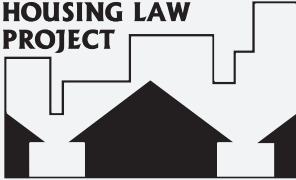


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# Housing Law Bulletin

Volume 36 • October 2006

Published by the National Housing Law Project



*San Francisco Advocates Respond to  
Public Housing Operating Subsidy Crisis*

—see page 197

*Victory: Ninth Circuit Allows Residents  
to Challenge RD Prepayment*

—see page 206

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## Table of Contents

	Page
San Francisco Advocates Respond to Operating Subsidy Funding Crisis.....	197
New Streamlined PHA Plan Template .....	202
Section 8 Landlord Required to Provide Consecutive Eviction Notices.....	205
Victory: Ninth Circuit Allows Residents to Challenge RD Prepayment .....	206
Advocates Take Issue with HUD's Troubled Projects Policy .....	208
Recent Cases .....	212
Recent Housing-Related Regulations and Notices..	213

### Announcements

Publication List/Order Form.....	215
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**Cover:** San Francisco Supervisor Tom Ammiano addresses a crowd of advocates, public housing residents, fellow supervisors, and a representative of the Mayor's office at a demonstration at City Hall to protest the loss of public housing funds due to HUD operating subsidy shortfalls. Photo by Catherine Bishop.

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## San Francisco Advocates Respond to Operating Subsidy Funding Crisis

Public housing agencies (PHAs) across the nation have been scrambling to respond to the new operating subsidies formula being used by the Department of Housing and Urban Development (HUD). But the success of local advocates in the San Francisco area demonstrates that strategic cooperation can net gratifying results—even on a topic that may seem too esoteric to attract the interest of elected representatives or the media.

On June 23, 2006, all PHAs nationwide, including the San Francisco Housing Authority (SFHA), were told by HUD that there was a \$600 million shortfall in the operating subsidy account, of which \$283 million was due to increases in the cost of utilities. As a result, SFHA would receive only 85.5% of needed funding retroactive to January 1, 2006.<sup>1</sup> It was anticipated that SFHA would receive \$26,544,137 for 2006, \$1,427,629 less than it would have received if it were funded at the amount representing 92% of need.<sup>2</sup> On September 22, 2006, HUD posted on its website a notice that the proration percentage for Fiscal Year (FY) 2006 is now 86.02%.<sup>3</sup>

The amount of operating subsidies that a PHA receives is determined by a formula which is set forth in HUD regulations.<sup>4</sup> For FY 2006, all PHAs nationwide were originally told that they would be funded at 92% of need.<sup>5</sup> For example SFHA received an initial allocation of \$13,985,883 for the first six months of 2006 for an operating subsidy for 6114 units of public housing.

### The National Picture: All PHAs

Underfunding of operating subsidies will continue into FY 2007. The President requested funding for operating subsidies at \$3.564 billion, which is the same level as FY 2006. The Administration stated in the supporting documents to the FY 2007 Budget that this level of funding was calculated at 85.5% of the formula need. Because of the unplanned for or unanticipated shortfall in funding for FY 2006 due to utility increases, plus anticipated

<sup>1</sup>See, e.g., Letter from Elizabeth A. Hanson, Dep. Asst. Sec., REAC to Gregg Fortner, Executive Director SFHA (June 23, 2006).

<sup>2</sup>This reduced level of funding provides approximately \$362 per unit per month.

<sup>3</sup>*Operating Fund Program Explanation of Final Proration Percentage for CY 2006*, at [http://www.hud.gov/offices/pih/programs/ph/am/of/2006prorationexpl\\_sept06.pdf](http://www.hud.gov/offices/pih/programs/ph/am/of/2006prorationexpl_sept06.pdf) (Sept. 22, 2006).

<sup>4</sup>Revisions to the Public Housing Operating Fund Program, Final Rule, 79 Fed. Reg. 54,984 (Sept. 19, 2005) (to be codified at 24 C.F.R. pt. 990).

<sup>5</sup>See, e.g., Letter from Elizabeth A. Hanson, Dep. Asst. Sec., REAC to Gregg Fortner, Executive Director SFHA (Jan. 3, 2006) (proration of 91.96%), available at <http://www.hud.gov/offices/pih/programs/ph/am/of/obletters/ca.pdf>.

increases in FY 2007 for utilities and other costs, the operating subsidies funding level for FY 2007 is likely to be substantially below what is needed. It is estimated that the shortfall for FY 2007 may translate into a funding level of 78% of need.<sup>6</sup>

Currently, the U.S. Congress has passed a bill providing for \$3.564 billion in operating subsidies. In H.R. 5576, the Senate Committee on Appropriations for the Department of Housing and Urban Development Appropriations Act, 2007, allocated \$3.660 billion for operating subsidies, which is an increase of nearly \$100 million over what was requested and what the House passed. This amount is still inadequate, as the need is \$4.5 billion. A recent posting on the HUD website confirms that the need for operating subsidies as determined by the formula for FY 2006 was \$4.142 billion, which does not take into consideration inflation and increases in utility costs for FY 2007.<sup>7</sup>

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*In addition to the reduced funding level for 2006, SFHA is also facing a reduction in operating subsidies because of the adoption of a new funding formula for operating subsidies.*

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### **The National Picture: “Decliner” PHAs**

In addition to the reduced funding level for 2006, SFHA is also facing a reduction in operating subsidies because of the adoption of a new funding formula. Under the new funding formula, approximately 500 of the more than 3000 PHAs nationwide will receive less funding than under the prior formula.<sup>8</sup> SFHA is one of the 500 decliner agencies, and in fact is in the group of 10 PHAs nationwide that will stand to lose the most funding.<sup>9</sup> The charts on page 199 show the fifteen largest decliner PHAs by dollar amount and by percentage reduction in operating subsidies and the fifteen largest gainer PHAs by dollar amount and by percentage increase in operating subsidies.

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<sup>6</sup>A spokeswoman for HUD, Donna White, responded that the projected funding of SFHA at 78% of need “[i]t’s a normal sort of up and down.” She added that, “What we hope is that housing authorities will find ways to still provide quality affordable housing.” Heather Knight, *Budget Fears for Public Housing*, S.F. CHRON., Sept. 19, 2006.

<sup>7</sup>*Operating Fund Program Explanation of Final Proration Percentage for CY 2006*, at [http://www.hud.gov/offices/pih/programs/ph/am/of/2006prorationexpl\\_sept06.pdf](http://www.hud.gov/offices/pih/programs/ph/am/of/2006prorationexpl_sept06.pdf) (Sept. 22, 2006).

<sup>8</sup>For more information, go to <http://www.hud.gov/offices/pih/programs/ph/am/of/> and click on “New Operating Fund Formula Rule, Transition Analysis Report.”

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

The federal regulations provide that a public housing agency which is a decliner/loser agency can stop its losses (“stop-loss”), except for 5% of the difference in funding between the old formula and the new formula, if it converts to asset management (project-based management and project-based budgeting) by October 1, 2006.<sup>10</sup> If an agency fails to convert by October 1, 2006, the regulations further provide that decliner agencies will lose an additional 24% of the difference between the funding under the new operating subsidy formula and the old operating subsidy formula.<sup>11</sup> Prudent PHAs have taken steps to convert to asset management. For example, staff of SFHA have stated that the agency can comply with the current rules and thus avoid the additional 24% reduction. But as of October 1, 2006, HUD has not made available all of the rules regarding conversion to asset management, making compliance hard to gauge.

Congress has partially responded to the problems created for the decliner agencies by HUD’s failure to fully set forth guidelines for compliance. The Senate Committee on Appropriations proposed Section 325 of H.R. 5576 RS, which would provide that the effective dates for any further reductions for decliner agencies be moved forward one year, so that a decliner PHA would have until October 1, 2008, to comply with asset management requirements.<sup>12</sup>

Presumably in response to the Senate action, HUD has posted a notice on its website and sent an email to all PHAs stating that “[a]ll decliner PHAs will be capped at 5% reduction for 2007 regardless of whether they apply for stop loss.”<sup>13</sup> This should mean that SFHA and other decliner agencies will not experience an additional loss of 24% of operating subsidy funding in 2007, but the cryptic notice is ambiguous as to whether the additional 24% reduction will be effective at a later date.<sup>14</sup>

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<sup>10</sup>24 C.F.R. § 990.230(e).

<sup>11</sup>*Id.*

<sup>12</sup>Section 325 provides as follows:

The dates for subsidy reductions and demonstrations for discontinuance of reductions under the new operating fund formula, pursuant to HUD regulations at 24 CFR 990.230, shall be moved forward one year, but implementation of the operating fund formula shall otherwise begin as scheduled on January 1, 2007: Provided, That all public housing agencies determined to be subject to a subsidy reduction under the operating fund formula shall be reduced by the 5% amount referred to in such regulations during calendar year 2007.

<sup>13</sup>The posting on the HUD website, <http://www.hud.gov/offices/pih/programs/ph/am/of/>, provided as follows:

It is the Department’s intent to issue, in the near future in the Federal Register, a rule regarding the Public Housing Operating Fund Program. The rule will modify the transition funding percentage for Federal Fiscal Year 2007 for PHAs (PHAs) that will experience a decline in funding between the old and new funding formulas. All decliner PHAs will be capped at a 5 percent reduction for 2007 regardless of whether they apply for stop loss. Decliner PHAs may still apply for stop loss in 2006 if they want to effect a permanent 5 percent reduction.

<sup>14</sup>*Id.*

**PHA Transition Funding Amounts Under the New Operating Fund Formula**

(Comparing 2004 subsidy eligibility with what PHAs would have received had the new formula been in effect in 2004)

**Top 15 Decliners by Dollar Amount**

Housing Authority Name	State	Transition Amount (Difference between Actual Eligibility and New Formula Eligibility)
New York City	NY	(\$60,811,883)
Cuyahoga	OH	(\$12,191,834)
Newark Housing Agency	NJ	(\$8,824,928)
San Francisco	CA	(\$7,254,629)
Buffalo Municipal Housing Agency	NY	(\$6,245,261)
Rochester Housing Agency	NY	(\$3,759,657)
Las Vegas	NV	(\$3,550,916)
Syracuse Housing Agency	NY	(\$3,236,599)
Detroit Housing Agency	MI	(\$2,864,144)
Allegheny County Housing Agency	PA	(\$2,779,352)
Albany Housing Agency	NY	(\$2,195,411)
Atlantic City Housing Agency	NJ	(\$2,009,912)
Akron Municipal Housing Agency	OH	(\$1,916,972)
Niagara Falls Housing Agency	NY	(\$1,780,215)
Rockford Housing Agency	IL	(\$1,646,707)

**Top 15 Decliners by Percentage**

Housing Authority Name	State	% Loss
Slinger Housing Agency	WI	(83%)
Monroe County Housing Agency	FL	(64%)
Douglas County Housing Agency	MIN	(64%)
Faribault	MIN	(63%)
Yamhill County Housing Agency	OR	(63%)
Marshfield CDA	WI	(63%)
Wessington Springs Housing Agency	SD	(62%)
Cottonwood	MIN	(59%)
Blue Earth County	MIN	(59%)
Boyer City Housing Commission	MI	(57%)
Olmsted County	MIN	(56%)
Oxford Housing Authority	NE	(55%)
Sauk County Housing Agency	WI	(53%)
Iowa City Housing Agency	IA	(53%)
Stanley Housing Agency	WI	(53%)

**Top 15 Gainers by Dollar Amount**

Housing Authority	State	Transition Amount (Difference between Actual Eligibility and New Formula Eligibility)
County of Cook Housing Agency	IL	\$2,152,558
Yonkers Housing Agency	NY	\$2,182,696
New Orleans Housing Agency	LA	\$2,273,240
New Bedford Housing Agency	MA	\$2,754,342
Denver Housing Agency	CO	\$2,766,528
Houston Housing Agency	TX	\$2,782,031
Charlotte	NC	\$2,789,554
Providence Housing Agency	RI	\$2,826,807
Tampa Housing Agency	FL	\$2,917,320
Augusta Housing Agency	GA	\$2,987,443
Monroe	LA	\$3,112,733
Hawaii Housing Agency	HI	\$3,616,554
Dallas	TX	\$4,242,864
Dade County Housing Agency	FL	\$4,926,692
El Paso	TX	\$7,457,229

**Top 15 Gainers by Percentage**

Housing Authority	State	% Gain
Lindstrom Housing Agency	MIN	441%
Beaufort Housing Agency	SC	473%
Boca Raton Housing Agency	FL	671%
Mount Kisco Housing Agency	NY	698%
Bexar County	TX	775%
Danvers Housing Agency	MA	780%
Council Bluffs Housing Agency	IA	810%
Kirkwood	MO	1127%
Monterey County	CA	2497%
Glastonbury Housing Agency	CT	2698%
Kaukauna Housing Agency	WI	3839%
Livermore City	CA	3974%
Naugatuck Housing Agency	CT	4881%
Greenburgh Housing Agency	NY	8234%
Tuckahoe Housing Agency	NY	10,526%

It has been reported that HUD met on September 11, 2006, with the PHA trade groups which were seeking clarification. HUD stated at the meeting that any PHA wanting to limit its losses to 5% must comply with asset management by April 15, 2007, which is at best a six-month extension, and, for some aspects of compliance, only a three-month extension.<sup>15</sup>

HUD apparently reacted to the proposed Senate amendment to H.R. 5576 by splitting the difference. Because the regulations continue to say compliance must be by October 1, most decliner PHAs presumably are already compliant. Others may have to take advantage of the later date and certify by April 15, 2007, as circumstances dictate. Without the Senate's legislative fix, if a PHA which is a decliner agency does not comply with asset management by these specified dates, it could lose the additional 24% of the difference between the funding under the new and old formulas in FY 2008. As stated above, HUD has not issued complete instructions as to the criteria for compliance, and they remain unsettled.<sup>16</sup>

### San Francisco Advocates Respond

SFHA's fiscal year begins on October 1. In July 2006, local housing advocates, including the Housing Rights Committee of San Francisco, Bay Area Legal Aid and the National Housing Law Project prepared comments on the PHA plan and also submitted to SFHA a series of questions arising from the impending reductions in the operating subsidy and the implications of the conversion to asset management.<sup>17</sup> In response, SFHA invited a small group of advocates, including legal services and local tenants' rights organizations, to meet with SFHA staff to discuss the agency's plan for responding to the budget cuts. Prior to the meeting, advocates became aware of the fact that staff of SFHA was scheduling meetings at public housing developments to explain the conversion to asset management. Sara Shortt, a staff person with the Housing Rights Committee, began to attend each of the meetings and to inform residents of the ways in which they could get involved to influence policymakers.

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<sup>15</sup>Operating Fund Program Final Rule: Transition Funding and Guidance on Demonstration of Successful Conversion to Asset Management to Discontinue the Reduction of Operating Subsidy, PIH 2006-14 (Mar. 22, 2006) (PHAs that want to take advantage of the stop-loss provisions have until January 15, 2007, to submit certain elements of the required documentation).

<sup>16</sup>Prior to the posting on the website of the commitment not to extract the 24% from decliner/loser agencies in 2007, HUD had stated in a notice that if a PHA certified compliance by October 1, 2006, it would nevertheless assume that the decliner/loser agencies had not complied and would therefore deduct an additional 24% from funding for FY 2007 and would not restore that deduction, upon determining compliance, until near the end of FY 2007. *See id.*

<sup>17</sup>Letter from Catherine Bishop, NHLP and Phil Morgan, Bay Area Legal Aid, to Gregg Fortner, Executive Director SFHA, June 23, 2006.

Tenants became concerned when informed of the proposed short fall in funding for 2006. They were already familiar with the effects of the prior years of under funding of the operating subsidy formula.<sup>18</sup> They worried that additional cuts would mean getting stranded when the elevators broke down, less security, and failure to make repairs. As Mr. Clark, a disabled tenant, said, "It is all because of the cutbacks. We cannot afford the cutbacks—we just can't. We are not Bushes. We're not people with multimillion-dollar businesses. We are just poor people trying to make it."<sup>19</sup> Housing advocate Sara Shortt noted that, "Low-income housing programs are suffering a slow and steady death by a constant assault of budget cuts. There are two options for families of public housing when the doors are shut or closed. They will leave San Francisco or they will wind up on the streets."<sup>20</sup>

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*The advocates and tenants expanded their strategy to broadening the base of support and forging alliances with other stakeholders.*

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The tenants began to organize. Through visits to nearly every public housing site in the city, postcards from tenants were collected to present to their congressional delegation to protest the cuts, to raise public awareness and to seek assistance. Advocates collected a total of 650 postcards in English, Cantonese, Spanish and Russian. Residents and advocates also set up meetings with members of the congressional delegation in order to brief them on the disastrous impact the cuts would have on San Francisco and to hand-deliver the postcards. These meetings led to an increased awareness of the issue, as well as concrete action taken in October 2006 by Representatives Nancy Pelosi (D-San Francisco), Tom Lantos (D-San Mateo), and Anna Eshoo (D-Palo Alto), who produced a joint letter written to committee members asking for support on the funding issue.

The advocates and tenants expanded their strategy to broadening the base of support and forging alliances with other stakeholders, including the unions representing the employees of SFHA. There are 315 unionized employees of SFHA and all SFHA bargaining contracts expire in

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<sup>18</sup>In the past ten years, PHAs have only twice received 100% of their operating subsidy needs as determined by the formula then in effect and twice the funding has been below 90% of the formula needs. *See Levels of Operating Subsidy Funding Levels FY 1981-2005*, at <http://www.hud.gov/offices/pih/programs/ph/am/of/prorationlevels.pdf>.

<sup>19</sup>Heather Knight, *Budget Fears for Public Housing*, S.F. CHRON., Sept. 19, 2006.

<sup>20</sup>Joshua Sabatini, *As feds cut funds, S.F.'s public housing is threatened*, THE EXAMINER, Sept. 19, 2006.

2006.<sup>21</sup> In other parts of the country, PHA directors were quoted saying they would be forced to lay off staff and in some cases jobs had already been lost due to HUD's June announcement. After the labor unions became involved, the San Francisco Labor Council, AFL-CIO, adopted a resolution to urge the congressional delegation to make up the shortfall in operating subsidies for 2006 due to increased utility costs and to adjust the operating subsidy shortfall for FY 2007.<sup>22</sup>

The public housing residents and other advocates also raised the issue with San Francisco Mayor Gavin Newsom and the Board of Supervisors. As a result, the Board of Supervisors held a hearing to examine the local impact of the loss of funds which was preceded by a demonstration on the steps of City Hall attended by community groups, residents, four members of the Board, and a representative of the Mayor's office.<sup>23</sup> The Board also adopted a resolution urging that the cuts in the operating subsidy be restored and that the language of the Senate Appropriations bill regarding the change in the dates for compliance be preserved.<sup>24</sup> The resolution recognized that inadequate funding "would seriously harm our ability to provide basic services such as security and increase our backlog of repairs to elevator and other vital services to our 6000 public housing [families]."

The Mayor also responded to the issue and sent a letter to Senator Dianne Feinstein (D-CA) asking that she support increased funding for operating subsidies for public housing and to support the language extending the dates for compliance with the stop-loss provisions.<sup>25</sup> He also committed to advocating within the U.S. Conference of Mayors to bring the issue to the forefront, and committed to supporting a local bond measure for \$100 million that could in part pay to rebuild eight San Francisco public housing sites that had been slated for HOPE VI redevelopment.<sup>26</sup>

During these advocacy efforts, the media picked up the story and helped keep a focus on the key issues: that

funds were being arbitrarily cut, there was a documented need for the requested funding, and that without the funding public housing residents would suffer.

## Conclusion

It is significant that so many key elements of the community came together to present the problem of the funding crisis. The residents, the unions, the staff of SFHA, the advocates, Board of Supervisors, the Mayor and the congressional delegation all understood the issue and joined together to advocate for increased funding and a slowdown in the process so that the loser/decliner agencies could have time to comply with the stop-loss provisions. Another key feature of the advocacy is that the advocates and SFHA recognized that they had a common interest. As is well recognized, it is not always the case that PHAs and local advocates who represent or work on behalf of the residents are able to build the trust necessary to work together. The San Francisco success story offers encouragement for PHAs to form relationships with local advocates.<sup>27</sup>

It is also significant that the Mayor believes that public housing should be supported both locally and federally. Advocates are aware that funding to refurbish public housing presents challenges and that there are many unanswered questions. But it is still early in the process and issues such as maintaining or expanding the number of units affordable to the lowest-income families, the right of residents to return to any refurbished units, relocation benefits and other issues will still need to be addressed. ■

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<sup>21</sup>Resolution to Urge Congressional Action to Restore Funding to the San Francisco Housing Authority's Public Housing Operating Budget, signed by Tim Paulson (Sept. 11, 2006), on file at NHLP. Gregg Fortner, executive director of SFHA, reported that twenty-four employees of SFHA were laid off in 2006 and that five years ago SFHA employed 535 workers and that today there are less than 400. Joshua Sabatini, *As feds cut funds, S.F.'s public housing is threatened*, THE EXAMINER, Sept. 19, 2006.

<sup>22</sup>Resolution to Urge Congressional Action to Restore Funding to the San Francisco Housing Authority's Public Housing Operating Budget, signed by Tim Paulson (Sept. 11, 2006), on file at NHLP.

<sup>23</sup>The picture on the cover of this issue of the *Housing Law Bulletin* was taken at the demonstration at City Hall.

<sup>24</sup>Committee/Board of Supervisors, San Francisco, Resolution urging the United States Congress to restore cuts in the budget of the United States Department of Housing and Urban Development, File No. 061316 (Sept. 9, 2006).

<sup>25</sup>Letter from Gavin Newsom, Mayor, San Francisco, to Senator Dianne Feinstein, Sept. 14, 2006.

<sup>26</sup>Cecilia M. Vega, *Newsom says he'll ask voters to shell out to fix public housing*, S.F. CHRON., Sept. 23, 2006.

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<sup>27</sup>See also President's Forum, PHADA members: Please act on our suggestion to publicize local effects of operating fund shortfall, PHADA ADVOCATE (Aug. 16, 2006).

# New Streamlined PHA Plan Template

The Department of Housing and Urban Development (HUD) has recently announced a proposal to simplify the current public housing agency (PHA) plan process by allowing PHAs to utilize a significantly streamlined plan template.<sup>1</sup> No copy of the proposed template was available at the Internet site included in the notice, although HUD provided the National Housing Law Project (NHLP) a draft copy of the template. According to the proposal, HUD will use a template that is considerably smaller than the current templates for annual and five-year streamlined plans, and will reduce the items PHAs must submit to HUD in their annual plans to: a Capital Fund Program Annual Statement; a Demolition and Disposition Statement; the Deconcentration Policy; a Civil Rights Certification; and “any element that is challenged.”<sup>2</sup>

The proposal further indicates that the significantly streamlined plan template will be used by all PHAs, although the United States Housing Act (USHA) only authorizes the use of streamlined PHA plans for high-performing PHAs, small PHAs that have not been designated as troubled, and PHAs that only administer tenant-based assistance.<sup>3</sup> Further, HUD has not amended any of the current regulations for streamlined plans, or published a formal notice of changes to the current streamlined plans. Therefore, an initial question exists concerning the validity of HUD’s current proposal.

The draft template that HUD provided to NHLP is fourteen pages long, including a cover page and three pages of instructions. The substantive portion of the draft is only ten pages, making it less than half the length of the small PHA annual plan template, and one-fourth the length of the current streamlined template for five-year plans.<sup>4</sup> HUD has reduced the template length by excluding from the draft nearly all of the questions, checklists and other guidance which current templates contain to ensure that PHAs thoroughly complete the plan process. The draft also references the regulatory requirements for plan contents by citation only, with little explanatory information. Thus, HUD is not only proposing to substantially reduce the amount of information that PHAs must submit to HUD for review, it is proposing to reduce or eliminate most of the direction and guidance that current plan templates provide to PHAs and residents.

A comparison of the current streamlined five-year plan template, and the section in the draft for the “Five-Year Plan Update,” demonstrate some of the typical problems that the draft presents. HUD regulations require PHAs to include in the five-year plan a statement of their mission for serving the needs of low-income families.<sup>5</sup> PHAs must identify quantifiable goals and objectives for meeting those needs, so that the public can measure their performance.<sup>6</sup> PHAs also must address their progress in meeting the goals of the previous five-year plan.<sup>7</sup> In keeping with these requirements, the current streamlined five-year plan template contains two pages of HUD’s overall strategic goals, along with suggested PHA goals that will help further HUD’s goals, and specific objectives to help PHAs achieve their goals.<sup>8</sup> The template also contains bold language reminding PHAs that they should adopt quantifiable measures of the success in reaching their objectives.<sup>9</sup>

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*The draft also references the regulatory requirements for plan contents by citation only, with little explanatory information.*

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The draft reduces the two pages of guidance to a small chart, at the bottom of the page, that asks PHAs to state their mission, identify their goals and objectives, and then to check “yes or no” as to whether these items have been amended. The draft does not offer any further instructions or guidance, not even a reference to the regulations for five-year plan contents. The draft format may lead PHAs to conclude that they are only required to submit abbreviated mission statements and goals which cannot be measured and which contain little substantive content. It is also unlikely that residents will be familiar with the regulatory requirements of the plan components, and those who review a plan in the draft format may conclude that this section of the plan is not especially important.

Although HUD proposes to allow all PHAs to use the draft, and to substantially reduce the elements that must be submitted to HUD for review, HUD has also indicated that PHAs must continue to complete the plan components required for their particular designation as a small PHA, standard PHA, high-performance PHA, or troubled PHA. HUD provides for this requirement in the draft by compiling all required components into a one-page chart that lists the different PHA plans and each of the required

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<sup>1</sup>Notice of Proposed Information Collection for Public Comment: Public Housing Agency Plans, 71 Fed. Reg. 48,934 (Aug. 22, 2006).

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

<sup>3</sup>42 U.S.C.A. §1437c-1(k) (West 2003).

<sup>4</sup>See Form HUD-50075-SF (Apr. 30, 2003); Form HUD-50075-SA (Apr. 30, 2003), available at [http://www.hudclips.org/sub\\_nonhud/html/forms.htm](http://www.hudclips.org/sub_nonhud/html/forms.htm).

<sup>5</sup>24 C.F.R. § 903.6 (2004).

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>Form HUD-50075-SF, 3-5, *supra* note 4.

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

plan components in rows and columns.<sup>10</sup> The chart uses asterisks and bullet points so that PHAs can determine when a component applies to a particular plan.

In addition to the chart, the draft also contains instructions for each plan component, which generally follow the brief definitions provided in the USHA, but do not contain any of the specific requirements set forth in the federal regulations. For example, the instructions identify “financial resources” as “a statement of the resources available to the agency and the planned uses of those resources,” which is taken verbatim from the definition for “financial resources” contained in the USHA.<sup>11</sup> However, the statute does not address what is necessary to constitute a sufficient statement; this information is found in HUD’s regulations. Pursuant to regulation, the “statement” of financial resources must include a listing, by general categories, of the PHA’s anticipated resources, and a listing of the non-federal sources of funds that help further the support of any of the federally funded programs.<sup>12</sup> Unfortunately, PHAs that simply follow the draft, without reviewing the regulations, will fail to include all of the required information for financial resources or other plan components.

Additionally, the instructions concerning the Violence Against Women Act (VAWA) component are not even completely consistent with definitions set forth in the statute. According to the draft, this component consists of a statement by the PHA listing “the goals, objectives, policies or programs that will enable the PHA to serve the needs of child and adult victims of domestic violence. . . .” While this instruction satisfies the requirements for the VAWA component in five-year plans, it omits the requirements for the VAWA component in annual plans.<sup>13</sup> Pursuant to the USHA, annual PHA plans must specifically identify the activities and services they offer to child or adult victims of domestic violence and sexual assault, the programs they offer to help such victims obtain or maintain housing, and any programs or services they offer to prevent domestic violence or enhance the safety of assisted families.<sup>14</sup>

The draft also provides only limited reference to the Resident Advisory Boards (RABs), although RAB participation is an important element of the PHA plan process. The draft requires PHAs to certify that the RAB has reviewed and commented on any changes to a list of six plan components, and have reviewed any plan components that were revised since the submission of the last annual plan. This is a significant departure from the RAB provisions of current templates, and also conflicts with the statutory and regulatory requirements for RAB

participation in the plan process. PHAs are required to have RABs that comprise residents served by the PHA, and to consult with the RAB in the development of the annual or five-year plan.<sup>15</sup> PHAs are further required to include both the RAB comments on the plan, and PHA responses, in their submissions to HUD.<sup>16</sup>

The formats of the current templates remind PHAs that RAB input is a required element of the plan process.<sup>17</sup> Conversely, the draft’s section on RAB input may lead residents, the public, and even some PHA staff to conclude that only RAB review of changes to the specific items listed is necessary. They may also conclude that the RAB’s comments and the PHA’s response are no longer required plan submissions.

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*PHAs that simply follow the draft, without reviewing the regulations, will fail to include all of the required information for financial resources or other plan components.*

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The PHAs still must submit a special Certification of Compliance, Form HUD-50077, which includes a certification that the RAB has reviewed and commented on the PHA plan, and that the PHA has included the RAB comments and the PHA response in its submissions to HUD.<sup>18</sup> However, most PHA residents, RAB members and members of the public will have little if any knowledge of this form, and even less of its contents. The draft’s indirect reference to the RAB’s involvement in the plan process may result in PHAs seeking minimal or even no input from RABs, with little consequences.

The draft presents a similar problem concerning opportunity for the public to review and comment on the PHA plan. In addition to obtaining input from the residents, PHAs are required to hold a public hearing to discuss the proposed annual or five-year plan, and to make the proposed plan and all relevant information available to the public for inspection at least forty-five days before the hearing.<sup>19</sup> However, the draft only requires PHAs to certify that the revised policies and programs were made available for public review and inspection. It contains no direct reference to the complete requirements for obtaining public comment on the PHA plan. While Form HUD 50077 also contains the PHA’s certification concerning the opportunity for public review and comment, neither the public nor PHA residents are likely to be aware of this form

<sup>10</sup>For required plan components, see generally 24 C.F.R. §§ 903.5-903.12 (2004).

<sup>11</sup>42 U.S.C.A. § 1437c-1(c)(2) (West 2005).

<sup>12</sup>24 C.F.R. § 903.7(c) (2006).

<sup>13</sup>42 U.S.C.A. § 1437c-1(a)(2) (West 2005).

<sup>14</sup>*Id.* at § 1437c-1(d)(13) (West 2005).

<sup>15</sup>*Id.* at § 1437c-1(e)(1) (West 2005).

<sup>16</sup>*Id.* at § 1437c-1(e)(2) (West 2005).

<sup>17</sup>See, e.g., Form HUD-50075-SF, 27, *supra* note 4.

<sup>18</sup>See Form HUD-50077 (2003), available at [http://www.hudclips.org/sub\\_nonhud/html/forms.htm](http://www.hudclips.org/sub_nonhud/html/forms.htm).

<sup>19</sup>42 U.S.C.A. §1437c-1(f) (West 2005).

or its contents, as noted above. Indeed, even PHA employees may not be fully aware of the regulatory requirements for public and resident involvement in the plan process and, without clearer language in the template, may frustrate the attempts of knowledgeable members of the public to review the proposed plan.

In at least two areas, the draft omits plan components completely. For example, the draft has no reference, even indirect, to Project Section 8. This is a significant departure from not only current templates, but the USHA,<sup>20</sup> which provides that PHAs may only approve HAP contracts under the Project-based voucher program if they are consistent with the approved PHA plan and the PHA's goals of deconcentrating poverty and expanding housing opportunities (which are also required plan components).<sup>21</sup> No reason is provided for this omission in either HUD's proposal or in the draft's instructions. It is unclear whether this was merely an oversight which will be corrected in the final version or whether HUD has intentionally eliminated this component. However, it is unlikely that PHAs will include information in the plan that is not provided for in the template, making it almost certain that Project-based vouchers will not be considered in the plan process if the draft is adopted in its current format.

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*The draft eliminates most of the guidance and direction HUD has previously included in plan templates, and contains little guidance to ensure that PHAs are completing all plan components in a manner consistent with regulations.*

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The draft also fails to require PHAs to specifically identify all of the supporting documents that are available for review, although this requirement is found in all current templates.<sup>22</sup> Current templates require PHAs to select from an established list of potential documents which items have been made available for public review. The omission of this list is especially troubling, as these are the documents that contain information that is important to the residents, such as the Public Housing admissions policy or the Section 8 administrative plan. These documents help remind the public and the residents that there is substance to the administrative plan, and that it is not a mere compilation of checklists and certifications.

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<sup>20</sup>*Id.* at § 1437f(o)(13) (C) (West 2006).

<sup>21</sup>See Form HUD-50075-SF at 29, *supra* note 4; Form HUD-50075-SA at 7, *supra* note 4.

<sup>22</sup>See Form HUD-50075-SF at 30, *supra* note 4; Form HUD-50075-SA at 9, *supra* note 4. See also Form HUD-50075 (2003).

## Conclusion

The draft template significantly reduces the number of documents that PHAs will submit for review to HUD, and ultimately reduces HUD's oversight and involvement in the PHA plan process. At the same time, the draft eliminates most of the guidance and direction HUD has previously included in plan templates, and contains little guidance to ensure that PHAs are completing all plan components in a manner consistent with regulations. Further, the language of the draft on its face potentially reduces resident and public input to a review of only a handful of required components, in the event those components are amended, and does not ensure that either residents or the public will have access to the complete PHA plan when changes are contemplated.

If all PHAs are allowed to use a significantly streamlined plan process and are allowed to submit a handful of certifications and little else, HUD must make substantial amendments to the draft template. It must contain sufficient and accurate instructions for each plan component, and the most critical feature of the plan process—the opportunity for resident and public input—cannot be referenced only indirectly. PHAs that do not carefully review HUD's regulations concerning the plan process may take the draft language concerning public and resident access to revised policies as a literal requirement, and deny access to the entire plan. It is plausible that some PHAs themselves may fail to keep track of the plan contents or to review the entire plan, unless they are required to make the entire plan available to the public, to provide a complete copy to HUD or have such a copy accessible by Internet, and to review the full plan with the RAB. The opportunity for public and resident input into the plan process and review of the entire plan must be stated plainly and directly in the draft. The draft should also provide for specific PHA certification, in addition to the general certifications in Form 50077, that the entire plan has been made available and accessible to the public, in as many venues and formats as practical, and that the PHA has identified clearly and conspicuously those components for which changes have been proposed. ■

# Section 8 Landlord Required to Provide Consecutive Eviction Notices

The Texas Court of Appeals recently ruled, in *Kennedy v. Andover Place Apartments*, that a landlord's failure to comply with both state and federal eviction notice requirements will invalidate an otherwise lawful forcible detainer action.<sup>1</sup> The court concluded that a landlord's compliance with federal notice requirements does not implicitly satisfy a landlord's obligation to comply with state notice requirements.

## Background

Andover Place Apartments (Andover) is a 102-unit project-based Section 8 development located in Houston, Texas. In February 2004, with the assistance of federal rent subsidies, the appellant, Kimberly Kennedy, and the appellee, Andover, entered into a written one-year lease agreement ending in March 2005. In October 2004, after sending several notices regarding alleged lease violations, Andover sent Kennedy a single letter listing several grounds to support its intention to terminate Kennedy's tenancy and notified Kennedy that she had ten days to discuss this termination with the landlord and thirty days to vacate the premises. The trial court determined that Kennedy had violated her lease, Andover had properly terminated her tenancy, and Andover was therefore entitled to possession of the apartment. Nevertheless, Kennedy challenged the trial court's ruling that Andover had properly terminated her lease; specifically, Kennedy asserted that Andover had failed to comply with Texas' eviction notice requirements.

## Jurisdiction: Automatic Lease Renewal and Mootness

As an initial matter, although Andover did not challenge the court's jurisdiction, the court examined whether it had proper jurisdiction in light of the recent decision by the Supreme Court of Texas in *Marshall v. Housing Authority of San Antonio*.<sup>2</sup> Similar to the instant proceeding, *Marshall* involved a forcible detainer of a tenant participating in a rent-subsidized federal housing assistance program. In *Marshall*, the question of jurisdiction arose because "the tenant no longer lived in the apartment and, since her lease had expired, she had no basis for claiming a current right to possession of the apartment."<sup>3</sup>

As such, the court in *Marshall* determined jurisdiction was not proper because of mootness. However, unlike *Marshall*, Kennedy's arguments were determined not to be moot because Kennedy's lease did not automatically terminate in March 2005. Rather, Kennedy's lease stated that it would continue for successive terms of one month each unless the landlord terminated for cause. Consequently, although the initial term of Kennedy's lease expired during the pendency of this action, the automatic renewal provision of Kennedy's lease preserved both her current right of possession and the court's jurisdiction.

## Consecutive Notice Requirements

Tenant evictions from federally assisted housing programs often address a common question: Must the landlord must give the tenant two consecutive eviction notices? The first notice in this case is the federally required notice of proposed termination with an opportunity to try and resolve the matter short of eviction, and the second is the final notice to vacate, as required by state or local law, if the resolution efforts have failed. While the short answer is usually no when dealing with public housing, in other programs the issue is less settled. For example, although the Department of Housing and Urban Development (HUD) Handbook 4350.3 authorizes concurrent federal and state notices, the handbook also states that "[a] tenant may rely on state or local laws governing eviction procedures where such laws provide the tenant procedural rights that are in addition to those provided by the regulatory agreements...."<sup>4</sup> As such, some courts have held that a lawful eviction notice cannot be issued until the resolution meeting has been held or the time for requesting a meeting has expired.<sup>5</sup>

In *Kennedy*, the forcible detainer action was governed by Section 24.005 of the Texas Property Code, and because this was a statutory cause of action, Andover was required to strictly comply with its requirements. Consequently, Kennedy argued, and the court agreed, that her termination was unlawful because Andover only provided her with a single eviction notice and thus failed to strictly comply with Section 24.005. Kennedy argued that Section 24.005 states: "If the lease or applicable law requires the landlord to give a tenant an opportunity to respond to a notice of proposed eviction, a notice to vacate may not be given until the period provided for the tenant to respond to the eviction notice has expired."<sup>6</sup> Thus, under the plain language of the statute, when a lease requires an opportunity to respond to a proposed eviction, the

<sup>1</sup>*Kennedy v. Andover Place Apartments*, No. 14-05-01051-CV, 2006 WL 2505554 (Tex. App.-Hous. Ct. Aug. 31, 2006).

<sup>2</sup>*Marshall v. Housing Authority of San Antonio*, No. 04-0147, 2006 WL 508635 (Tex. Mar. 3, 2006).

<sup>3</sup>*Kennedy*, 2006 WL 2505554, at \*2.

<sup>4</sup>HUD, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, HUD HANDBOOK 4350.3, at § 8-13.B.5.d. (REV-1 2003).

<sup>5</sup>*Gonzales v. SK Mgmt.*, No. 82 CV 344 (Colo. Super. Ct. June 13, 1983), 18 CLEARINGHOUSE REV. 176 (No. 36,220, June 1984); *Cogen v. Corey*, No. 83-17496CA (Fla. Cir. Ct., Dade Cnty., Dec. 12, 1983), 17 CLEARINGHOUSE REV. 1243 (No. 35,714, Mar. 1984).

<sup>6</sup>Tex. Prop. Code Ann. § 24.005 (e) (Vernon 2006).

landlord must provide a separate, later notice to vacate. Therefore, because Andover failed to provide Kennedy with a separate notice to vacate, it did not comply with Section 24.005 and thus constituted an unlawful termination of Kennedy's tenancy.

Andover argued that its single eviction notice was sufficient to comply with Section 24.005 based on language in the lease that indicates that state and HUD notice periods *may* run together as opposed to consecutively. The court rejected this argument because the lease did not state that the HUD notice periods eliminated or replaced the state statutory requirement of providing a second, later notice.

*Kennedy* reiterates the important point that, under certain circumstances, a landlord's failure to provide a tenant with consecutive eviction notices may invalidate an otherwise lawful forcible detainer action. ■

## Victory: Ninth Circuit Allows Residents to Challenge RD Prepayment

The United States Court of Appeals for the Ninth Circuit has ruled that tenants in a Rural Development (RD) Section 515 Rural Rental Housing development whose owner prepaid the RD loan pursuant to a court-approved settlement agreement are entitled to have the prepayment reviewed under the Administrative Procedure Act (APA) to determine whether the government violated the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA). *Goldammer v. United States*, 2006 WL 2806691 (9th Cir. Oct. 3, 2006).

The ruling reverses a district court decision that denied the residents the right to seek APA review of the prepayment. It also severely restricts an earlier Ninth Circuit decision that suggests, but does not hold, that owners of Section 515 developments, whose right to prepay their loans was restricted by ELIHPA, are entitled to quiet title to their property if RD refuses to accept their prepayment tender. *Kimberly Assocs. v. United States*, 261 F.3d 864 (9th Cir. 2001).

### Background

*Goldammer* arose when DBSI Limited Partnership, the owner of six Section 515 developments located in Oregon, prepaid the loan for one of its developments pursuant to an agreement entered between itself and RD to settle a quiet title action suit that DBSI filed against RD in 1998. Prosecution of the lawsuit was suspended pending

resolution of *Kimberly*, a case also filed in 1998 by a related partnership in Idaho under the same equitable quiet title theory. When *Kimberly*, which the Ninth Circuit reviewed and reversed on the Idaho district court's initial ruling that the suit could not be maintained, was ultimately decided in the owner's favor, DBSI and RD entered into an agreement in principle in 2003 to settle the Oregon case. Under that agreement, RD and DBSI agreed to negotiate the sale value of six Oregon properties owned by DBSI and to offer the properties for sale to nonprofit entities that would keep them in the RD rental program. If no sale occurred, the agreement provided that RD would accept DBSI's prepayment of the loans and release the properties from the Section 515 restrictions without regard to any prepayment restrictions, including those imposed by ELIHPA.

While RD and DBSI agreed to the value of four Oregon properties owned by DBSI, it did not approve the sale of those properties to a particular nonprofit organization. Acting under its agreement with RD, DBSI prepaid the loan for one of those properties, Seacrest, on October 23, 2003. RD accepted the prepayment and released Seacrest from the Section 515 program. On December 19, 2003, DBSI and RD stipulated to a quiet title judgment with respect to Seacrest, which was later approved by the Oregon District Court. Thereupon, DBSI sold Seacrest to Northwest Real Estate Capital Corporation, a nonprofit corporation. Since the prepayment terminated the RD tenant subsidies, Northwest had to increase rents at the development. To protect residents from displacement, however, it secured HUD vouchers from the local housing authority that enabled some of the residents to pay the higher rents.

### The Residents' Case

When residents of Seacrest learned of the impending prepayment in 2003, they filed a lawsuit against RD seeking review of the prepayment under the APA, alleging that the agency violated the law by allowing DBSI to prepay the Section 515 loan without complying with ELIHPA. Residents of another DBSI-owned development, Meadowbrook, joined the lawsuit seeking declaratory relief with respect to DBSI's right to prepay the Meadowbrook loan under the DBSI and RD agreement. DBSI, as owner of the two developments, was named in the residents' lawsuit as a necessary party defendant.

In January of 2004, the same resident plaintiffs filed a motion to intervene as a matter of right in the original DBSI quiet title lawsuit against RD. In their motion, the residents sought an opportunity to set aside the quiet title judgement on the ground that it violated ELIHPA.

The district court denied the residents' intervention motion on the ground that their interests were adequately protected in their previously filed and separate APA case. However, it then denied the residents' motion for preliminary relief in their APA case and ruled in favor of RD and

DBSI on cross motions for summary judgment. The district court held that its decision denying relief to the residents was mandated by the Ninth Circuit's earlier decision in *Kimberly*, which, according to the district court, held that ELIHPA was not a "sovereign act" and therefore was not enforceable. The residents appealed both decisions to the Ninth Circuit.

### Ninth Circuit Decision

In its decision, the Ninth Circuit first ruled on the residents' right to intervene in the DBSI case. Addressing that issue, it upheld the district court's decision and denied the residents the right to intervene in the DBSI case. According to the court, to intervene as a matter of right the residents had to meet all the elements of a four-part test: (1) the application to intervene had to be timely; (2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect the interest; and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit. Like the district court, the Ninth Circuit found that the residents failed to meet the third factor in that the relief that they sought in their APA case was essentially the same that they sought to secure through intervention. Finding that the district court had authority to set aside the prepayment under the residents' APA case, it held that the third test had not been met and upheld the district court decision with respect to the denial of the residents' motion to intervene.<sup>1</sup>

Moving to the residents' APA case, the Ninth Circuit next addressed a number of justiciability issues raised by both DBSI and RD. Specifically, RD suggested that the plaintiff residents lacked standing because they had not suffered an injury, given that the Meadowbrook development had not been prepaid and that the Seacrest tenants were protected by vouchers. The Ninth Circuit agreed with RD with respect to the Meadowbrook plaintiff, concluding that the plaintiff had not been harmed and that the prepayment of the Meadowbrook loan was not sufficiently imminent to provide the plaintiff with standing.<sup>2</sup>

With respect to the Seacrest tenants, the Ninth Circuit came to a different conclusion. While noting that the Seacrest residents' rents had not in fact been raised,<sup>3</sup> it found that residents in the Section 515 program had non-economic protections that were terminated when Seacrest was removed from the Section 515 program and were not

available under the voucher program. For example, a landlord under the voucher program may terminate participation in the program at the end of the lease term without good cause. Section 515 landlords cannot terminate resident leases except for good cause. The Ninth Circuit also noted that tenants under the Section 515 program had a statutory right to a grievance process that was not available to persons participating in the voucher program. Finding that the residents had suffered non-economic injury as a result of the prepayment, the court concluded that the Seacrest residents had standing to pursue their claim.<sup>4</sup>

The Ninth Circuit also rejected DBSI's argument that the Seacrest tenants' claims were mooted by the sale of Seacrest to Northwest. It explained that federal courts are authorized to void a property transfer when necessary. Accordingly, it concluded that since the sale to Northwest could be undone and the prepayment reversed, the residents' claim was not moot.<sup>5</sup>

Turning to the main argument, the Ninth Circuit noted that the district court decided the APA case against the residents, believing that such a decision was mandated by the Ninth Circuit's earlier decision in *Kimberly*. The *Goldammer* panel disagreed:

There is a critical distinction between *Kimberly* and the present case. *Kimberly* was a quiet title action in which borrowers claimed to be entitled to pay off their loans in accordance with their contracts. In the present case, the question is entirely different—whether the agency acted contrary to federal law in failing to comply with ELIHPA to the detriment of the residents.<sup>6</sup>

Noting the factual similarity between *Goldammer* and *Kimberly*, the court proceeded to explain how the legal issues in the two cases differed. *Kimberly* involved a dispute between an owner and RD in which the owner sought to quiet title to the property when the agency failed to accept the owner's prepayment tender. The government moved to dismiss the *Kimberly* case raising two initial defenses, waiver of sovereign immunity and the unmistakability doctrine.<sup>7</sup> The district court in that case ruled that the government had waived sovereign immunity but that the unmistakability doctrine barred the owners from any remedy under its contract with the government.

On appeal from the *Kimberly* district court's approval of the government's motion to dismiss, the Ninth Circuit reversed. It agreed with the district court that sovereign

<sup>1</sup>*Goldammer* at 17235.

<sup>2</sup>*Id.* at 17237.

<sup>3</sup>The panel's conclusion that the residents' rents had not been raised is incorrect. In fact, rents at the project had been raised by Northwest. It is just that the vouchers covered the increased rent on behalf of the plaintiffs.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.* at 17238.

<sup>6</sup>*Id.* at 17239.

<sup>7</sup>The unmistakability doctrine is one of two doctrines that bars relief against the government in contract damage actions. A discussion of the unmistakability doctrine is beyond the scope of this article. For more information on the doctrine, see *United States v. Winstar*, 518 U.S. 839 (1996).

## Advocates Take Issue with HUD's Troubled Projects Policy

immunity had been waived, but held that the unmistakability doctrine did not apply to the case because ELIHPA was "not a sovereign act" as interpreted for the purposes of determining whether the unmistakability doctrine operated as a bar to the owner's case. Accordingly, *Kimberly* held that the government could not use the unmistakability doctrine as an initial defense warranting dismissal of the case.

While the *Goldammer* panel allowed that *Kimberly* remains good law as far as it goes, it further stated:

nowhere does *Kimberly* hold that ELIHPA is invalid or that the government is free to disobey it. Bearing in mind that *Kimberly* was a quiet title action, we had no occasion then to opine on whether the government violated the APA by affirmatively allowing borrowers to ignore ELIHPA's statutory requirements.<sup>8</sup>

Thus, the panel in *Goldammer* concluded that the district court erred in relying on *Kimberly* as the basis for granting summary judgment on the tenants' APA claim. Therefore, it remanded the case to the district court to decide whether RD acted contrary to law.<sup>9</sup>

The panel also noted that DBSI would not be deprived of relief should the residents prevail in setting aside the prepayment in the subsequent proceeding before the district court. The panel stated that DBSI may have relief by way of a damage action under the Tucker Act to compensate it for the breach of contract caused by the passage of ELIHPA.<sup>10</sup>

*Goldammer* now returns to district court for a determination of whether RD violated ELIHPA when it accepted the prepayment of the Seacrest loan. If it did, it is likely that the development will be brought back into the Section 515 inventory.<sup>11</sup>

The *Goldammer* decision's distinction of *Kimberly* is particularly significant because three district courts, all within the Ninth Circuit's jurisdiction, have interpreted *Kimberly* as sanctioning owners' right to circumvent ELIHPA by bringing a quiet title action. The decision should put this to an end and force owners and RD to follow ELIHPA's prepayment restrictions. ■

For much of the past decade, often irrespective of administrations, the Department of Housing and Urban Development (HUD) has been on a mission to rid itself of responsibility for preserving affordable multifamily housing, for a variety of reasons, including budgetary constraints, staffing problems, policy preferences, and hostile ideology. One unfortunately consistent policy has been HUD's termination of project-based Section 8 contracts prior to or at a foreclosure sale. This termination policy deprives these properties of the assistance needed to preserve project affordability for very low-income tenants when projects are acquired (and hopefully rehabilitated) by a new owner at foreclosure or by later purchase from HUD after acquisition of the property at foreclosure or by deed-in-lieu.

In 2005, preservation advocates, led by colleagues in New York City, commenced renewed efforts to seek more specific restrictions on HUD's authority to terminate these contracts. While these efforts convinced Congress to enact stronger preservation protections for Fiscal Year (FY) 2006, HUD issued guidance at the end of May that threatens to undercut Congress' preservation policy. Advocates have made specific recommendations to HUD and continued to seek further legislative revisions to extend and improve these important protections for troubled properties.

### The Schumer Amendment

Because an essential ingredient of preserving and improving HUD multifamily properties facing foreclosure or other disposition is retention of the project-based Section 8 contract, Congress enacted Section 311 of the FY 2006 HUD appropriations bill, which generally requires HUD to maintain project-based Section 8 contracts when selling properties at foreclosure or from the HUD inventory:

Notwithstanding any other provision of law, in fiscal year 2006, in managing and disposing of any multifamily property that is owned or held by the Secretary of Housing and Urban Development, the Secretary shall maintain any rental assistance payments under section 8 of the United States Housing Act of 1937 that are attached to any dwelling units in the property. To the extent the Secretary determines that such a multifamily property owned or held by the Secretary is not feasible for continued rental assistance payments under such section 8, based on consideration of the costs of maintaining such payments for that property or other factors, the Secretary may, in consultation with the tenants of that property,

<sup>8</sup>*Goldammer* at 17241.

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

<sup>10</sup>*Id.* at 17241-2.

<sup>11</sup>See *Lifgrin v. Yeutter*, 767 F. Supp. 1473 (D. Minn. 1991).

contract for project-based rental assistance payments with an owner or owners of other existing housing properties, or provide other rental assistance.<sup>1</sup>

This provision became effective upon Presidential signature, November 30, 2005, but HUD remained silent on any guidance governing its implementation, especially concerning the interpretation of the “infeasibility” exception to maintaining assistance.

### HUD’s May 31 Guidance

However, on May 31, 2006, HUD finally issued guidance, although it never took any steps to share this information with the public or Congress, despite active solicitation by preservation advocates. Unfortunately, the guidance substantially limits the applicability of Section 311 in cases where retention is still appropriate.<sup>2</sup> Of paramount concern are provisions that:

- require HUD to assess feasibility of retaining the contract without adequate consideration of the rent adjustments ordinarily available upon contract renewal or other available resources;
- allow HUD to find contract retention infeasible based on neighborhood conditions or local land use plans;
- fail to guide HUD on utilizing other authorities (such as sale requirements or bidding practices) often crucial to comprehensive preservation planning;
- prohibit assistance from flowing to new owners until after substandard conditions are completely remedied;
- permit tenant participation in these critical decisions only after HUD has already made key determinations;
- require HUD to ignore the costs of repair to legal habitability standards in establishing prices for properties to be sold from the HUD-owned inventory; and
- limit the number of tenant protection vouchers issued to the number of occupied units, rather than the full number of assisted units in the development.

### Summary of Recommended NPWG Policy Revisions

In response, NHLP, working on behalf of advocates from the National Preservation Working Group (NPWG), submitted policy recommendations to HUD to improve

<sup>1</sup>Pub. L. No. 109-115, § 311, 119 Stat. 2936 (2005).

<sup>2</sup>Memorandum from Charles H. Williams to HUD Staff (May 21, 2006) (re Fiscal Year 2006 Property Disposition Program).

the preservation process, as well as recommendations to Congress for more specific language that would constrain HUD’s authority to be adopted when renewing the statute for FY 2007.

**HUD Policy:** In determining the “feasibility” of retaining project-based assistance, the May 31 guidance requires that existing Section 8 contract rents be sufficient to carry both the operating costs and any debt service on needed repairs, irrespective of other available funding sources and any adjustments ordinarily available; while HUD may sell such a property with Section 8, it need not do so.

*Comment:* This HUD policy will impede preservation of the many properties requiring significant rehabilitation, since Section 8 rents alone may be below-market and incapable of supporting additional rehabilitation debt service and normal operating expenses, and because the infeasibility determination usually precedes the identification of other available federal, state and local resources. In addition, because the policy elsewhere limits contract rent adjustments to HUD’s operating cost formula, rather than those normally available under HUD policy, feasibility determinations will be unnecessarily pessimistic.

*NPWG Recommendation:* Where foreclosure sale (rather than a HUD acquisition and disposition) is used to determine the long-term owner of the property, HUD should adopt a more flexible definition of feasibility to permit consideration of other resources. These other resources to support needed rehabilitation should include Section 8 contract rent adjustments available upon contract renewal after sale under HUD’s policies (implementing Section 524 of the Multifamily Assisted Housing Reform and Affordability Act), as well as other funding, such as tax credits and bond financing, or state or local housing subsidy programs. Any proposed “infeasibility” finding should be addressed through an improved consultation process, permitting correction of any oversights in identifying available preservation resources. Where “infeasibility” is found, HUD should consider all other options to transfer the contract to another property and preserve affordable units in the community.

**HUD Policy:** The policy permits “deteriorated neighborhood conditions” or “local land use plans” to justify an infeasibility determination.

*Comment:* Although serious environmental conditions that cannot be remedied in a cost-effective fashion could justify an infeasibility determination, neighborhood conditions should not alone suffice, since improvement of the subject property under responsible ownership, in conjunction with other local efforts, may often serve as a catalyst for neighborhood stabilization, or be part of a neighborhood revitalization strategy.

*NPWG Recommendation:* Such determinations should not alone suffice to override preservation via retention

of the contract. At the very least, such proposed findings warrant thorough examination through a more timely resident and local consultation process.

**HUD Policy:** The policy is silent on the circumstances where HUD will bid in its mortgage debt and other advances, exercise mortgagee-in-possession rights, and seek to acquire title for resale of the property.

*Comment:* In many cases, HUD acquisition of title and subsequent resale is often appropriate to enable local preservation strategies outside the accelerated foreclosure auction process. Ideally, HUD should pursue pre-foreclosure planning that engages consultation with residents, local governments and prospective preservation purchasers, with a goal of determining appropriate preservation options. Where HUD acquisition is necessary to ensure transfer to a responsible purchaser with adequate capacity and resources for implementing an appropriate preservation plan, HUD should establish conditions at the foreclosure sale and pursue bid practices that maximize potential for acquiring title and re-selling the property accordingly. Taking interim action to stabilize such properties through exercise of mortgagee-in-possession rights may also be essential.

*NPWG Recommendation:* HUD should establish conditions at the foreclosure sale and pursue bid practices that maximize the potential for acquiring title and re-selling the property under a responsive preservation plan.

**HUD Policy:** The policy permits Section 8 assistance to flow to purchasers only after substandard conditions are remedied.

*Comment:* While we support the Department's objective not to pay defaulting owners for substandard housing, HUD's policy deprives responsible preservation purchasers of the resources needed to solve long-standing project deficiencies, especially for occupied properties.

*NPWG Recommendation:* We recommend that the policy consider the needs of responsible preservation purchasers for cash flow to finance repairs under an approved rehabilitation plan while being held harmless from any unsatisfactory REAC findings attributable to the previous owner. So long as specified progress on the plan is achieved, purchasers should be able to receive assistance payments without being penalized by the prior owner's REAC score. At the very least, abated payments should be escrowed so that they can be released as units and common areas are brought into compliance, while holding the preservation purchaser harmless from the prior defaults.

**HUD Policy:** The policy requires consultation with residents only *after* HUD has made its decision.

*Comment:* Deferring resident consultation until HUD has reached a preliminary decision demeans resident input. Like the Department, residents and local communities have a huge stake in these decisions, and much to

contribute to their resolution. More timely consultation will promote better planning and results, and reduce the potential for unnecessary conflict.

*NPWG Recommendation:* In order to reach responsive decisions, the Department's consultation with residents and the local community should commence at the front-end of foreclosure planning (just as with planning disposition from the HUD-owned inventory), and continue at major steps throughout the foreclosure and disposition planning process, including major proposed decisions and any replacement subsidy or relocation planning.

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*HUD's policy deprives responsible preservation purchasers of the resources needed to solve long-standing project deficiencies, especially for occupied properties.*

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**HUD Policy:** The policy states that the Department will not consider the costs of repair in establishing the market value of the property to be paid by those cities exercising a right of first refusal.

*Comment:* In many cases, this policy will discourage cities from participating as partners in developing a responsive disposition strategy. Prior to 2005, federal policy permitted cities to acquire troubled properties from HUD through a right of first refusal. Where HUD determined that a local government was interested in acquisition, it would include the debt in its bid price and seek to acquire the property for resale to the city, making available both a discounted sales price, as well as an up-front matching grant for rehabilitation of up to \$40,000 per unit.

HUD's directive to ignore repair costs results from an incorrect interpretation of last year's Reconciliation Act, which prohibits below-market sales or up-front grants (with grandfathered exceptions) unless backed by appropriations, which have not yet materialized. While the Act does indicate that valuations cannot reflect HUD-imposed affordability restrictions (which include *rehabilitation* requirements), this should not mean that ordinary marketplace behavior, which must factor in *repairs to market standards* (at least to code requirements) in order to permit property to be legally rented, should not govern the appraisal process that determines market value. Otherwise, the Department is forcing cities to pay twice to make properties habitable—first in the undiscounted sales price and then in the rehabilitation plan. Given scarce resources, few cities would find such projects feasible.

*NPWG Recommendation:* Normal industry standards for market valuation should apply, and valuations should consider the costs of repairs to legal habitability standards.

**HUD Policy:** Where the Section 8 contract will be terminated, the policy limits the number of tenant protection vouchers to those necessary “to assist all eligible current [project-based Section 8] residents.”

*Comment:* The Administration has sought Congressional approval for this shift in policy for all multifamily conversion situations, which has not yet been granted. With troubled properties, occupancy rates often drop dramatically due to owner decisions not to re-rent vacant units during enforcement action. Communities should not suffer due to owner decisions.

*NPWG Recommendation:* Until Congress acts, HUD must continue its prior policy of long-standing, as expressed in HUD Notice PIH 2001-41, to provide vouchers to replace subsidies for the full number of affordable housing units being lost, not just those currently occupied, as well as those needed to protect unassisted residents facing loss of affordability protections via foreclosure.

### Miscellaneous Recommendations

NPWG also made a number of other recommendations regarding HUD’s troubled projects policies. These include:

- HUD should adopt stronger purchaser qualification requirements that require consideration of a prospective purchaser’s performance outside the locality of the property and independent evaluation of the purchaser’s track record.
- HUD should ensure the policy concerning maintenance of project-based contracts covers all similar subsidies, not just Section 8, so that similarly situated properties with other assistance, such as Section 202 PRAC, Rent Supplement, or Section 236 Rental Assistance, are treated similarly, since retention of these resources is central to preservation efforts.
- With earlier intervention and broader consultation, HUD should take appropriate steps to ensure that project-based contracts remain in effect prior to foreclosure wherever possible, subject to abatement remedies necessary to assist relocation for imminent major threats to tenants’ health and safety.
- Where contracts will not be maintained, HUD should continue to permit staged relocations in certain market settings to avoid flooding local markets with additional vouchers that cannot be efficiently absorbed.

### FY 2007 Legislation

By its terms, the Schumer Amendment applies only during FY 2006, which ended September 30. Apparently, this has been extended through the Continuing Resolution adopted by Congress to fund almost all agencies through

November 17.<sup>3</sup> For FY 2007, the House bill would revert to the prior policy of maintaining Section 8 contracts only for projects housing predominantly the elderly or people with disabilities. In contrast, the Senate bill, as reported out of Committee in July, not only renews the Schumer amendment for another year, but attempts to specifically address some of the deficiencies of HUD’s policies as noted by the foregoing recommendations.<sup>4</sup> In addition, another section requires reporting that could help the oversight process, for troubled projects as well as others.<sup>5</sup> Resolution of the final policy for FY 2007 awaits Congressional action after the session reconvenes following the November mid-term elections. ■

<sup>3</sup>Pub. L. No. 109-289 (Sept. 29, 2006).

<sup>4</sup>The Senate language requires all project-based assistance to be maintained, unless “infeasible,” and requires consideration of (1) the costs of rehabilitating and operating the property and all available federal, state and local resources including rent adjustments under Section 524 of the Multifamily Assisted Housing Reform and Affordability Act of 1997 and (2) environmental conditions that cannot be remedied in a cost-effective manner. It also requires quarterly reports to the Committees on Appropriations on decisions made under this authority (both maintaining contracts and not), and the reasons for any infeasibility decisions. H.R. 5576, § 311, as reported by the Senate Committee on Appropriations (July 26, 2006).

<sup>5</sup>*Id.*, § 313. The Committee report also states:

The Committee is concerned that HUD’s property disposition program is not adequately committed to preserving the affordability of formerly subsidized units, and directs HUD to establish and submit to the Committee workable criteria for ensuring the maintenance of project-based section 8 wherever possible. The Committee also expects HUD to improve its consultation and coordination with units of local government and residents. HUD is reminded that it should use its discretionary preservation authority for the purpose of preserving affordability. S. Rep. No. 293, 109<sup>th</sup> Cong., at 171 (July 26, 2006).

## 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 website.<sup>3</sup> Copies of the cases are *not* available from NHLP.

### **Constitutional Law — Due Process; Fair Housing — Reasonable Accommodation; Termination — Shelter Plus Care**

*Price v. Rochester Hous. Auth.*, 2006 WL 2827165 (W.D.N.Y. Sept. 29, 2006). Deciding a plaintiff participant's motion for summary judgment, the federal district court for the Western District of New York concluded that the Due Process Clause of the Fourteenth Amendment requires that termination letters issued to participants in the Shelter Plus Care Program include a notice advising them of their right to request an accommodation of a disability.

### **Eviction — Good Cause; Federal Courts — Preemption; Housing Choice Voucher Program**

*Rosario v. Diagonal Realty, LLC*, 821 N.Y.S.2d 71 (Sup. Ct. App. Div. Sept. 19, 2006). Affirming the decision of the trial court, the Appellate Division of the Supreme Court of New York concluded that federal Housing Choice Voucher requirements regarding the termination of tenancies, 42 U.S.C. § 1437f(d)(1)(B)(ii), did not preempt New York City's rent stabilization ordinance.

### **Eviction — Public Housing**

*Allegheny County Hous. Auth. v. Johnson*, 2006 WL 2623897 (Pa. Super. Sept. 14, 2006). Reversing the denial of a public housing authority's emergency petition to evict a public housing tenant, the Superior Court of Pennsylvania concluded that the following conduct by the tenant constituted serious and repeated lease violations that gave rise to an adequate basis for the termination of tenancy:

- 1) repeatedly played loud music at all hours of the night; 2) banged on the doors of other residents; 3) caused damage to another resident's door; 4) permitted his nephew to reside with him in excess

<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>.

of fourteen days without written consent from ACHA; 5) allowed his nephew to engage in fighting, arguing, and creating loud noise during his stay; 6) engaged in disruptions requiring police intervention on April 7, 2004; and 7) left the stove jets and oven pilot running, thereby causing the evacuation of his floor.

### **Fair Housing — Disparate Impact; Fair Housing — Disparate Treatment; Fair Housing — Familial Status**

*Khalil v. Farash Corp.*, 2006 WL 2708468 (W.D.N.Y. Sept. 21, 2006). Deciding motions for summary judgment, the federal district court for the Western District of New York rejected plaintiff tenants' Fair Housing Act disparate impact and disparate treatment claims challenging a landlord's rule regarding use of the surrounding grounds of an apartment complex. The rule provided in relevant part: "Tenants, Occupants and their respective guests shall not . . . [u]se the surrounding grounds as a place to congregate or allow children to play." Rejecting the disparate impact claim, the court noted, *inter alia*, that the rule, as it mentioned children, was not facially neutral; it also emphasized the relatively small affected group of tenants affected by the rule. Rejecting the disparate treatment claim, the court noted, *inter alia*, that the rule was enforced against adults in addition to children and families with children, and that the children against whom the rule was enforced "had been, or were reported by other tenants to have been, creating a genuine disturbance or causing a problem or dangerous situation."

### **Fair Housing — Familial Status; Public Housing; Seniors with Children**

*Silberstein v. Greenstein*, 821 N.Y.S.2d 117 (Sup. Ct. App. Div. Sept. 12, 2006). The Appellate Division of the Supreme Court of New York concluded that a New York City Housing Authority rule preventing public housing tenants from permanently adding their grandchildren to their households, where tenants did not have custody of their grandchildren, was not unlawful discrimination for the purposes of the Fair Housing Act.

### **Fair Housing — Reasonable Accommodation**

*Wisconsin Cmty. Servs. v. City of Milwaukee*, 2006 WL 2729694 (7th Cir. Sept. 26, 2006) (en banc). An en banc panel of the Seventh Circuit concluded, in this challenge to a municipal land use decision that prevented the development of a mental health clinic on reasonable accommodation grounds, held that whether an accommodation is

“necessary” for the purposes of the Fair Housing Act, Section 504 of the Rehabilitation Act, or Title II of the Americans with Disabilities Act is to be determined according to a “but for” standard. Specifically, “the element is satisfied only when the plaintiff shows that, ‘but for’ his disability, he would have been able to access the services or benefits desired.”

### **Federal Courts — Private Right of Action; Section 3**

*Williams v. HUD*, 2006 WL 2546536 (E.D.N.Y. Sept. 1, 2006). Dismissing a plaintiff public housing resident’s claims for fraudulent and unlawful rescission of an employment offer, the federal district court for the Eastern District of New York ruled, *inter alia*, that Section 3 of the Housing and Urban Development Act, 12 U.S.C. § 1701u, did not provide the plaintiff an “unambiguously conferred” right enforceable via 42 U.S.C. § 1983.

### **Federal Courts — Standing; Residential Lead-Based Paint Hazard Reduction Act**

*McCormick v. Kissel*, 2006 WL 2669955 (S.D. Ind. Sept. 18, 2006). Declining to follow *Mason ex rel. Heiser v. Morrisette*, 403 F.3d 28 (1st Cir.2005) the federal district court for the Southern District of Indiana ruled, *inter alia*, that parents of a minor injured by residential lead paint exposure did have standing to pursue a claim under the Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. § 4852d, on behalf of their child.

### **National Environmental Policy Act; National Historic Preservation Act; Public Housing — HOPE VI**

*Coliseum Sq. Assoc., Inc. v. Jackson*, 2006 WL 2664455 (5th Cir. Sept. 18, 2006). The Fifth Circuit concluded that HUD had not acted arbitrarily and capriciously in declining to consider further environmental and historic preservation impacts—under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, and the National Historic Preservation Act, 16 U.S.C. §§ 470f *et seq.*—of the HOPE VI redevelopment of the St. Thomas public housing site in New Orleans. ■

## **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 2006. For the most part, the summaries are taken directly from the summary of the regulation in the Federal Register or each notice’s introductory paragraphs.

Copies of the cited documents may be secured from various sources, including (1) the Government Printing Office’s website 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.

### **HUD PIH Notices**

#### **Notice PIH 2006-33 (HA) (Sept. 6, 2006) Changes in Financial Management and Reporting Requirements for Public Housing Agencies Under the New Operating Fund Rule (24 CFR Part 990); Interim Instructions**

**Summary:** This notice transmits changes in financial management and reporting requirements for public housing agencies pursuant to the Revisions to the Public Housing Operating Fund Program, Final Rule published in the *Federal Register* on September 19, 2005 (79 FR 54983). The final rule replaces the interim rule that was published on March 29, 2001.

**Expires:** September 30, 2007.

#### **Notice PIH 2006-35 (HA) (Sept. 25, 2006) Operating Fund Program Final Rule: Transition Funding and Guidance on Demonstration of Successful Conversion to Asset Management to Discontinue the Reduction of Operating Subsidy Participation Extension of Stop Loss Deadline to April 15, 2007**

**Summary:** This notice amends PIH 2006-14 (HA), issued March 22, 2006, to extend the application submission deadline to qualify for the first stop-loss deadline to April 15, 2007. As provided in PIH 2006-14, stop-loss applies only to public housing agencies that: (1) lose funding under the new Operating Fund formula; and (2) wish to submit documentation in accordance with the requirements for the first stop-loss deadline of October 1, 2006, so they may limit their losses to 5%.

**Expires:** September 30, 2007.

<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>.

**Notice PIH 2006-36 (HA) (Sept. 26, 2006)**  
**Guidance on Unit Status Categories in the Development Sub-module of the Office of Public and Indian Housing (PIH) Information Center (PIC) and Revised Form HUD-50058 Reporting Recommendations**

*Summary:* This notice explains and provides guidance to PHAs on how to use the unit status categories, and their respective sub-categories, that were included in the PIC September 2005 release for the Development Sub-module. Accurate classification of all units in the Development Sub-module allows the Department and PHAs to determine operating subsidy funding eligibility, calculate Form HUD-50058 reporting rates, and monitor occupancy levels in public housing.

*Expires:* September 30, 2007.

**Notice PIH 2006-37 (HA) (Sept. 28, 2006)**  
**Changes to Disaster Voucher Program (DVP) Operating Requirements—Family Eligibility and Initial Lease Terms**

*Summary:* This notice revises the DVP Operating Requirements set forth in HUD Notice PIH 2006-12, issued February 3, 2006. These revisions result from Section 7028 of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, Public Law 109-234, enacted June 15, 2006. The June 2006 Supplemental requires two significant changes to the DVP Operating Requirements: (1) it expands family eligibility for DVP to include to several categories of HUD-assisted dwelling units that were previously eligible for the Katrina Disaster Housing Assistance Program; and (2) it removes the initial lease term requirements of Section 8(o)(7)(A) of the United States Housing Act of 1937 from the DVP. With the exception of the two changes described above, this notice does not rescind or replace HUD Notice PIH 2006-12 or other supplemental guidance on the DVP.

*Expires:* September 30, 2007.

## **HUD Housing Notice**

**Notice: H 2006-12 (Sept. 12, 2006)**  
**Closing Costs Paid by the U.S. Department of Housing and Urban Development**

*Summary:* This notice supersedes Notice H 2005-12, and announces a new and simplified policy on closing costs payable by the Department of Housing and Urban Development (HUD) on sales of single-family properties owned by HUD. This change is intended to align HUD home sale policies with the industry practices.

*Expires:* September 30, 2007. ■

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