income in the past twelve months exceeds 20% of the household's income.<sup>10</sup> While this requirement is inconsistent with the moratorium program's statutory framework and with the method by which RHS determines whether a borrower is eligible for relief under the second moratorium eligibility criterion,<sup>11</sup> no borrower has challenged the underlying RHS regulations, which are binding on NAD hearing officers.<sup>12</sup>

The second criterion is based on whether borrowers have incurred unexpected expenses that impair their ability to continue to make their mortgage payments. There is no threshold for the level of payments that borrowers have incurred and the impairment determination is made individually based on the household income and other expenses.<sup>13</sup>

#### a. Loss of Income

The requirement that a borrower's income decreased by 20% within the past twelve months is a strict requirement under RHS regulations and NAD decisions.<sup>14</sup> If the income reduction does not meet this standard, the borrower simply does not qualify for moratorium assistance.<sup>15</sup> The repayment income is based only on the annual income<sup>16</sup> received by household members who are a party to the promissory note.<sup>17</sup>

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<sup>9</sup>7 C.F.R. § 3550.207(a) (2005).

<sup>10</sup>*Id.* § 3550.207(a)(1)(i).

<sup>11</sup>For a discussion about the validity of the regulations, see NHLPRHCDS (FMHA) HOUSING PROGRAMS: TENANTS' AND PURCHASERS' RIGHTS §19.2.1.2.1 (2d ed. 1995).

<sup>12</sup>The NAD director recently rejected a borrower's contention that the regulations were inconsistent with the statute. The director relied on the NAD regulation, 7 C.F.R. § 11.10(c) (2005), which states that existing regulations are binding on RD decision-makers. Case No. 2005E000695 (Aug. 23, 2005) (hereinafter all NAD cases will simply be referred to by number).

<sup>13</sup>RHS Handbook 2-3550, DLOS Centralized Service Center, ¶ 5.5 C (5-27-98)(Rev. 7-13-05).

<sup>14</sup>7 C.F.R. § 3550.207(a)(1)(i) (2005); 2005000451 (May 3, 2005); 2005S000190 (Feb. 22, 2005); 2005E000105 (Feb. 14, 2005).

<sup>15</sup>2005E000395 (Apr. 1, 2005); 2005S000345 (Mar. 29, 2005); 2005E000448 (Mar. 25, 2005); 2004S000940 (Mar. 10, 2005); 2005S000094 (Mar. 7, 2005);

A reduction in repayment income may be caused by a reduction in hourly wages, hours worked, or changes in government support payments. It may also be caused by the death of one of the borrowers, divorce, or separation when one of the borrowers moves from the home.<sup>18</sup> Expenses such as child support payments, credit card payments, and health insurance payroll deductions do not constitute loss of repayment income,<sup>19</sup> although they may qualify as increased expenses if incurred for purposes that were beyond the borrower's control.

RHS routinely denies borrowers' requests for moratorium relief based on their failure to meet the 20% loss of income test.<sup>20</sup> While most of these decisions are consistent with RHS regulations, some are not. RHS staff members have made mistakes when calculating the size of the reduction in income,<sup>21</sup> have failed to consider borrowers' total income when concluding that they have not met the test,<sup>22</sup> and have applied the test in cases where it was inappropriate because the borrower's request was based on increased expenses and not loss of income.<sup>23</sup> Fortunately, NAD has reversed these decisions when they were brought to its attention.

It is crucial to determine whether the loss of income is due to circumstances beyond the borrower's control. Such circumstances may include the following:

*Termination of Employment.* Getting fired from a job due to misconduct or for violation of company policies is not considered outside the borrower's control.<sup>24</sup> For example, losing a job due to constant disagreements with co-workers,<sup>25</sup> violating a casino's cash drawer policies,<sup>26</sup> lacking a sense of care for patients,<sup>27</sup> reporting working hours dishonestly,<sup>28</sup> sleeping on the job,<sup>29</sup> and failing a

drug test<sup>30</sup> are all considered conduct that is within the borrower's control and, therefore, do not warrant moratorium assistance.

However, the mere fact that a borrower is terminated from employment should not be determinative of whether the borrower is eligible for moratorium relief. In one case, NAD reversed an RHS denial of moratorium relief when the borrower showed that her termination was due to her taking more legitimate sick days than were permitted by her employer.<sup>31</sup> In another case, RHS' denial of moratorium decision was reversed for its failure to properly consider evidence from a state department of employment, which, after investigation, disclosed that the borrower's discharge was not based on any willful or deliberate misbehavior.<sup>32</sup> This conclusion is consistent with a decision under the Department of Housing and Urban Development's (HUD) former Assignment program,<sup>33</sup> in which a court held that a resignation from a job was not within the borrower's control when the borrower was given a choice of resigning or being fired when the reasons for the firing were not within the borrower's control.<sup>34</sup>

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*However, the mere fact that a borrower is terminated from employment should not be determinative of whether the borrower is eligible for moratorium relief.*

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Unfortunately, in a similar case, the NAD director came to a contrary conclusion without considering the reasons underlying the borrower's resignation.<sup>35</sup> Though the borrower contended that her resignation, which occurred after she received a notice of termination due to non-performance during a one-year probationary period, was beyond her control, the NAD director refused to consider the underlying facts: "The circumstances of Appellant's

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2005E000096 (Jan. 31, 2005); 2004S000572 (Aug. 13, 2004); 2004W000206 (June 29, 2004).

<sup>16</sup>2005E000695 (June 24, 2005) (reduction in monthly income does not qualify borrower for relief). In some cases this may be troublesome inasmuch as the borrower who experiences a loss of income will have to wait several months before qualifying for relief.

<sup>17</sup>2003S000658 (Oct. 23, 2003) (Borrower's live-in girlfriend was not privy to promissory note and her loss of income is, therefore, irrelevant. Only income of parties to promissory note is considered when calculating repayment income).

<sup>18</sup>2005E000837 (July 20, 2005).

<sup>19</sup>See 2004W000432 (Nov. 15, 2004) (child support payments are an expense, not a reduction in income).

<sup>20</sup>See e.g. 2005S000451 (May 3, 2005).

<sup>21</sup>2005S000224 (Feb. 14, 2005), 2005S000091 (Jan. 4, 2005).

<sup>22</sup>2005W000330 (Apr. 7, 2005).

<sup>23</sup>2002E001222 (Mar. 11, 2003).

<sup>24</sup>2005W000293 (Apr. 8, 2005).

<sup>25</sup>2004W000013 (Jan. 21, 2005).

<sup>26</sup>2005S000266 (Mar. 3, 2005) (Casino policy, which provides that cashier will be terminated the third time the cash drawer is short, is legitimate).

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<sup>27</sup>2003W000087 (Apr. 9, 2003).

<sup>28</sup>*Id.*

<sup>29</sup>2002E001651 (Jan. 13, 2003).

<sup>30</sup>2002S001110 (Jan. 21, 2003).

<sup>31</sup>2005E000128 (Jan. 21, 2005).

<sup>32</sup>2005E000627 (June 1, 2005).

<sup>33</sup>The Assignment program was operated by HUD in connection with its single-family home loan program between 1974 and 1995. It was very similar to the RHS Moratorium program and advocates are urged to look at court decisions under that program for persuasive authority in support of their RHS clients' claims.

<sup>34</sup>*Cronkhite v. Kemp*, 741 F. Supp. 828 (E.D. Wash., 1990).

<sup>35</sup>2003S000869 (Dec. 30, 2003).

employment and the reasons that led to her receiving a termination notice are not subject to NAD's jurisdiction. Therefore, I will not make a determination whether the termination notice was based on accurate information or was either appropriate or inappropriate."<sup>36</sup>

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*A borrower may also qualify for moratorium relief if the household incurred and was obligated to pay unexpected and unreimbursed expenses due to circumstances beyond the borrower's control.*

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*Self-Employment.* Experiencing financial difficulties because of self-employment has not necessarily been viewed as derivative of personal choice. NAD has reversed RHS' denial of a moratorium when the agency failed to look at the reasons for the loss of income and simply denied relief because the borrower was self-employed. NAD determined that before a moratorium may be denied under these circumstances, RHS must demonstrate that the self-employed borrower is simply experiencing ordinary periods of fluctuating income due to self-employment and not due to outside circumstances beyond his or her control, such as the death of a major client.<sup>37</sup>

*Seasonal Employment.* NAD typically views certain jobs, such as harvesting, processing produce<sup>38</sup> or working for steel companies,<sup>39</sup> as seasonal work that follows an irregular pattern of employment.<sup>40</sup> Accordingly, it reasons that a seasonal employee has chosen the job voluntarily and must find ways to cope with the financial instability that accompanies such a choice. This should not, however, preclude a borrower from seeking moratorium relief when the pattern of unemployment changes significantly due to factors beyond the borrower's control.

*Retirement.* A borrower's decision to retire does not automatically make the borrower ineligible for moratorium relief. An NAD hearing officer reversed an RHS

decision when the retirement decision was prompted by documented medical reasons that precluded the borrower from continuing to work regularly.<sup>41</sup>

*Choosing not to seek full-time employment.* Efforts to continue or improve one's education are applauded by NAD, but choosing to attend school full-time instead of seeking employment is not a circumstance where the loss of income was due to circumstances beyond the borrower's control.<sup>42</sup> Hence, borrowers who contend that their loss of income is due to their attending school are typically denied moratorium relief.

*Choosing less remunerative employment.* NAD reversed an RHS denial of moratorium relief on the ground that the borrower accepted a lower-paying job that she did not have to accept. The NAD hearing officer found that there was no support for RHS' contention since it did not provide any evidence that the borrower, who had been unemployed due to illness, has the choice of accepting another higher-paying job.<sup>43</sup>

*Incarceration.* Loss of income resulting from incarceration also does not meet the threshold moratorium eligibility requirement. Thus, if borrowers are incarcerated and subsequently lose benefits such as Social Security income, they are not eligible for moratorium assistance.<sup>44</sup>

#### **b. Increased Expenses**

A borrower may also qualify for moratorium relief if the household incurred and was obligated to pay unexpected and unreimbursed expenses due to circumstances beyond the borrower's control.<sup>45</sup> Medical expenses often constitute unexpected expenses.<sup>46</sup> Note, however, that if a borrower appears to be suffering from a continuous and ongoing illness, the borrower's condition may be considered permanent and not temporary. In that case, the request for moratorium relief may be denied even though the cause may have been outside the borrower's control.<sup>47</sup>

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<sup>41</sup>2005E000467 (Apr. 25, 2005) (Borrowers whose income is reduced by retirement must show, as other borrowers, that their reduced income is not permanent. In this case, the borrower showed that within several months of retirement she would be eligible for Social Security Survivor benefits that exceeded the amount she was earning from less than full-time work).

<sup>42</sup>2004W000570 (Sept. 16, 2004); 2002W000977 (Nov. 12, 2002).

<sup>43</sup>2005S000091 (Jan. 4, 2005).

<sup>44</sup>2005S000297 (Mar. 14, 2005) (Borrower, incarcerated due to DUI conviction, lost Social Security benefits); 2002E001403 (Oct. 9, 2002) (Borrower's Social Security income was temporarily reduced due to his incarceration. RHS decision not to grant moratorium was justified).

<sup>45</sup>7 C.F.R. § 3550.207(a)(1)(ii) (2005).

<sup>46</sup>2002E001222 (Mar. 1, 2003) (NAD reverses RHS decision, finding that borrower's medical expenses for breast cancer treatment are unexpected).

<sup>47</sup>2002E001222 (Mar. 11, 2003) (RHS was overruled. Borrower absorbed unexpected costs due to cancer diagnosis. Inability to pay was deemed

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<sup>36</sup>*Id.*

<sup>37</sup>2004E000805 (Oct. 21, 2004) (Evidence did not indicate that borrower experienced periods of fluctuating income due to being self-employed, but rather that she was unable to make her mortgage payments due to lack of work resulting from a client's death).

<sup>38</sup>2004W000050 (Mar. 24, 2005) (Borrower has worked in produce handling for thirteen years and established pattern of being unemployed and receiving unemployment benefits during summer months. Her loss of income is derived from her choice of work).

<sup>39</sup>2003E000995 (Jan. 7, 2004).

<sup>40</sup>2005W000386 (May 16, 2005).

## 2. Loss of Income or Increased Expenses Must Be Temporary

A borrower is not eligible for a moratorium if the adverse financial condition appears permanent.<sup>48</sup> There is no provision in RHS regulations establishing how one determines whether a condition is temporary or permanent. One NAD hearing officer concluded that a condition is temporary if it lasts less than two years, based on the two-year maximum length of a moratorium.<sup>49</sup> Typically, the determination is made on a case-by-case basis without a specific time standard.

*Medical Conditions.* NAD hearing officers commonly determine that ongoing long-term medical problems are not temporary.<sup>50</sup> They have also concluded that receipt of benefits, such as Social Security or Medicaid, for which the borrower has applied but has not yet been approved, is speculative and provides no assurance that a borrower will be able to resume mortgage payments after the moratorium period expires.<sup>51</sup> This conclusion is troublesome in that it assumes that the borrower will neither qualify for the benefits nor be able to return to work. Both are typically not true. Under the former HUD Assignment program, one court held that a person with a documented disability is likely to receive disability benefits and that HUD's contrary decision was arbitrary.<sup>52</sup>

NAD has also concluded that borrowers who are receiving SSI benefits will have a difficult time demonstrating that their condition is temporary.<sup>53</sup> Similarly, it has concluded that borrowers who are unable to obtain steady employment because of a permanent disability, or because they have consistently had a difficult time finding and holding onto a job, are not experiencing a period of temporary hardship and, therefore, do not qualify for a moratorium.<sup>54</sup>

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temporary, not permanent. At time of review, she was considered clinically free of cancer and doctor appointments had been extended to six-month intervals).

<sup>48</sup> C.F.R. § 3550.207 (2005). See e.g. 2004S000184 (Apr. 20, 2004) (Loss of Social Security income due to son turning 18 is permanent).

<sup>49</sup>2005E000837 (July 20, 2005). See RHS HANDBOOK 2-3550 ¶ 5.5 (C) (5-27-98) (Rev. 7-13-05).

<sup>50</sup>2004S000751 (Mar. 10, 2005) (Borrower's monthly medical prescription costs were considered permanent because her medical problems were ongoing); 2003W000468 (July 29, 2003) (Borrower's medical condition worsened and she had no reasonable prospect of working in the future).

<sup>51</sup>2004S000062 (Apr. 9, 2004) (Both daughter and mother have ongoing, indefinite specialized medical conditions and have no health insurance, thus situation is not temporary in nature).

<sup>52</sup>*In re Armstead*, 97 B.B. 798 (Bankr. E.D. Pa 1989).

<sup>53</sup>2005E000504 (May 17, 2005) (It can be inferred that because borrower receives SSI subsidies her disability is permanent and would prevent her from obtaining employment).

<sup>54</sup>2005S000342 (Apr. 13, 2005) (Merely searching for work does not necessarily warrant moratorium eligibility).

That these decisions are not always rational is demonstrated by a recent case of a borrower who sought a moratorium due to two medical conditions which resulted in the loss of a job and the extension of disability payments. When the borrower applied for relief, the agency determined that the borrower was ineligible for relief because her condition was not temporary. The borrower appealed that decision and during the pendency of the appeal secured a new job that enabled her to continue making her mortgage payments. Notwithstanding, the hearing officer upheld the RHS determination because it was correct at the time it was made and denied the borrower a moratorium because her current employment permitted her to continue making the required payments.<sup>55</sup>

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*NAD's underlying assumption that the borrower must demonstrate employability is somewhat troublesome.*

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*Ability to become employed.* Frequently, NAD takes the position that in order to qualify for a moratorium, borrowers who are unemployed must demonstrate that they are employable in order to demonstrate that the loss of income is temporary. Accordingly, it has held that a borrower who is experiencing sporadic cycles of unemployment and varying levels of income during the period of employment is not experiencing a temporary condition that qualifies for a moratorium.<sup>56</sup> It has also held that an individual who has been turned down for jobs repeatedly is unemployable and therefore ineligible for moratorium relief.<sup>57</sup>

While these decisions appear justified under the facts set out in the NAD opinions, the underlying assumption that the borrower must demonstrate employability is somewhat troublesome. If a moratorium applicant is able to show a favorable record of past employment, lacks a disability that prevents employments, and is actively

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<sup>55</sup>2005E000976 (Sept. 22, 2005).

<sup>56</sup>2005W000376 (May 4, 2005).

<sup>57</sup>2003S000282 (June 16, 2003) (Borrower could not show her financial situation was temporary. She had applied for twenty-six jobs since being laid off, yet has remained unemployed); 2003E000326 (May 12, 2003) (Borrower's lack of steady employment for more than four years is not temporary in nature. Borrower conceded his children have prevented him from finding a job for more than four years and proffered no evidence that he would be able to find job in near future).

seeking employment, RHS and NAD should assume that the borrower's unemployment is temporary.<sup>58</sup>

Unfortunately, this type of reasoning did not work in one case that was decided by the NAD director.<sup>59</sup> In that case the borrower, whose disability payments from the Social Security Administration were terminated because of the temporary nature of her disability, sought a moratorium a mere three months after the payments were discontinued. The NAD hearing officer and the NAD director refused to overturn RHS denial of moratorium relief on the ground that her unemployment was temporary. Acknowledging that the RHS decision was inconsistent with that of the Social Security Administration, the NAD director deferred to the RHS denial decision, stating that "different programs of the Federal government have different tests for determining whether someone is eligible for benefits." He then upheld the RHS decision on the ground that the borrower did not show that the loss of repayment ability was temporary. While the underlying facts in the case are not clear from the NAD decision, the decision is disconcerting given that the borrower was only unemployed for three months after her Social Security Administration disability payments were discontinued. If the borrower was looking for employment during that time, it is difficult to understand how she could have shown that her continued unemployment was temporary.

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*NAD has consistently upheld RHS decisions denying borrowers' application for moratorium relief after their loans have been accelerated.*

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#### 4. Borrower Must Occupy the Dwelling

NAD has literally and consistently upheld the requirement, set out in RHS regulations,<sup>60</sup> that a borrower must occupy the dwelling in order to qualify for moratorium relief.<sup>61</sup> The requirement is only excused if the dwelling is determined to be uninhabitable.<sup>62</sup>

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<sup>58</sup>See *Grasty v. HUD*, 636 F. Supp. 912 (E.D. Pa. 1985) (Under HUD Assignment Program, HUD abused its discretion when it decided that unemployed mortgagor with previous work experience and no disabilities had no reasonable prospect of resuming payments).

<sup>59</sup>2003S000554 (Sept. 6, 2003).

<sup>60</sup>7 C.F.R. § 3550.211 (h) (2005).

<sup>61</sup>2005E000100 (Apr. 27, 2005) (At time of application, borrower was homeless, therefore ineligible for moratorium assistance because he did not physically occupy dwelling financed by RHS).

<sup>62</sup>2005S000228 (Mar. 17, 2005); 2004W000449 (Jan. 7, 2005); 2002E001599 (Dec. 2, 2002); 2002S000378 (Nov. 22, 2002).

#### 5. Loan Must Not Have Been Accelerated

RHS regulations limit borrowers' capacity to secure a moratorium after their loan has been accelerated.<sup>63</sup> NAD, which is bound by RHS regulations, has therefore consistently upheld RHS decisions denying borrowers' application for moratorium relief after their loans have been accelerated.<sup>64</sup>

Unfortunately for borrowers, the RHS regulation, which is routinely enforced, is inconsistent with three court decisions that have held that the regulation is contrary to the moratorium statute, which authorizes the extension of a moratorium at any time that the loan is outstanding.<sup>65</sup>

#### C. Continued Eligibility for Moratorium

After securing a moratorium, borrowers are obliged to affirmatively report changes in the circumstances that justified their moratorium. In addition, RHS is supposed to conduct a compliance review of each borrower's account every six months after a moratorium have been extended<sup>66</sup> to determine if the borrower continues to be eligible for relief. As part of that review, borrowers are required to submit financial information to RHS to demonstrate that moratoriums should be continued for the balance of the moratoriums' two-year term.<sup>67</sup>

#### D. Moratorium Terminations

A moratorium may be cancelled under three circumstances. First, if the borrower fails to respond to a request for financial information.<sup>68</sup> Second, if the agency receives information suggesting that a moratorium is no longer necessary. Third, if the moratorium was granted to absorb unexpected expenses and the borrower fails to show that an amount equal to the deferred payments has been applied toward the expenses.

*Change in financial circumstances.* A moratorium may be terminated if the financial record submitted by the borrower discloses that the borrower's income increased to

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<sup>63</sup>7 C.F.R. § 3550.202(b)(1) (2005).

<sup>64</sup>2005S000089H (Apr. 27, 2005); 2005S000144 (Jan. 20, 2005); 2004S000894 (Jan. 7, 2005); 2003S001073 (Apr. 9, 2004); 2002E001228 (Aug. 29, 2002).

<sup>65</sup>42 U.S.C. § 1475 (West 2003).

<sup>66</sup>RHS HANDBOOK 2-3550, DLOS Centralized Service Center ¶5.5 D (5-27-98); 7 C.F.R. § 3550.207 (2005).

<sup>67</sup>7 C.F.R. § 3550.207 (b)(1) (2005).

<sup>68</sup>In one very recent case, a borrower appealed RHS determination to terminate his moratorium after he failed to respond to the agency's request for financial information in order to determine his continued eligibility for relief. The borrower, who had been called to service after receiving a moratorium, contended that because of his military service he was unable to respond in a timely basis. The NAD hearing officer, while upholding the RHS decision, advised the borrower that he could still submit the information because RHS had not actually terminated his moratorium and urged him to do so. 2005E000695 (Aug. 25, 2005).

the point where the borrower no longer needs assistance.<sup>69</sup> The determination of continued need is not based upon the borrower's income reaching a certain prescribed level or a percentage of income related to the level of income that the borrower received prior to the moratorium.<sup>70</sup>

*Payment of unexpected expenses.* If a moratorium was granted in order for the borrower to pay unexpected or unreimbursed expenses, the borrower has an obligation to apply the deferred mortgage payments towards the unexpected expenses or debts.<sup>71</sup> Failure to make such payments constitutes another ground for terminating a moratorium and NAD hearing officers have consistently upheld termination decisions based on the borrower's failure to make such payments.<sup>72</sup>

*Notice.* Whenever RHS terminates a moratorium, it must notify the borrower. The borrower has thirty days in which to dispute the RHS termination decision.<sup>73</sup>

### E. Actions at the Expiration of a Moratorium

RHS has various options to reinstate a borrower's account at the end of a moratorium. This includes new payment assistance contracts, delinquency workout agreements, protective payments for taxes and insurance, and loan reamortization.<sup>74</sup>

In one case, NAD reversed an RHS decision to accelerate a borrower's loan when the borrower contended that the agency failed to provide her with a reamortization agreement. The hearing officer found no evidence in the RHS files that the agency sent out such an agreement and found it illogical to assume that the borrower would not sign such an agreement if presented since it would bring her account current.

### F. Procedural Issues

#### 1. RHS Duty to Provide Moratorium Application

The RHS handbook<sup>75</sup> states that while some borrowers may be sufficiently knowledgeable to request a moratorium, more typically RHS staff will recognize that a borrower is eligible for assistance and suggest that the

borrower apply. Regardless of who initiates the moratorium discussion, NAD has consistently held that the actual request for moratorium assistance must be submitted by the borrower.<sup>76</sup>

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*Regardless of who initiates the moratorium discussion, NAD has consistently held that the actual request for moratorium assistance must be submitted by the borrower.*

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Moreover, a borrower who has requested a moratorium application is responsible for ensuring that she receives it. She may not rely on the failure to receive the moratorium application to justify an indefinite failure to make mortgage payments.<sup>77</sup>

Once a moratorium package is sent to the borrower, the borrower has thirty days to complete and return it to RHS. If the borrower fails to return the package in a prompt and timely manner<sup>78</sup> or fails to complete the application,<sup>79</sup> RHS may accelerate the loan.

Interestingly, in one case, RHS denied a borrower's request for a moratorium for failure to submit adequate supporting information after RHS specifically asked the borrower to submit certain specified documents. The borrower appealed the decision and submitted the missing documentation to the hearing officer prior to the appeal hearing. Even though RHS staff stated during the hearing that the additional information may be sufficient to determine the borrower's moratorium eligibility, the hearing officer denied the appeal on the ground that insufficient information was submitted to RHS on a timely basis. The borrower sought the NAD director's review.

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<sup>69</sup>2003S000413 (Sept. 9, 2003) (Compliance review showed borrower was receiving SSA benefits and income increased. RHS properly denied continuation of moratorium).

<sup>70</sup>2005E000813 (June 24, 2005).

<sup>71</sup>7 C.F.R. § 3550.207 (b)(1)(iii) (2005).

<sup>72</sup>2002S000948 (Mar. 25, 2003) (Borrower received moratorium to make payments on unreimbursed funeral expenses. Borrower failed to show she used deferred mortgage payment to pay expenses. Termination of moratorium was justified).

<sup>73</sup>RHS HANDBOOK 2-3550, DLOS Centralized Service Center ¶ 5.5 (E) (5-27-98); 7 CFR § 3550.207 (2005).

<sup>74</sup> See, 7 C.F.R. § 3550.201 (2005).

<sup>75</sup>RHS HANDBOOK 2-3550, DLOS Centralized Service Center, ¶ 5.5 (5-27-98).

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<sup>76</sup>2005E000458 (Apr. 20, 2005) (RHS provided written notice explaining loan was delinquent and suggested moratorium as possible loan servicing option).

<sup>77</sup>2005W000235 (May 31, 2005) (Failure to receive moratorium application does not merit overturning decision to accelerate loans); 2005W000253 (May 26 2005).

<sup>78</sup>2005E000680 (May 10, 2005); 2005W000235 (Mar. 24, 2005); 2005S000331 (Mar. 18, 2005); 2004W000825 (Mar. 16, 2005); 2005S000155 (Mar. 3, 2005); 2004E000932 (Jan. 13, 2005); 2005S000078 (Jan. 5, 2005); 2004W000287 (Aug. 4, 2004); 2004S00E0393 (July 2, 2004); 2004S000224 (May 25, 2004); 2003S000714 (Oct. 16, 2003); 2003E000475 (July 14, 2003); 2003S000216 (May 8, 2003); 2003S000222 (Apr. 18, 2003); 2003W000070 (Mar. 7, 2003); 2002S000888 (Dec. 17, 2002).

<sup>79</sup>2004S000743 (Oct. 4, 2005); 2005E000512 (Apr. 29, 2005); 2005W000244 (Apr. 27, 2005); 2005E000403 (Apr. 20, 2005); 2005W000215 (Mar. 8, 2005); 2005S000099 (Jan. 13, 2005); 2004S000531 (Sept. 30, 2004); 2004W000538 (July 26, 2004); 2003S000640 (Sept. 5, 2003); 2003E000374 (May 16, 2003); 2003S000338 (May 16, 2003); 2004W000039 (Mar. 22, 2004).

The NAD director reversed the decision and directed the hearing officer to conduct another hearing to receive RHS' determination based on the additional information and to consider any arguments that the borrower may make in response to the RHS decision. On remand, the hearing officer, after independently reviewing the information submitted by the borrower without RHS' additional input and without holding a second hearing, issued a second decision upholding the RHS denial on the ground that the information was still insufficient to determine the borrower's eligibility for a moratorium. The borrower again appealed to the NAD director, who again reversed the decision. The NAD director found that the hearing officer failed to comply with the NAD director's initial decision, which required RHS to consider the information submitted for the first hearing and for the NAD hearing officer to hold another hearing if the borrower sought to submit responsive information.<sup>80</sup>

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*The NAD appeals decision database is a unique resource for advocates and borrowers.*

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While this decision is not grounded on any specific violation of any RHS or NAD regulations, it clearly suggests that NAD may act in an equitable capacity when the hearing officer or the NAD director believes it to be justified. Advocates are urged to keep this in mind when representing borrowers in the NAD appeals process.

As noted earlier, under RHS regulations, but not the moratorium statute, a borrower must apply for a payment moratorium before the account is accelerated.<sup>81</sup>

## 2. Time for Filing Administrative Appeals

Borrowers whose applications for a moratorium have been denied must appeal the denial decision within thirty days.<sup>82</sup> If they fail to do so, they have no administrative recourse and the initial agency decision is considered to

be final. RHS may not, however, accelerate borrowers' loans before the thirty-day period for an appeal expires.<sup>83</sup>

## 3. Eligibility for More Than One Moratorium Over the Life of a Loan

Borrowers are eligible for moratoriums throughout the term of their loans and are not restricted from receiving more than one moratorium provided that one particular set of circumstances is not used to justify more than one moratorium.<sup>84</sup> If a second moratorium is independently justified, there is no waiting period between moratoriums. When a second moratorium is justified by unexpected increased expenses, the borrower must demonstrate that the expenses justifying the first moratorium bear no relation to the expenses justifying the second moratorium.<sup>85</sup>

## III. Conclusion

The NAD appeals decision database is a unique resource for advocates and borrowers. It provides insight into the RHS and RD decision-making process and enables advocates to determine how agency regulations are applied to particular fact patterns by RHS, RD and NAD staff. While some NAD decisions may not be logical or consistent with other NAD decisions, the fact that they are readily accessible should enable advocates to focus and sharpen arguments that they are considering. The NAD is commended for its decision to post hearing decisions to its Web site and to make the decisions searchable. ■

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<sup>80</sup>2004S000725 (Apr. 14, 2005). Ultimately, RHS made a new determination on the borrower's eligibility for a moratorium and concluded that she did not qualify. That decision was upheld by the hearing officer and the NAD director. *Id.* (Aug. 23, 2005).

<sup>81</sup>2005W000253 (May 25, 2005); 2005W000388 (May 26, 2005).

<sup>82</sup>7 C.F.R. § 11.6 (b)(1) (2005). See 20005W000313 (Apr. 22, 2005); 2005S000387 (Apr. 18, 2005); 2005W000090 (Jan. 7, 2005); 2004E000360 (July 29, 2004); 2003S001048 (Feb. 4, 2004); 2003W000657 (Jan. 29, 2004); 2003E000831 (Nov. 7, 2003).

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<sup>83</sup>2005S000480 (June 8, 2005); 2005S000110 (Feb. 2, 2005).

<sup>84</sup>RHS HANDBOOK 2-3550, DLOS Centralized Service Center, ¶ 5.5.(A) (5-27-98).

<sup>85</sup>2002E001222 (Mar. 11, 2003) (RHS' denial of second moratorium was erroneous. First moratorium covered medical expenses which bears no relation on new expenses incurred after breast cancer diagnosis).

# California Supreme Court Rules Assisted Housing Notice Law Applies Throughout State

by Danielle Pelfrey Duryea\*

In a victory for hundreds of thousands of assisted housing tenants across the state, the California Supreme Court ruled in June that state law requires property owners to give Section 8 Housing Choice Voucher holders the same extended notice of lease termination in rent-control and non-rent-control jurisdictions alike.<sup>1</sup> The landlord had claimed that voucher tenant Syriah Degrade was not entitled to the ninety days' notice that state law mandates when an owner decides to stop participating in a government-subsidized housing program. The Court, however, unanimously rejected the argument that such notice was only required for tenants living in rent-control districts.

## Background

Syriah Degrade had already lived in her privately owned San Diego apartment for over a year when she signed a new, six-month lease for the unit in May 2000. Because Degrade held a voucher that paid the difference between the unit's total rent and her income-based contribution, the owner also entered into a housing assistance payment (HAP) contract for her unit with the San Diego Housing Commission. As is usual in such contracts for voucher housing, the contract applied only to Degrade's household and unit and would "terminate[] automatically if the lease is terminated by the owner or the tenant."<sup>2</sup>

Degrade's lease was renewable on a month-to-month basis after its October 2000 expiration, and Degrade continued to live in the apartment and pay her rent. By January 2001, however, the owner had decided to drop out of the voucher program. At the end of that month, Degrade received thirty days' notice to vacate, with no indication that she had violated her lease or otherwise given the landlord good cause to terminate her tenancy. She refused to leave, and Wasatch filed an unlawful detainer complaint against her.

The San Diego Superior Court ruled against Degrade and denied her motion to vacate the judgment, rejecting the argument that she was entitled to ninety days' notice of

termination under California Civil Code section 1954.535, which reads, in its entirety:

§ 1954.535. Termination of agreement with government agency providing for rent limitations; Notice to tenants

Where an owner terminates or fails to renew a contract or recorded agreement with a governmental agency that provides for rent limitations to a qualified tenant, the tenant or tenants who were the beneficiaries of the contract or recorded agreement shall be given at least 90 days' written notice of the effective date of the termination and shall not be obligated to pay more than the tenant's portion of the rent, as calculated under the contract or recorded agreement to be terminated, for 90 days following receipt of the notice of termination of nonrenewal of the contract.

This provision, held the Superior Court, could only apply to tenants living in rent control jurisdictions because it is placed under the Civil Code chapter entitled "Residential Rent Control." Because Degrade lived in a locality not covered by a rent control ordinance, she was not entitled to the provisions' protection; instead, Wasatch had only been obligated to give her thirty days' notice.

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*The Court, however, unanimously rejected the argument that such notice was only required for tenants living in rent-control districts.*

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On appeal, the appellate division of the Superior Court agreed with the trial court's interpretation of California Code section 1954.535, but reversed the unlawful detainer judgment against Degrade because Wasatch had failed to give her notice of good cause to terminate the lease, as required by both the lease and the HAP contract.

Represented by Legal Aid Society of San Diego,<sup>3</sup> Degrade moved to certify the case to the Court of Appeal,

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<sup>3</sup>Degrade was also supported by *amici curiae* the Southern California Association of Non-Profit Housing, California Coalition for Rural Housing, Housing Rights, Inc., the Fair Housing Foundation, the Coalition for Economic Survival, the Greater Long Beach Interfaith Community Organization, the Long Beach Community Action Network, the Long Beach Area Coalition for the Homeless, the City of West Hollywood, the Santa Monica Rent Control Board, and Annette Osborne, who were represented by the National Housing Law Project, Legal Services of Northern California, Neighborhood Legal Services of Los Angeles County, Legal Aid Foundation of Los Angeles, and California Rural Legal Assistance.

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<sup>1</sup>Wasatch Prop. Mgmt. v. Degrade, 35 Cal. 4th 1111 (2005).

<sup>2</sup>24 C.F.R. § 982.309(b)(2)(i) (2004).

which not only upheld the appellate division's conclusion that Wasatch had not given notice of good cause, but also reversed the lower court on the question of section 1954.535.<sup>4</sup> The Court found that Wasatch had failed to amend its lease with Degrade when Congress removed the good cause requirement after the initial term of a voucher lease, so the management company continued to owe her notice of good cause in order to terminate her tenancy at the end of any extension term. And, parsing the statutory language and reviewing its legislative history, the Court of Appeal found that the California legislature intended section 1954.535 to cover tenants in both rent-control and non-rent-control jurisdictions.

Claiming that the Court of Appeal ruling threatened the very viability of the voucher program in California because prospective landlords would be so burdened by the ninety-day notice requirement, Wasatch appealed both questions to the California Supreme Court, which agreed to consider only the proper interpretation of section 1954.535.<sup>5</sup> The management company argued that the code section applied only to the termination of a landlord's HAP contract, not to the termination of a tenant's lease, and that here only its lease with Degrade had been terminated, not its HAP contract with the San Diego Housing Commission. Further, Wasatch contended, even if section 1954.535 did cover the termination of a tenant's lease, stated legislative intent and the plain language of the statute indicated that the code section should apply only in rent-control districts.<sup>6</sup>

In *amicus curiae* briefs, landlord trade organizations argued that upholding the Court of Appeal's decision would make it impossible for landlords to evict nuisance or dangerous tenants speedily and suggested that federal law would preempt this result. Degrade's answer brief noted that the Court of Appeal's decision applied only where a landlord terminated the tenancy through no fault of the tenant and therefore created no extended notice requirements for problem tenants. Further, Degrade's answer brief argued, the Court of Appeal's reading of

section 1954.535 posed no conflict with or frustration of federal law and, in fact, furthered the voucher program goals of promoting tenant choice and enabling low-income tenants to live in communities that are economically, racially and ethnically integrated.

## California Supreme Court Unanimously Upholds Tenants' Right to Notice

The Court's decision first addressed the question of the applicability of section 1954.535 to non-rent-control jurisdictions by looking at the section's plain language, its legislative history, and the placement of the section within the Civil Code. Comparing 1954.535 with section 1954.53—which was amended, in the same bill that added 1954.535 to the Code, to expressly restrict its reach to rent-control jurisdictions—the Court found that the “actual words” of section 1954.535 clearly applied to both rent-control and non-rent-control jurisdictions. “Had the Legislature intended to also limit the scope of section 1954.535 in the same manner” as 1954.53, stated the Court, “it would have included similar language doing so.”<sup>7</sup> Because it had not, the Court saw no justification for reading the limitation into the plain language of the statute.

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*Parsing the statutory language and reviewing its legislative history, the Court of Appeal found that the California legislature intended section 1954.535 to cover tenants in both rent-control and non-rent-control jurisdictions.*

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Turning to the legislative history, the Court determined that the purpose of the section was to address a statewide concern: that the typical thirty-day notice period does not give voucher tenants sufficient time to find replacement housing, particularly given the dearth of low-income rental units available in California.

Finally, the Court rejected Wasatch's argument that section 1954.535 applies only in rent-control areas because it is placed under the Civil Code chapter unofficially entitled “Residential Rent Control.” Unofficial titles and chapter headings do not alter the explicit scope, meaning, or intent of a statute, reaffirmed the Court, further noting that the official short title of the chapter is the “Costa-Hawkins Rental Housing Act,” which indicates no legislative intent to limit the scope of section 1954.535 to rent-control

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<sup>4</sup>Wasatch Prop. Mgmt. v. Degrade, 103 Cal. App. 4th 913 (2002).

<sup>5</sup>Under California law, when the state Supreme Court grants review, the lower-court opinion “is no longer considered published.” Cal. Rules of Court 976(d)(1) (2005). Because of the “‘all or nothing’ character of the rules governing publication of appellate opinions” in California, state Supreme Court review results in the complete “depublication” of the lower-court decision. Cf. *People v. Mack*, 66 Cal. App. 3d 839, 846 n.1 (Cal. App. 1977). Therefore, when the state Supreme Court grants review of a case, the precedential value of the lower-court decision on issues that the Supreme Court declines to consider is just as much a nullity as the lower-court's decision on issues that the Supreme Court overrules. In this case, therefore, the Court of Appeal's decision on the good cause question is the law of the case, but cannot be cited carries no precedential value.

<sup>6</sup>See *Degrade*, Petition for Review, 2002 WL 32334531 (Dec. 24, 2002).

<sup>7</sup>*Degrade*, 35 Cal. 4th at 1118.

jurisdictions. More broadly, the Court found no suggestion that the legislature intended to divide laws “neatly into rent-control and non-rent-control sections.”<sup>8</sup>

In one short paragraph, the Court also rejected the argument that applying section 1954.535 statewide would discourage potential voucher landlords from participating in the program. Declining to second-guess the legislature’s judgment regarding this possible effect, the Court stated: “Presumably ... this concern applies equally in jurisdictions with and without rent control ordinances and therefore does not bear on the question of whether section 1954.535 applies outside of rent-controlled jurisdictions.”<sup>9</sup>

The Court then determined that a “common sense”<sup>10</sup> interpretation of section 1954.535 dictated that terminating Degrate’s lease triggered the section’s notice requirements. Because, under federal regulations, all HAP contracts “automatically terminate[]”<sup>11</sup> when the leases they cover do, Wasatch’s argument would allow the owner of a unit under HAP contract “in effect, to choose between giving a 90-day or 30-day notice to a Section 8 [voucher] tenant whose tenancy agreement was being terminated without cause, merely based upon which contract was terminated first.”<sup>12</sup> Calling this potential result “absurd,”<sup>13</sup> the Court held that the statute applies equally when an owner “knowingly causes”<sup>14</sup> the termination of the HAP contract by terminating the voucher holder’s tenancy agreement as when an owner directly terminates the HAP contract.

### Landlords Express Concern; Advocates Point to Clear Need for Longer Notice

The California Apartment Association and some public housing officials continue to suggest that the ruling may discourage landlords from renting to voucher holders. The *Degrate* decision, they claim, undercuts landlords’ ability to serve voucher tenants who fail to pay their rent or engage in criminal conduct with ordinary three-, thirty-, or sixty-day notices to vacate. Although the Court specifically declined to consider whether the ninety-day notice provision applies where the tenancy is terminated for good cause,<sup>15</sup> advocates dismiss this idea, noting that there is a material distinction between an owner’s

withdrawal from a subsidy program and a tenant’s default in his or her obligations under the lease. As NHLP’s Catherine Bishop observes, “If they want to evict [without cause], all they have to do is plan ahead.”<sup>16</sup>

In fact, argue advocates, the ninety-day notice of termination is essential to the effective operation of the voucher program. HUD has confirmed that, nationwide, it is virtually impossible for a tenant to find a unit, complete the necessary paperwork, have the unit inspected, and move into the unit, all within thirty or even sixty days.<sup>17</sup> According to the HUD study, voucher holders need a national average of eighty-three days to find a unit, and nearly one quarter of those households took more than 120 days to lease a unit with their vouchers.

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In California, “many who get vouchers and search for a place to rent might as well be panning for gold. In fact, they might find gold faster.”<sup>18</sup> With more than 280,000 voucher holders statewide, California is home to almost 15% of the nation’s voucher program participants, but the state’s extremely low rates of rental vacancy make the search for units for which they can use their vouchers even more difficult than in the nation at large. In Sacramento County, for example, according to the *Sacramento Bee*, prospective voucher renters forfeited about half the vouchers issued in 2000 when they were unable to locate housing within the time and rent limitations.<sup>19</sup> According to the *Los Angeles Times*, in Los Angeles in 2002, almost 60% of vouchers issued similarly expired without being used: “The dilemma facing Section 8 [voucher] tenants is an outgrowth of the city’s tight housing market, high rents and changes in federal guidelines.”<sup>20</sup>

Without the universal application of the state’s extended notice requirement for voucher tenants, say

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<sup>8</sup>*Id.* at 1120.

<sup>9</sup>*Id.* at 1121.

<sup>10</sup>*Id.* at 1122, 1123.

<sup>11</sup>*Id.* at 1123 (emphasis in the original).

<sup>12</sup>*Id.* at 1122-23.

<sup>13</sup>*Id.* at 1123.

<sup>14</sup>*Id.* at 1121 (emphasis in the original).

<sup>15</sup>*Id.* at 1124, n.4.

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<sup>16</sup>Scott Pesznecker, *Section 8 Renters Given More Notice*, MERCED SUN-STAR (June 15, 2005).

<sup>17</sup>See HUD, *Study on Section 8 Voucher Success Rates*, at iii (2001), available at <http://www.huduser.org/publications/pubasst/sec8success.html>.

<sup>18</sup>M.S. Enkoji, *Rent Vouchers Being Pushed by HUD Now*, SACRAMENTO BEE (Jan. 29, 2002).

<sup>19</sup>See *id.*

<sup>20</sup>Jocelyn Y. Stewart, *Section 8 Renters May Get Help From City*, L.A. TIMES (Mar. 20, 2002), at 2.6.

advocates, the situation would be even more dire. The state legislature's decision to ensure voucher tenants ninety days to find new housing increases the likelihood that tenants will successfully relocate without a period of homelessness. The additional time also enhances a tenant's odds of finding new housing with private landlords in areas that are economically and racially mixed, which is one of the national voucher program's ultimate stated purposes.

### Other Applications for *Degrate*?

Certainly the *Degrate* decision provides positive protections for California voucher tenants. The *Degrate* decision has halted California landlords' efforts to chip away at state mandates that support voucher tenants in the absence of federal regulation. It may also provide a model for advocacy in other states where landlords' decisions not to renew vouchers result in families losing their housing benefits because of the time that it takes to locate another unit. ■

## Sample Documents for Use in Implementing *Degrate* in California

Posted on the NHLP Web site at [www.nhlp.org/html/sec8/index.htm](http://www.nhlp.org/html/sec8/index.htm) are sample letters and notices to be used to implement the decision of the California Supreme Court regarding the ninety-day notice for voucher recipients. These include:

- a sample letter to be sent to the local public housing agency informing it of the ruling
- a sample notice to be provided to California voucher holders advising them of the decision
- a sample letter for California voucher tenants to send to their landlords, in the event that they receive a thirty-day or sixty-day no-cause notice to quit
- a sample letter to be sent to the local California court that handles landlord-tenant matters advising it of the *Degrate* decision. ■

## HUD Issues Helpful Notice on Vouchers and Disabled Persons

Earlier this year, the Department of Housing and Urban Development (HUD) took an unusual step, issuing a notice to assist public housing agencies (PHAs) and HUD field staff with ways that the voucher program can be used to assist families with members who are disabled.<sup>1</sup> This notice is part of the Bush Administration's initiative to promote community-based alternatives for individuals with disabilities. The notice is largely a compilation and reiteration of already published rules relating to individuals with disabilities. However, the notice contains a number of explanatory items that may be useful to advocates assisting disabled persons in finding and renting housing through the Housing Choice Voucher program.

### Assistance in Locating a Unit

The notice instructs PHAs to be "generous" in establishing initial search time and extension policies "to maximize the family's opportunity to find suitable housing."<sup>2</sup> HUD regulations require a minimum sixty-day search time and instruct PHAs to extend the time period as a reasonable accommodation, if requested.<sup>3</sup> The notice recommends that PHAs partner with agencies that work with disabled persons for guidance on what is a reasonable period of time. The notice also instructs PHAs to provide families with disabled persons specific information including:

- A list of service and advocacy organizations. Organizations that should be included on the list include protection and advocacy agencies and "disability advocacy groups" which should include legal services organizations.
- A list of accessible units.<sup>4</sup>

The notice urges PHAs to offer search assistance to families with members who are disabled and to cooperate

<sup>1</sup>New Freedom Initiative, Executive Order 13217: "Community-Based Alternatives for Individuals with Disabilities," and the Housing Choice Voucher Program, PIH 2005-5 (Feb. 1, 2005) [hereinafter PIH 2005-5], available at <http://www.hud.gov/offices/pih/publications/notices/05/pih2005-5.pdf>.

<sup>2</sup>*Id.*

<sup>3</sup>24 C.F.R. § 982.303(a), (b)(2) (2004).

<sup>4</sup>The notice does not provide details, but accessible units ought to include not only units accessible to mobility impaired individuals but also units that are accessible to individuals with other disabilities such as hearing, sight or mental impairments. 24 C.F.R. § 982.301(b)(12) (2004) (tenant may request a list of accessible units known to PHA).

with other agencies in setting policy and sharing resources. PHAs are reminded that they may establish preferences for families with a disabled member and/or establish a set-aside for such families.<sup>5</sup> PHAs cannot, however, prefer specific types of disabilities, such as a preference for those who are sight- or mobility-impaired over other individuals with mental disabilities.

### Special Purpose Vouchers for Disabled Families

The HUD notice reminds PHAs that they must use, to the “extent practicable,” vouchers that were specially earmarked for disabled families for such families upon turnover. The notice states: “To the ‘extent practicable,’ means that all non-elderly disabled families on a PHA’s waiting list have been issued these turnover vouchers, and PHA outreach efforts specifically directed to non-elderly disabled families has yielded no eligible applicants.”<sup>6</sup> If the vouchers are not so used, they will be forfeited.

### Special Housing Types

The notice also instructs PHAs to allow disabled families to use special housing types (single room occupancy, group home, shared housing, etc.) even if the PHA does not allow vouchers to be used for such housing for other families. The notice states that an individual with a disability may rent from a relative as a reasonable accommodation,<sup>7</sup> but notes that the rule regarding renting shared housing from a relative is different.<sup>8</sup> For shared housing, HUD regulations prohibit the provision of voucher assistance if the disabled individual with the voucher is related to the owner of the unit.<sup>9</sup>

The notice also mentions homeownership. PHAs that do not administer a homeownership program must also determine if they must reasonably accommodate a person with disabilities by providing a homeownership option.<sup>10</sup>

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<sup>5</sup>A set-aside means allocating a certain number of vouchers for families with disabled members. Thus a PHA could allocate any number, such as one-quarter or one-half, of the turnover vouchers to families with members who are disabled. The remaining vouchers would be issued to families with other preferences and/or chronologically.

<sup>6</sup>PIH 2005-5, *supra* note 1, at 5. Some special purpose vouchers may be targeted to both elderly and non-elderly families.

<sup>7</sup>*Id.* § 982.306(d).

<sup>8</sup>Significantly, HUD fails to mention that regulations that are not statutorily based may be waived for good cause. *Id.* § 5.110. See also NHLP, *HUD Waivers Benefit Individual Program Participants and Facilitate the Use of Project Based Vouchers*, 33 HOUS. L. BULL. 309, 320 (2003). In addition, a reasonable accommodation in the regulation does not foreclose such relief.

<sup>9</sup>24 C.F.R. § 982.615(b)(3) (2004).

<sup>10</sup>*Id.* § 982.625(d)(1) and (2).

## Adjusting Payment Standard

The notice reminds PHAs that in addition to the flexibility that PHAs have for setting the payment standard within the basic range of up to 110% of the Fair Market Rent (FMR), upon a request for reasonable accommodation, the appropriate HUD field office can approve exceptions to the payment standard for amounts between 110-120% of the FMR and that HUD headquarters may approve payment standards above 120%.

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*The notice reminds PHAs to apply the earned income disregard to disabled members of voucher households who are working and experience an increase in income due to such work.*

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However, the practical ability of a disabled individual to take advantage of this provision is severely limited because the family must locate a unit prior to the request for reasonable accommodation. Disabled voucher holders are often unable to wait for a HUD determination. Also, because of uncertainty regarding recent changes in the funding formulas, some PHAs have not sought approval of higher payment standards from HUD.

### Rents and Utilities

The notice reminds PHAs to apply the earned income disregard to disabled members of voucher households who are working and experience an increase in income due to such work.<sup>11</sup> The notice states that HUD “believes that the exclusion . . . will help persons with disabilities obtain and retain employment . . .”<sup>12</sup>

Significantly, the HUD notice did not mention the regulation which states that a PHA must approve a higher utility allowance for an individual with disabilities if the higher utility allowance is needed as a reasonable accommodation.<sup>13</sup> ■

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<sup>11</sup>See also *id.* § 5.617.

<sup>12</sup>PIH 2005-5, *supra* note 1, at 5.

<sup>13</sup>24 C.F.R. § 982.517(d) (2004).

# HUD Regulatory Waivers: Summary of Recent Waivers Regarding Voucher and Other Programs

by Anthony Ha\*

HUD is required to publish quarterly in the *Federal Register* a description of waivers of federal regulations that it has issued.<sup>1</sup> As of June 21, 2005, HUD published descriptions of all the waiver requests granted during each quarter of 2003 and 2004, and during the first quarter of 2005.<sup>2</sup> A summary of key waivers is set out below.<sup>3</sup>

The majority of the waivers granted for calendar years 2003, 2004, and the first quarter of 2005 affecting the voucher program can be divided into two broad categories: waivers made on behalf of families with disabled individuals who needed a reasonable accommodation, the majority of which were for payment standard increases, and waiver requests regarding the project-based voucher program. HUD has also granted waivers for other programs. During this period, HUD granted one waiver for the Section 3 program. The waivers granted to the HOME program for the period 1996-2003 are available and listed separately on the HUD Web site.<sup>4</sup>

This summary is intended to assist advocates in determining whether to urge a public housing authority (PHA) to seek a waiver of HUD regulations to assist families in leasing a unit and in determining whether a PHA would be successful when seeking a waiver to facilitate the placement

of project-based vouchers.<sup>5</sup> For each waiver there is a citation to the issue of the *Federal Register* in which the notice of the waiver was published and in which further detail is provided.

## Waiver of Effective Date of Reduced Payment Standard for Voucher Program

Housing Choice Voucher regulations provide that if the payment standard is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular re-examination following the effective date of the decrease.<sup>6</sup> As a result of the voucher funding crisis, which has created problems for many local PHAs, HUD has urged PHAs to reduce their program costs. In particular, HUD has urged PHAs to reduce their payment standards and to implement a new payment standard as soon as possible. To seek immediate implementation, HUD has urged PHAs to seek a waiver of the rule regarding the effective date.<sup>7</sup>

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*This summary is intended to assist advocates in determining whether to urge a public housing authority to seek a waiver of HUD regulations to assist families in leasing a unit.*

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On March 9, 2005, the Boston Housing Authority (BHA) requested a waiver of the regulation regarding the effective date of a reduced payment standard.<sup>8</sup> HUD granted the waiver request on April 4, 2005.<sup>9</sup> The letter approving the request relied upon the fact that the BHA

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<sup>1</sup>In 1989, Section 106 of Public Law 101-235 added the provisions regarding the reporting of waivers granted and the delegation of the authority to grant a waiver. 42 U.S.C.A. § 3535(q) (West, Westlaw, Current through P.L. 109-57 approved 08-02-05).

<sup>2</sup>68 Fed. Reg. 54,936 (Sept. 19, 2003) (first quarter 2003); 68 Fed. Reg. 63,914 (Nov. 10, 2003) (second quarter 2003); 69 Fed. Reg. 11,714 (Mar. 11, 2004) (third quarter 2003); 69 Fed. Reg. 47,250 (Aug. 4, 2004) (fourth quarter 2003); 69 Fed. Reg. 62,992 (Oct. 28, 2004) (first quarter 2004); 69 Fed. Reg. 64,440 (Nov. 4, 2004) (second quarter 2004); 70 Fed. Reg. 2,218 (Jan. 12, 2005) (third quarter 2004); 70 Fed. Reg. 18,194 (Apr. 8, 2005) (fourth quarter 2004); 70 Fed. Reg. 35,968 (Jun. 21, 2005) (first quarter 2005).

<sup>3</sup>NHLP previously summarized relevant HUD waivers for 2003. NHLP, *HUD Waivers Benefit Individual Program Participants and Facilitate the Use of Project-Based Vouchers*, 33 HOUS. L. BULL. 320 (2003).

<sup>4</sup>See <http://www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm> (HOME resources and Waiver). It would be helpful to advocates, public housing agencies and other recipients of HUD programs if other offices within HUD, especially Public and Indian Housing, Fair Housing and Housing, provided on the web a list by year of waivers granted by program (e.g., Project-Based Vouchers) and subject matter (e.g., reasonable accommodation).

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<sup>5</sup>There is no limitation on who may request a waiver, but all the published waivers appear to be from PHAs, project owners and other recipients of grant funds, including cities. There does not seem to be a prohibition on waiver requests from program participants, but it is not the practice. If a program participant sought a waiver, it would seem that obtaining the grant recipient's endorsements—such as the PHA—would substantially improve the likelihood of success. If that is true, there are possibly few situations in which a recipient of assistance would make the waiver request independently.

<sup>6</sup>24 C.F.R. 982.505(c)(3) (2004).

<sup>7</sup>Public Housing Agency (PHA) Flexibility to Manage the Housing Choice Voucher Program in 2005, PIH Notice 2005-9 (Feb. 25, 2005).

<sup>8</sup>Letter from Sandra B. Henriquez, Administrator/CEO, Boston Housing Authority, to Dr. Alfred C. Jurison, Director Housing Voucher Management and Operations Division, HUD (Mar. 9, 2005), on file at NHLP.

<sup>9</sup>Letter from Michael Liu, Assistant Secretary, HUD to Sandra Henriquez, Administrator/CEO, Boston Housing Authority (Apr. 4, 2005), on file at NHLP.

had taken other steps to reduce costs including “suspending the issuance of new vouchers, conducting additional rent reasonableness reviews for units currently under HAP, reviewing subsidy standards to see if they are overly generous, and implementing a reduction in the payment standard . . . .” HUD also stated that it reviewed the funding projections of the BHA. In granting the waiver request, HUD cautioned that “any HUD-approved exception standards granted as a reasonable accommodation in accordance with 24 CFR Section 982.505(d) should not be reduced.”

## Reasonable Accommodation of Disability

### Increases in Payment Standards

A PHA may approve a higher payment standard as a reasonable accommodation to a person with a disability if the rent is within the basic range (90 to 110% of Fair Market Rent (FMR)).<sup>10</sup> HUD granted a number of waiver requests which resulted in an increase of the payment standard to an amount above 120% of the FMR.

All of the requests approved were for a waiver of the cap on the PHA’s ability to approve a payment standard above the basic range. Ten waivers were granted for the general purpose of enabling the participant to locate or remain in housing that provided the personal connections and necessary space and services for a healthy, independent life.<sup>11</sup> In two cases the waiver was granted for the above reasons, as well as to allow the participant the time to find another unit.<sup>12</sup> HUD granted another waiver to allow a voucher participant to rent a unit close to the medical care facilities that were required frequently by a disabled family member.<sup>13</sup> Two waivers were granted to allow participants to live near relatives who assist with daily living activities.<sup>14</sup> HUD granted a waiver to allow a participant to remain in the space where he currently lived and received supportive services and training in life skills.<sup>15</sup> In another case, HUD granted a waiver to allow a participant who suffered from a mental condition that causes severe depression and paranoia to maintain a stable

lifestyle and live independently.<sup>16</sup> Finally, HUD granted a request where a participant was wheelchair-dependent in an area where only 3% of units were wheelchair-accessible, and the participant’s doctor had advised that relocation would be detrimental to the participant’s health.<sup>17</sup>

### Housing Quality Standards

A dwelling unit is required to have at least one window in the living room and in each sleeping room.<sup>18</sup> A waiver was granted because a unit was determined to have sufficient illumination from its large bedroom and bathroom windows, the unit had amenities that accommodated the voucher participant’s disabilities, and other suitable housing was unavailable in the vicinity.<sup>19</sup>

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*A PHA may approve a higher payment standard as a reasonable accommodation to a person with a disability if the rent is within the basic range.*

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### Pro-Rata Payment Standard

One PHA requested a waiver to the shared housing regulations to permit the use of a payment standard for a one-bedroom unit rather than the pro-rata standard for a three-bedroom unit.<sup>20</sup> The waiver was granted because it was beneficial for the participant, who had been diagnosed with bipolar disorder and intermittent explosive disorder, to live in a single-family home with a person he trusts.<sup>21</sup>

## Project-Based Vouchers

### Development Located in Census Tract with Poverty Rate Greater than 20%

Section II, subpart E, Revisions to PHA Project-Based Assistance Program, Initial Guidance provides that all new project-based voucher assistance agreements must be for units in census tracts with poverty rates of less than 20%.<sup>22</sup> HUD has granted waivers for several developments in census tracts with poverty rates as high as 78.32%. In

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<sup>10</sup>24 C.F.R. § 982.505(d) (2004).

<sup>11</sup>68 Fed. Reg. 54,936, 54,951 (Sept. 19, 2003); 69 Fed. Reg. 11,714, 11,732 (Mar. 11, 2004) (four waivers); 69 Fed. Reg. 47,250, 47,284 (Aug. 4, 2004) (two waivers); 69 Fed. Reg. 64,440, 64,455 (Nov. 4, 2004); 70 Fed. Reg. 2,218, 2,239 (Jan. 12, 2005); 70 Fed. Reg. 18,194, 18,214 (Apr. 8, 2005) (two waivers).

<sup>12</sup>70 Fed. Reg. 2,218, 2,239 (Jan. 12, 2005) (two waivers).

<sup>13</sup>68 Fed. Reg. 54,936, 54,951 (Sept. 19, 2003).

<sup>14</sup>69 Fed. Reg. 11,714, 11,731 (Mar. 11, 2004); 69 Fed. Reg. 62,992, 63,004 (Oct. 28, 2004).

<sup>15</sup>69 Fed. Reg. 11,714, 11,732 (Mar. 11, 2004).

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<sup>16</sup>69 Fed. Reg. 47,250, 47,284 (Aug. 4, 2004).

<sup>17</sup>*Id.*

<sup>18</sup>24 C.F.R. 982.401(f)(2)(i) (2004).

<sup>19</sup>69 Fed. Reg. 62,992, 63,004 (Oct. 28, 2004).

<sup>20</sup>24 C.F.R. § 982.617 (2004).

<sup>21</sup>70 Fed. Reg. 2,218, 2,240 (Jan. 12, 2005).

<sup>22</sup>66 Fed. Reg. 3,605, 3,608 (Jan. 16, 2001).

some cases, the poverty rate of the census tract was not mentioned.<sup>23</sup>

The justification for granting the waivers was primarily based upon whether the plan was consistent with the goal of deconcentration and expanding housing opportunities. HUD granted waivers for developments located on census tracts with poverty rates ranging from 22.8 to 78.32%.<sup>24</sup> Examples include:

- A request for a project in a census tract with a poverty rate of 23.4% was granted because the project was located in a Tax Increment Financing (TIF) district.<sup>25</sup>
- HUD granted a request for developments on census tracts with poverty rates of 34 and 50% because the developments were associated with HOPE VI projects.<sup>26</sup>
- HUD granted requests where the units were in areas with high growth rates and large increases in the number of businesses and wage earners.<sup>27</sup>

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<sup>23</sup>There is no census tract information in the following grant of waivers: 68 Fed. Reg. 54,936, 54,953 (Sept. 19, 2003) (waiver granted because the City of New Orleans had developed an Impact Neighborhood Strategy that promoted rehabilitating projects in cluster areas); 69 Fed. Reg. 11,714, 11,732 (Mar. 11, 2004) (waiver granted because the projects were located in a HUD-designated Empowerment Zone); *id.* 11,733 (waiver granted because poverty level in the area had decreased by 4% since the previous census and because the project was scheduled to be demolished in 2005); 69 Fed. Reg. 62,992, 63,007 (Oct. 28, 2004) (waiver granted because the census tract will undergo revitalization as a result of two HOPE VI grants); *id.* 63,008 (waiver granted because the census tract will undergo revitalization as a result of two HOPE VI grants); *id.* (waiver granted because census tract is in Empowerment Zone); *id.* 63,010 (Oct. 28, 2004) (waiver granted because the Department of Neighborhood Development was investing a substantial amount of public dollars); *id.* (waiver granted because of construction projects underway in the project area, such as a new convention center, hotel, civic center, and community college); 70 Fed. Reg. 2,218, 2,241 (Jan. 12, 2005) (waiver granted because project was located in an area of anticipated construction projects totaling an estimated \$850 million); 70 Fed. Reg. 18,194, 18,215 (Apr. 8, 2005) (waiver granted because the development was undertaken as part of a redevelopment plan that would deconcentrate poverty in the area); *id.* (waiver granted because the neighborhood was undergoing significant revitalization that would result in a net decrease in assisted housing units); 70 Fed. Reg. 35,968, 35,981-82 (Jun. 21, 2005) (HOPE VI); *id.* 35,981 (waiver granted because project located in HUD-designated Renewal Community and Enterprise Zone).

<sup>24</sup>68 Fed. Reg. 54,936, 54,952 (Sept. 19, 2003) (52%; 28.9%); *id.* 54,953 (30.5 to 54.2%); *id.* 54,954 (22.8%; 78.32%; 24.9%); 69 Fed. Reg. 62,992, 63,007-09 (Oct. 28, 2004) (40.1%; 42.6%; 23%; 39.6%; 34.4%; 30%; 28%); 69 Fed. Reg. 64,440, 64,456-7 (Nov. 4, 2004) (37.1%); 70 Fed. Reg. 35,968, 35,981-83 (Jun. 21, 2005) (39.6%, one waiver for two tracts with 29.9% and 39.6%).

<sup>25</sup>69 Fed. Reg. 64,440, 64,457 (Nov. 4, 2004).

<sup>26</sup>68 Fed. Reg. 54,936, 54,952 (Sept. 19, 2003) (50%); 69 Fed. Reg. 47,250, 47,285 (Aug. 4, 2004) (34%).

<sup>27</sup>68 Fed. Reg. 54,936, 54,952 (Sept. 19, 2003) (the growth rates between 1990 and 2000 in the two areas were 37 and 39%; and there was a 23% increase in the number of businesses and a 20% increase in the number of wage earners).

- HUD granted a waiver in a 34.1% poverty rate community due to a net reduction of low-income housing units in an area combined with an increase in the percentage of market-rate units in the project.<sup>28</sup>
- HUD granted a request in a 25% poverty census tract due to a decline of 4% in the poverty rate and a 57% increase in housing prices.<sup>29</sup>
- HUD granted a request for a project in an area where 2,200 new market-rate residential units had recently been completed and more were planned to accommodate employees of a new research facility.<sup>30</sup>
- HUD granted a waiver to a project in a census tract with a poverty rate of 25% because of recent investment in housing, commercial and retail projects totaling over \$109 million.<sup>31</sup>
- Other requests were granted when the projects were located in census tracts with poverty rates of 26 and 28% because housing development and infrastructure improvement initiatives were planned.<sup>32</sup>
- In a case in which a waiver was approved, the poverty rate of the census tract, which included students, exceeded 20%. When students were excluded from the analysis, the poverty rate was below the threshold.<sup>33</sup>

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*The justification for granting the waivers was primarily based upon whether the plan was consistent with the goal of deconcentration and expanding housing opportunities.*

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### **Project-Based Voucher Units Exceeding 25% of the Units in a Building**

Section II, subpart F of the Initial Guidance for project-based vouchers states that no more than 25% of the dwelling units in any building may be assisted under a HAP contract for project-based vouchers. However, the percentage can be exceeded when the dwelling units are

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<sup>28</sup>69 Fed. Reg. 11,714, 11,732-33 (Mar. 11, 2004).

<sup>29</sup>*Id.* 11,733.

<sup>30</sup>70 Fed. Reg. 2,218, 2,239 (Jan. 12, 2005).

<sup>31</sup>*Id.* 2,241.

<sup>32</sup>69 Fed. Reg. 62,992, 63,007 (Oct. 28, 2004) (28%); 69 Fed. Reg. 64,440, 64,458 (Nov. 4, 2004) (26%).

<sup>33</sup>69 Fed. Reg. 11,714, 11,733 (Mar. 11, 2004) (census tract with poverty rate of 23.3%; poverty rate if students are excluded is not given, but is estimated by HUD to be below 20%).

specifically made available for elderly families, disabled families and families receiving supportive services.<sup>34</sup> HUD granted a number of waivers for family units based upon the self-sufficiency nature of the services, such as assistance with finding and retaining employment, financial responsibility, and encouraging neighborhood and community involvement.<sup>35</sup>

### Competitive Bidding

PHAs must engage in a competitive bidding process for awarding project-based voucher assistance.<sup>36</sup> The regulations require PHAs to select units to be subsidized with project-based voucher assistance in accordance with a written, HUD-approved unit selection policy that prescribes advertising procedures that must be followed. In addition, the regulation requires that a PHA's written selection policy identify the factors the PHA will use to rank and select applications.

HUD granted sixteen waiver requests because the particular development had already been competitively selected for Low-Income Housing Tax Credits (LIHTC).<sup>37</sup> HUD granted other waivers on similar grounds, including the fact that the developer successfully competed for HOPE VI funds.<sup>38</sup>

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<sup>34</sup>66 Fed. Reg. 3,605, 3,608 (Jan. 16, 2001).

<sup>35</sup>68 Fed. Reg. 54,936, 54,953 (Sept. 19, 2003) (array of services); *id.* 54,953-54 (childcare, education programs, voucher programs); *id.* 54,954 (all units will participate in Family Self-Sufficiency program); 69 Fed. Reg. 62,992, 63,008 (Oct. 28, 2004) (living skills program); *id.* 63,009 (two waivers for Family Self-Sufficiency programs); *id.* 63,010 (employment and educational support services); 69 Fed. Reg. 64,440, 64,456-57 (Nov. 4, 2004) (self-sufficiency services); *id.* 64,458 (economic self-sufficiency services); 70 Fed. Reg. 2,218, 2,238 (Jan. 12, 2005) (services included financial literacy, nutrition, family interaction, government and community awareness, job training, and increased health care awareness); 70 Fed. Reg. 35,968, 35,981 (Jun. 21, 2005) (thirty-one or thirty-three units participated in a Family Self-Sufficiency (FSS) program, other two units occupied by disabled households); *id.* 35,983 (three waivers granted for projects with job training services).

<sup>36</sup>24 C.F.R. § 983.51 (2004).

<sup>37</sup>68 Fed. Reg. 54,936, 54,952 (Sept. 19, 2003) (two waivers); 69 Fed. Reg. 47,250, 47,285 (Aug. 4, 2004); *id.* 47,285-86; 69 Fed. Reg. 62,992, 63,005-06 (Oct. 28, 2004) (three waivers); 69 Fed. Reg. 64,440, 64,456 (Nov. 4, 2004) (two waivers); *id.* 64,457 (three waivers); 70 Fed. Reg. 2,218, 2,237-38 (Jan. 12, 2005) (three waivers); 70 Fed. Reg. 18,194, 18,214-15 (Apr. 8, 2005).

<sup>38</sup>68 Fed. Reg. 54,936, 54,951-52 (Sept. 19, 2003) (three HOPE VI waivers); *id.* 54,953 (the waiver was granted because the PHA's development partner had already been competitively selected). 69 Fed. Reg. 11,714, 11,733 (Mar. 11, 2004) (HOPE VI); 69 Fed. Reg. 47,250, 47,285 (Aug. 4, 2004) (HOPE VI); *id.* 47,285 (the waiver was granted because the project-based assistance was being attached to a YMCA project that had already been competitively selected); 69 Fed. Reg. 64,440, 64,456 (Nov. 4, 2004) (the waiver was granted because the project had already undergone a competitive process); 70 Fed. Reg. 2,218, 2,237-38 (Jan. 12, 2005) (HOPE VI); *id.* 2,238 (waiver was granted because the project had already undergone a competitive selection process); *id.* 2,238-39 (HOPE VI); *id.* 2,239 (HOPE VI); 70 Fed. Reg. 18,194, 18,214-15 (Apr. 8, 2005) (three waivers were granted because the projects had already undergone competi-

HUD also granted two waivers to a PHA in New Orleans because of the uniqueness confronting the New Orleans PHA and low-income residents of New Orleans. These problems included administrative receivership, lack of affordable housing, and a complex ownership structure.<sup>39</sup>

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*HUD granted sixteen waiver requests because the particular development had already been competitively selected for Low-Income Housing Tax Credits.*

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### Project-Based Vouchers and Section 202

Project-based voucher assistance may not be attached to units for a project with a Section 202 loan.<sup>40</sup> A waiver was granted based on HUD's plans to remove this restriction.<sup>41</sup>

### Specific Disabilities

Under the project-based voucher program, PHAs may adopt a preference for admission of families that include a person with disabilities, but may not adopt a preference for persons with a specific disability.<sup>42</sup>

In one case, a PHA requested a waiver in order to target members of the homeless population with a serious and persistent mental illness, who would otherwise be unable to maintain their position on waiting lists due to not having a fixed address, not understanding materials sent to them, and frequent hospitalizations. The PHA proved to the satisfaction of HUD that even if homeless applicants managed to obtain a voucher, they would still have problems with the housing search, due to the stigma associated with mental illness, lack of landlord references, and bad credit.<sup>43</sup>

In a similar case, a PHA requested a waiver because it wished to target homeless individuals with disabilities (primarily mental illnesses) that have significantly interfered with their ability to obtain and maintain themselves in housing, and for whom supportive services cannot be provided in a non-segregated setting.<sup>44</sup>

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tive selection processes); *id.* 18,215 (development partner had already received funds through a competitive selection process).

<sup>39</sup>70 Fed. Reg. 18,194, 18,215 (Apr. 8, 2005) (two waivers).

<sup>40</sup>24 C.F.R. 983.7(c)(9) (2004).

<sup>41</sup>70 Fed. Reg. 35,968, 35,981 (Jun. 21, 2005).

<sup>42</sup>24 C.F.R. 982.207(b)(3) (2004).

<sup>43</sup>69 Fed. Reg. 11,714, 11,731 (Mar. 11, 2004).

<sup>44</sup>69 Fed. Reg. 62,992, 63,010 (Oct. 28, 2004).

The law also requires that only persons with HIV/AIDS may occupy units developed with Housing Opportunities for Persons with AIDS (HOPWA) funds.<sup>45</sup> In a number of cases involving project-based vouchers in units that also receive HOPWA funds, PHAs perceived a conflict between the two programs and sought waivers to pass over persons on their waiting lists in order to select a participant with HIV/AIDS.<sup>46</sup>

HUD also granted a waiver to fourteen housing agencies for units that contained project-based vouchers with the LIHTC. The Alabama Housing Finance Authority requires that a project receiving a tax credit allocation designate no fewer than 10% of the units for individuals with mental retardation (with additional points for 15% or more). HUD issued a waiver to allow the Alabama owners to select applicants with mental disabilities.<sup>47</sup>

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*HUD granted a waiver in order to give the targeted population the same opportunity as others to enjoy the benefits of secure affordable housing.*

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#### Site-Specific Waiting Lists

Site-specific waiting lists are prohibited under the project-based voucher program.<sup>48</sup> However, in the case of the developments targeting members of the homeless population discussed above, HUD granted a waiver in order to give the targeted population the same opportunity as others to enjoy the benefits of secure affordable housing, which would be difficult without a site-specific waiting list for the reasons already described.<sup>49</sup>

In other cases, HUD granted a waiver to the site-based waiting list rule because the requests were consistent with Section 8(o)(13)(J) of the United States Housing Act of 1937, which allows PHAs to maintain separate waiting lists for project-based voucher developments as long as all families on the PHA's waiting list can place their names on any of the separate waiting lists.<sup>50</sup> There is no indication in the

granting of the waiver request what evidence the PHA submitted to demonstrate that all applicants were fully aware of their opportunity to get on the site-based waiting list.

#### HAP Contracts

The number of vouchers to be project-based must not be under a tenant-based or project-based voucher HAP contract or otherwise committed, e.g., vouchers issued to families searching for housing or units with a HAP contract.<sup>51</sup> HUD granted a waiver to a PHA because the development would not be ready until the PHA would likely have sufficient turnover of vouchers to meet its contractual obligations under the HAP contract.<sup>52</sup>

#### REAC Inspections

HUD's Real Estate Assessment Center must provide an independent physical inspection of a PHA's inventory of properties.<sup>53</sup> Eleven waivers were granted after three hurricanes hit an area in August and September of 2004, causing roof and/or soffit and fascia damage to 70% of family units, with repairs expected to take twelve months.<sup>54</sup>

#### Section 3

Employment and other economic opportunities generated by HUD assistance or HUD-assisted projects covered by Section 3 of the Housing and Urban Development Act of 1968 are required, to the greatest extent feasible, to be directed to low- and very-low income persons, particularly persons who are recipients of HUD housing assistance. All Section 3-covered contracts are required to include a contract that reflects compliance with Section 3.<sup>55</sup> A Section 3 waiver was granted to the city of Watsonville, California, because the Department of Commerce's Economic Development Administration took the position that the inclusion of the Section 3 clause in a contract would conflict with its procurement regulations and stated that it would deny a \$2.75 million grant for a public parking structure if the clause was not removed.<sup>56</sup>

#### Conclusion

HUD regulatory waivers continue to be a fairly common occurrence. In general, the waivers recently granted

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<sup>45</sup>42 U.S.C. § 12,901-12,912 (West, WESTLAW current through P.L. 109-57 approved 08-02-05); 24 C.F.R. § 574.3 (2004) (definition of eligible person).

<sup>46</sup>68 Fed. Reg. 54,936, 54,951 (Sept. 19, 2003) (three waivers); 69 Fed. Reg. 47,250, 47,280 (Aug. 4, 2004); 69 Fed. Reg. 64,440, 64,456 (Nov. 4, 2004); 70 Fed. Reg. 2,218, 2,240 (Jan. 12, 2005) (two waivers).

<sup>47</sup>69 Fed. Reg. 47,250, 47,279-84 (Aug. 4, 2004) (fourteen waivers).

<sup>48</sup>24 C.F.R. § 983.203(a)(3) (2004).

<sup>49</sup>69 Fed. Reg. 11,714, 11,731 (Mar. 11, 2004).

<sup>50</sup>42 U.S.C. § 1437f(o)(3)(J) (West 2003); 70 Fed. Reg. 2,218, 2,237 (Jan. 12, 2005); 70 Fed. Reg. 18,194, 18,215 (Apr. 8, 2005) (two waivers).

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<sup>51</sup>24 C.F.R. 983(a)(2) (2004).

<sup>52</sup>70 Fed. Reg. 35,968, 35,981 (Jun. 21, 2005).

<sup>53</sup>24 C.F.R. 902.20 (2004).

<sup>54</sup>70 Fed. Reg. 35,968, 35,977-79 (Jun. 21, 2005) (eleven waivers).

<sup>55</sup>24 C.F.R. § 135.38 (2004).

<sup>56</sup>69 Fed. Reg. 64,440, 64,441 (Nov. 4, 2004).

by HUD appear to be consistent with the reasonable and efficient administration of HUD programs by local entities. However, the potential for abuse remains present.

Advocates should work closely with local PHAs to determine when they are seeking waivers of regulations. Resident Advisory Boards and PHA Boards of Commissioners should request PHA staff to provide them with advance notice of any proposed request for a waiver of rules that have an impact on a large number of program participants. ■

## Recent Cases

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

### Constitutional Law — First Amendment; No-Trespass Policies

*La Vean v. Randall*, 2005 WL 2405957 (W.D. Mich. Sept. 29, 2005). The United States District Court for the Western District of Michigan rejected pro se plaintiff political organizer's First Amendment claim and granted defendant housing commission and officials' motion for summary judgment. Plaintiff challenged Defendants' decision to deny him access to senior residential properties operated by Defendants. Plaintiff had sought access to these properties in order to publicize a Michigan Democratic Party caucus site. The court concluded that the properties operated by Defendants were a non-public forum for First Amendment purposes, in which those restrictions on speech that are "reasonable and viewpoint-neutral" are constitutionally valid. Citing, *inter alia*, residents' privacy interests and policies circulated by HUD in 1996 and 2002, the court further concluded that Defendants' actions did not violate these constitutional requirements. The court stated: "In more prosaic terms, an unwanted outsider simply has no constitutional right of access to someone else's front door."

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<sup>1</sup><http://www.westlaw.com>.

<sup>2</sup><http://www.lexis.com>.

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

### Eviction — Good Cause

*AIMCO Props., LLC v. Dziejewicz*, 2005 WL 2139845 (N.H. Sup. Ct. Sept. 7, 2005) (subject to rehearing). In this case, the Supreme Court of New Hampshire held that expiration of a lease term did not constitute good cause required for eviction from a residential property restricted under state statute, R.S.A. 540:2. The state statute permits termination of tenancy in restricted residential properties only for the following reasons:

- (a) Neglect or refusal to pay rent due and in arrears, upon demand.
- (b) Substantial damage to the premises by the tenant, members of his household, or guests.
- (c) Failure of the tenant to comply with a material term of the lease.
- (d) Behavior of the tenant or members of his family which adversely affects the health or safety of the other tenants or the landlord or his representatives, or failure of the tenant to accept suitable temporary relocation due to lead-based paint hazard abatement . . . .
- (e) Other good cause.
- (f) The dwelling unit contains a lead exposure-hazard which the owner will abate by [methods specified in the statute] . . . . ■

# Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD) and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued in September of 2005. 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,<sup>1</sup> (2) bound volumes of the *Federal Register*, (3) HUD Clips,<sup>2</sup> (4) HUD,<sup>3</sup> and (5) USDA's Rural Development Web page.<sup>4</sup> Citations are included with each document to help you secure copies.

## Federal Register Final Rule

### **70 Fed. Reg. 54,200 (Sept. 13, 2005) Mixed-Finance Development for Supportive Housing for the Elderly or Persons With Disabilities and Other Changes to 24 CFR Part 891**

**Summary:** This final rule implements statutory changes that enable the use of mixed-finance and for-profit participation in the Section 202 Supportive Housing program for the elderly and the Section 811 Supportive Housing program for persons with disabilities, as well as making other changes to those programs. This final rule follows an interim rule published on December 1, 2003.

**Effective Date:** October 13, 2005.

### **70 Fed. Reg. 54,984 (Sept. 19, 2005) Revisions to the Public Housing Operating Fund Program**

**Summary:** This rule amends the regulations of the Public Housing Operating Fund Program to provide a new formula for distributing operating subsidies to public housing agencies (PHAs) and to establish requirements for PHAs to convert to asset management. The final rule follows publication of an April 14, 2005, proposed rule.

**Effective Date:** November 18, 2005.

<sup>1</sup>[http://www.access.gpo.gov/su\\_docs](http://www.access.gpo.gov/su_docs).

<sup>2</sup><http://www.hudclips.org/cgi/index.cgi>.

<sup>3</sup>To order notices and handbooks from HUD, call (800) 767-7468 or fax (202) 708-2313.

<sup>4</sup><http://www.rdinit.usda.gov/regs>.

## Federal Register Proposed Rule

### **70 Fed. Reg. 53,480 (Sept. 8, 2005) Disposition of HUD-Acquired Single Family Property; Good Neighbor Next Door Sales Program**

**Summary:** This proposed rule would establish regulations for HUD's new Good Neighbor Next Door Sales Program. The requirements for the new program are closely modeled on those for HUD's Officer Next Door and Teacher Next Door Sales Programs.

**Comments Due Date:** November 7, 2005.

## Federal Register Notices

### **70 Fed. Reg. 53,488 (Sept. 8, 2005) Eligibility of Firefighters and Emergency Medical Technicians To Participate in the Officer Next Door Sales Program**

**Summary:** This notice announces the eligibility of firefighters and emergency medical technicians to purchase HUD-acquired homes located in HUD-designated revitalization areas at a discount, in accordance with HUD's regulations for the Officer Next Door Sales Program. The notice also refers to the new proposed Good Neighbor Next Door Sales Program.

### **70 Fed. Reg. 53,490 (Sept. 8, 2005) Notice of Funding Availability for Fiscal Year (FY) 2005 Self-Help Homeownership Opportunity Program (SHOP)**

**Summary:** SHOP funds are intended to facilitate and encourage innovative homeownership opportunities on a national geographically diverse basis through self-help housing programs that require a significant amount of sweat equity by the homebuyer toward the construction or rehabilitation of the dwelling. Housing assisted under this NOFA must involve labor contributed by homebuyers and volunteers in the construction of dwellings and by other activities that involve the community in the project.

### **70 Fed. Reg. 53,679 (Sept. 9, 2005) Notice of Funding Availability for Fiscal Year (FY) 2004 HOPE VI Main Street Grants; Notice of Extension of Application Submission Date for Areas Affected by Hurricane Katrina**

**Summary:** This notice announces that HUD has extended the submission deadline date for the FY 2004 HOPE VI Main Street Grants Notice of Funding Availability (NOFA) for those applicants located in areas designated by the President as disaster areas, and other areas that experienced major power outages due to Hurricane Katrina. For those applicants located in one of these states or counties, the revised submission date is September 7, 2005, at 5:15 p.m. For applicants unaffected by Hurricane Katrina, the submission deadline remains unchanged.

**70 Fed. Reg. 54,068 (Sept. 13, 2005)  
Notice of HUD's Fiscal Year (FY) 2005 Notice of Funding Availability Policy Requirements and General Section to SuperNOFA for HUD's Discretionary Grant Programs; Community Development Technical Assistance NOFA; Competition Reopening Announcement**

*Summary:* On March 21, 2005, HUD published its Fiscal Year (FY) 2005, Notice of Funding Availability (NOFA) Policy Requirements and General Section to the SuperNOFA for HUD's Discretionary Grant Programs. The CD-TA NOFA competition, which was included in the SuperNOFA, closed on June 1, 2005. This document announces the reopening of the CD-TA NOFA competition.

*Dates:* The new application submission date for the CD-TA is October 13, 2005.

**70 Fed. Reg. 55,916 (Sept. 23, 2005)  
Public Housing Graduation Incentive Bonus Program; Correction**

*Summary:* On June 2, 2005, HUD published its Notice of Funding Availability (NOFA) for the Public Housing Graduation Incentive Bonus program. The NOFA includes a provision that disqualifies applicants that request funding in excess of the applicable maximum award. The department has determined that this provision was erroneously included in this NOFA. This notice corrects this error by removing the provision from the NOFA. Except for the changes discussed here, and the other technical change published on July 29, 2005, the original NOFA published on June 2, 2005, is unchanged.

## **RHS Administrative Letters**

### **Rental Assistance (RA) for Hurricane Katrina Evacuees (Sept. 12, 2005).**

*Summary:* USDA Rural Development is committed to directing all available RA resources to help people displaced by Hurricane Katrina and occupying a Rural Housing Service (RHS) financed multifamily housing (MFH) project.

Unused RA (approximately 360 units) from the Administrator's reserve will be used to help tenants displaced from RHS MFH projects that did not have RA, and disabled evacuees who are income eligible to receive RA.

Unused RA, which meets the section 3560.259(a)(4) definition, may be transferred within each state to address occupancy by evacuees or displaced MFH tenants with no further clearance from the National Office.

States may transfer any RA with a displaced tenant who is moving from a hurricane damaged MFH project to another MFH project with a vacancy. The expectation is that the tenant and rental assistance would return to the original project once the damage is repaired.

RHS is immediately making available 3,000 obligations of emergency RA to support occupancy by evacuees over

a 6-month period. RHS is allocating funding sufficient to assist 300 tenant households in each of the following states: Alabama, Louisiana, Mississippi, Missouri, Texas, Michigan, Oklahoma and Tennessee. RHS is allocating funds sufficient to assist 200 tenant households in South Dakota, 100 tenant households each in Nebraska, Kansas and Arkansas, and to assist 50 tenant households in Oregon and Minnesota. To meet the immediate needs of evacuees in states not listed above, there is funding sufficient to assist an additional 50 tenant households that has not been allocated to any particular state. The units are only to be used in MFH projects with vacant units being occupied by evacuees or MFH tenants displaced by Hurricane Katrina.

RHS anticipates an additional allocation of approximately 7,000 units of emergency RA to be provided shortly.

*Expiration Date:* September 30, 2006.

### **MFH Guidance Relating to Hurricane Katrina Evacuees (Sept. 14, 2005).**

*Summary:* RHS is issuing additional guidance concerning Rental Assistance and Tenant Certification processing for evacuees, security deposits, and utility deposits.

Owners of Section 515 developments may accept displaced tenants from Rural Development (RD) financed properties, Section 502 and 504 borrowers, or other Hurricane Katrina evacuees. For initial occupancy, evacuees may provide the owners with documentation of being registered with Federal Emergency Management Agency (FEMA) in lieu of a Letter of Priority Entitlement or other documentation that demonstrates the applicant resided in the federally declared disaster area. Other documentation may include: a drivers license or other picture ID with an address; an application number from FEMA; or the owner may verify the address, date of birth etc., from a credit agency. The evacuees must have a FEMA registration number or claim number within 30 days of occupancy.

The Agency will waive 7 C.F.R. § 3560.152(e)(2)(i) and allow for self-verification of income for the first 90 days of occupancy but not to exceed 6 months. Also, imputed income for assets due to homeownership affected by the hurricane will be waived.

Zero income applicants may be allowed to reside in apartment units; however, RA or other tenant subsidy must be available to the applicant.

The Agency will waive 7 C.F.R. § 3560.204 security deposit requirements if requested by the owner of the property.

The Agency will allow use of project funds to cover application fees normally paid by the tenant, if requested by the owner.

The Agency may allow flexibility in the owners' selection criteria to accommodate the evacuees, if requested by the owner. This includes credit and criminal checks. However, the owner's selection criteria cannot be arbitrary or discriminatory.

The Agency will waive 7 C.F.R. § 3560.156(b)(2) requiring leases to be for a 1 year period and should be issued on a month-to-month basis, not to exceed 6 months.

The Agency will waive 7 C.F.R. § 3560.152(e)(2)(iii), which requires the tenant to submit a tenant certification form to the Agency within 10 days of the effective date of any initial certification or any changes in the tenant status.

The Agency will allow all Tenant Certifications for the initial move-in of an evacuee during the month of September to be effective September 1, 2005.

An Administrator's Exception (7 C.F.R. § 3560.8) to 7 C.F.R. § 3560.11 is granted to cover the cost of the initial turn on of utilities for evacuee households using RA funds.

*Expiration Date:* September 30, 2006 ■

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