



Housing Law Bulletin

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SUCCESSFUL ADVOCACY IN THE PHA PLAN PROCESS

Introduction

The Quality Housing and Work Responsibility Act (QHWRA) of 1998 requires public housing authorities (PHAs) to set forth their policies in a Five-year Plan and an Annual Plan.¹ This planning process is part of the federal effort to invest PHAs with increased local control and also to hold PHAs accountable for their decisions. The purpose of these plans is "to provide a framework for local accountability and an easily identifiable source by which public housing residents, participants in the tenant-based assistance program, and other members of the public may locate basic PHA policies, rules and requirements concerning its operations, programs and services."² Each Annual Plan must

include at a minimum, 17 specific items.³ The statute and the Department of Housing and Urban Development (HUD) regulations require all PHAs to submit to HUD their Five-Year Plan and their first Annual Plan 75 days prior to the end of their fiscal year.⁴ The statute and regulations provide that a plan will be automatically approved 75 days after it is submitted, unless HUD notifies the PHA that the plan has not been approved. Thus, by the end of 2000, all PHAs should have submitted and have HUD-approved Five-Year and first-year Annual Plans. PHAs without HUD-approved plans may be subject to sanctions.⁵ To gauge what PHAs are doing and how they are exercising their discretion, particularly with regard to issues important to very-low income tenants and applicants, NHLP undertook a review of selected PHA Plans. This article and a follow-up article to be published in the November/December 2000 issue of the *Bulletin* discuss the results of that review.

¹42 U.S.C.A. § 1437c-1 (West Supp. 2000).

²24 C.F.R. § 903.1(b) (2000).

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³The 17 items include the following: (1) housing needs, (2) financial resources, (3) policies on eligibility, selection and admission, (4) rent policies, (5) operation and management policies, (6) grievance procedures, (7) capital improvement needs, (8) demolition and disposition, (9) designation of housing, (10) conversion of public housing, (11) homeownership, (12) community service, (13) crime and safety, (14) pets, (15) civil rights certification, (16) audit, and (17) asset management. They are described more fully in the statute and regulations. See 42 U.S.C.A. §1437c-1(d) (West Supp. 2000), 24 C.F.R. § 903.7 (2000). See also *The Annual Public Housing Authority Plan: A New Opportunity to Influence Local Public Housing and Section 8 Policy*, 33 CLEARINGHOUSE REV. 87 (May-June 1999) and the *Residents' Guide to the New Public Housing Authority Plans*, Center for Community Change (Washington, DC, June 1999).

⁴All PHAs have a fiscal year that starts on January 1, April 1, July 1 or October 1. Information on PHA's fiscal year is available on the National Housing Law Project's Web site at nhlp.org and at HUD's Web site at hud.gov/pih/systems/pic/haprofiles.

⁵42 U.S.C.A. § 1437c-1(i)(4) (West Supp. 2000), 24 C.F.R. § 903.23(b)(3) (2000). For calendar year 2000, not all PHAs have complied with the regulations and submitted plans. Recently, HUD provided extensions for PHAs to avoid sanctions and operate without approved plans. But, a PHA with a January, April, or July fiscal year that does not have an approved plan by November 30, 2000 may be subject to sanctions. Any PHA with an October fiscal year start date that does not have an approved plan by December 30, 2000 may also be subject to sanctions. *HUD Notice PIH 2000-43* (Sept. 18, 2000).

The PHA Plan Process and the NHLP Review

HUD developed a Template for the Five-Year and Annual Plans and required PHAs to complete the Template and submit it electronically. The Template, in addition to addressing the 17 specific items, requires PHAs to provide information on Resident Advisory Board (RAB) recommendations, a description of the election process for residents to the PHA board, a statement of consistency with the jurisdiction's Consolidated Plan and a description of how the PHA amends or modifies the plans. Required attachments include the PHA's admission policy for deconcentration, the five-year fiscal year (FY) 2000 capital fund program annual statement, the RAB comments and PHA's responses if they are not included in the text of the Template. Other supporting documents such as the Section 8 Administrative Plan and the Admission and Continued Occupancy Plan (ACOP) are not required to be submitted to HUD but must be available for review. These supporting documents are key because PHA staff rely on them and they provide the critical details that flesh out the more cryptic information provided in the Template. HUD does not require PHAs to include in the plan submitted to HUD mandatory policies, such as the earned income disregard for public housing tenants or the exemption from minimum rent for hardship. The reason given for excluding mandatory requirements is that such a requirement would be unnecessarily burdensome to the PHA and would make the PHA Plan unwieldy.⁶

A year ago, HUD announced that it would be posting approved PHA Plans on its Web site.⁷ However, HUD did not begin to post any plans until August or September of 2000. In the interim, NHLP collected, from a variety of sources and in different formats, information regarding 27 plans and attachments including, in some cases, RAB comments, Section 8 Administrative Plans and ACOPs. Because NHLP was unable to secure final plans from HUD's Web site until after most of the analysis was complete, we encountered several problems in reviewing the collected information.

First, some of the copies of the plans that were transmitted electronically to NHLP were useless because the Template boxes that were supposed to be checked appeared blank or appeared as if all had been checked. In other situations the local advocates had copies of the proposed Template but not the final plan Template. The plans were often missing the required attachments. On the other hand, some advocates had the final plan with attachments that were not required to be submitted to HUD; such as the ACOP for public housing units and the Section 8 Administrative Plan. NHLP tried to clarify inconsistencies between plans and other documents and determine the trustworthiness of the plans with the local advocates, but errors and/or misunderstandings may still have occurred. Second, NHLP was reviewing plans prior to

the end of the first year. Final plans were not required to be submitted by some PHAs until mid-July 2000 and HUD approval of those plans was anticipated by October 1, 2000. For others, the PHA Plan was revised at HUD's request so that the plan that NHLP reviewed was not the one which was finally approved. These facts impacted the number of PHAs that could be included in the review and the accuracy and finality of the information that NHLP received.

In June 1999, HUD issued a report entitled *The Uses of Discretionary Authority in the Public Housing Program: A Baseline Inventory of Issues, Policy, and Practices*.⁸ The purpose of this report, hereinafter referred to as the *HUD Baseline Report*, was to document some of the changes that occurred as a result of the greater discretionary authority provided to PHAs for the period prior to the full implementation of QHWRA. The report looked at PHA's priorities with respect to issues, such as the adoption of local admission preferences, minimum rent, discretionary earned income disregards and interim reporting of increases in income. Because the report looked at some of the same discretionary policies that NHLP reviewed for selected PHAs' Five-Year and first-year Annual Plans, some of the findings of that report are summarized below. Where relevant, we also make comparisons to the information that NHLP collected.

Table A lists those PHAs for which NHLP reviewed documents relating to the PHA Plan process. Of these PHAs, NHLP conducted interviews with 12 advocates who were involved in the PHA planning process with 15 PHAs. We also collected information from advocates on PHA plans from another 12 PHAs. Although NHLP reviewed aspects of the plans for 27 PHAs, information on each of the issues listed below was not always available from all of them. The number of PHAs included in the review for each policy area is listed below when pertinent under each heading.

NHLP reviewed plan documents from these PHAs with a focus on issues that they have the discretion to adopt, including:

- local admission preferences;
- extensions of the Section 8 voucher search time;
- minimum rent;
- interim rent redetermination;
- payment standard for voucher tenants;
- discretionary earned income disregards;
- selected "local issues," and
- selected issues regarding the process followed at the local level to adopt the plan.

⁶64 Fed. Reg. 56,843, 56,855 (Oct. 21, 1999).

⁷*Id.* at 56,844.

⁸HUD, Office of Policy Development and Research (Washington, D.C., July 1999). The *HUD Baseline Report* did not collect data on PHAs' policies with respect to the Section 8 program. The report relied on informal discussions with PHA staff. The PHAs were randomly selected based upon program size. The sampling universe was approximately 1,670 PHAs from which approximately 120 PHAs were selected.

TABLE A
PHA CHARACTERISTICS^a

Jurisdictions	Performance	No. Pub. Housing Units	No. Sect. 8 Participants	PHA FY Date	HUD Classification
Alameda County, CA067	Standard	232	5,266	7/1	Small
Allegheny County, PA006	<i>Not Avail.</i>	3,821	4,746	10/1	Large
Boston, MA002	<i>Not Avail.</i>	11,461	9,943	4/1	Extra Large
Bridgeport, CT001	Standard	2,504	2,473	10/1	Large
Camden, NJ010	Standard	2,229	804	1/1	Large
Chicago, IL002	Standard	37,634	26,149	1/1	Extra Large
Cuyahoga County, OH003	Standard	11,128	9,584	1/1	Extra Large
Erie, PA013	Standard	1,858	931	4/1	Large
Frederick, MD003	High	458	518	4/1	Med. Low
Kansas City, MO002	High	1,336	6,049	1/1	Large
Kern County, CA008	High	1,033	2,832	7/1	Med. High
Long Beach, CA068 ^c	<i>Not Appl.</i>	<i>Not Appl.</i>	5,373	10/1 ^d	<i>Not Appl.</i>
City of Los Angeles, CA004	<i>Not Avail.</i>	8,168	38,119	1/1	Large
Los Angeles County CA002	High	2,932	16,072	7/1	Large
New Britain, CT005	<i>Not Avail.</i>	807	763	1/1	Med. High
New London, CT022 ^b	Troubled	225	114	1/1	Small
Norwalk, CT002	Standard	823	601	4/1	Med. High
Oakland, CA003	High	3,306	9,474	7/1	Large
Providence, RI001	High	2,640	1,862	7/1	Large
Sacramento County, CA007	Standard	1,117	4,206	1/1	Med. High
City of San Diego, CA063	High	1,401	8,584	7/1	Large
San Luis Obispo, CA064	High	172	1,468	10/1	Small
Sanford, FL016	<i>Not Avail.</i>	480	89	7/1	Med. Low
Santa Clara County, CA059	High	555	2,499	7/1	Med. High
Stanislaus County, CA026	High	647	3,543	10/1	Med. High
Stratford, CT027	High	297	280	1/1	Med. Low
Ventura County, CA092	High	355	2,433	7/1	Med. Low
Woonsocket, RI003	Standard	1,291	335	1/1	Large

^a Total Units Data Available from MTCS

^b New London – Sec. 8 – total occupied units = 160

^c Administers Section 8 only

^d PHA may have fiscal year of 7/1

For each of these issues, this article summarizes the law, describes what decisions were made locally and discusses the issues and problems that local advocates highlighted. NHLP anticipates that this limited survey will provide some insight as to what happened in the first year of the planning process and provide some lessons for future planning and advocacy.

Admissions Preferences

The federal statute formerly required PHAs to make available certain percentages of public and Section 8 housing to families who were:

- homeless;
- living in substandard housing;
- facing involuntary displacement;
- paying more than 50 percent of their income for housing; or
- victims of domestic violence.

These requirements, known as the federal preferences, were designed to assure that families with the greatest need were served by the federal housing programs. These preferences were suspended in 1996 and finally repealed in 1998.⁹ Now PHAs are authorized to adopt local preferences, but these must be based upon local need and the priorities of the PHA.¹⁰ In adopting preferences, a PHA may consider local data sources and must consider any information submitted at the public hearings on the PHA Plan and the Consolidated Plan.¹¹ Under federal law PHAs are precluded from treating differently residents of public housing that apply for Section 8 assistance. Thus, any preferences created by a PHA for the Section 8 program must also be extended to public housing residents who apply for Section 8 assistance.¹²

The HUD *Admission and Occupancy* regulation lists certain local preferences including, but not limited to, a preference based upon residency, working families, and victims of domestic violence.¹³ The HUD Template attempts to collect information about what preferences, if any, PHAs have

adopted locally, whether the federal preferences have been retained and what priority, if any, the PHA allocates to each preference.¹⁴

Continuation of the Former Federal Preferences

Of the 25 PHA Plans reviewed with respect to public housing admissions preferences, approximately 50 percent retained one or more federal preference. Of those, nearly 70 percent retained three of the former federal need-based preferences and approximately 30 percent retained all the former federal preferences.

Of the PHAs that retained any of the former federal preferences, more than 50 percent kept the identical preferences for both the public housing and Section 8 program. Of the remainder, all but one selected fewer former federal preferences for the Section 8 program than for the public housing program and half of those eliminated entirely the former federal preferences for admission to the Section 8 program.

A common reason given for discarding the federal preferences was fraud. For example, one West Coast PHA, which discarded all former federal preferences, asserted that applicants fraudulently claimed the domestic violence preference. The PHA relied on that assertion to discard all the federal preferences. A large East Coast PHA, which retained all federal preferences except the rent burden preference, stated that it dropped the rent burden preference because of the level of fraud it encountered in claims of that preference. Another reason frequently cited by PHAs for discarding the federal preferences was the complexity associated with administering them. However, because many of the same PHAs promptly adopted other local preferences, such as employment and residency, the sincerity of their claim is questionable.

Local Preferences

Other than retention of the former federal preferences, the most popular local preferences were for:

⁹42 U.S.C.A. §§ 1437d(c)(4)(A) and 1437a(b)(3) (West Supp. 2000).

¹⁰*Id.*

¹¹24 C.F.R. § 960.206(a) (2000).

¹²42 U.S.C.A. § 1437f(s) (West Supp. 2000). Apparently, HUD's approval process of PHA plans is not designed to review or enforce this statutory requirement. One of the PHA plans that NHLP reviewed stated that one of the preferences for Section 8 assistance was "not currently receiving subsidized housing assistance." Such a preference is in direct contradiction with the statute. Notwithstanding, HUD approved the PHA's Plan.

¹³24 C.F.R. § 960.206(b) (2000). Other preferences mentioned in the regulation include preferences based upon disability and a preference for single individuals who are elderly, displaced, homeless or disabled.

¹⁴The value of the information that the Template provides on the preferences and priorities within preferences is not clear. The few PHAs that NHLP has reviewed had very different systems of preferences and priorities. In Boston, for example, where all the federal preferences were retained for public housing residents, the preferences were split into priority tiers, with domestic violence and displacement in the first tier, homelessness in the second tier and rent burden and substandard housing in the third tier. The PHA's policy provides that all applicants from each tier should be housed before applicants in a lower tier. In Woonsocket, RI, there were five preference categories. A tenant could obtain a point for qualifying for each of four categories and four points for qualifying for the remaining category. An applicant qualifying for more than one category could add the points together. In Oakland, CA, the preference for public housing units includes none of the former federal preferences. The four local preferences are sorted so that at least 50 percent are from families who are working including the disabled and elderly and the other 50 percent are from families who are not working. Under varying preference and priority systems, it is hard to imagine that PHAs will consistently fill out the Template in a uniform fashion. Moreover, it is not clear that PHAs can respond to the questions in a meaningful fashion. Without the underlying documents, no tenant, advocate or Resident Advisory Board member could understand a PHA's admission policies.

- working families;
- residents of the jurisdiction;
- applicants in education and training programs; and
- veterans and veteran's families.

The popularity of the veterans preference/priority in this sample, however, is skewed by the fact that California law requires PHAs to establish a priority for veterans.¹⁵ Among non-California PHAs, only 10 percent of the PHAs adopted this preference/priority.

Employment Preference

For public housing admissions, nearly 75 percent of the 25 PHAs adopted a preference for working families. Of these, nearly 73 percent also adopted a preference for those in education and training programs. Interestingly however, for the Section 8 program only 46 percent of the PHAs adopted a preference for applicants who are employed. When the education and training preference is compared, fewer PHAs also adopted this preference for the Section 8 program (35 percent) than they had for public housing (more than 50 percent).

HUD regulations provide that if a PHA adopts a preference for working families, that preference must also be extended to a family whose head of household, spouse or sole member is elderly or has a disability.¹⁶ Despite the mandatory nature of the regulations, advocates should verify that PHAs apply the preference equally to elderly applicants and applicants with a disability.¹⁷ One PHA Plan acknowledged that elderly tenants and tenants with disabilities must have comparable rights with a family whose head of household is working. Notwithstanding, the same PHA's Administrative Plan stated that "one-in-four new admissions is set aside for working families." How the PHA will implement this preference is not at all clear.¹⁸

A critical issue that NHLP could not determine from a review of the PHA plans was how work was defined. PHAs are not required to define the term in the Template and the supporting documents that NHLP reviewed also did not contain a definition of the term. Thus, it is not clear whether PHAs are defining work by the number of hours per week that a person is employed, whether the term includes volunteer time, whether it includes a definition comparable to that used in the state welfare programs or whether all adults in the family must qualify for the preference to apply.

¹⁵Cal. Health & Safety Code § 34322.2 (2000) states that a California PHA must provide a preference for persons displaced by public or private action and shall give veterans a priority within any preference category selected by the PHA.

¹⁶24 C.F.R. § 960.206(b)(2) (2000).

¹⁷The proposed regulations authorized a working preference for project-based Section 8 without reference to disabled and elderly applicants. 64 Fed. Reg. 23,459, 23,470 (Apr. 30, 1999).

¹⁸See also note 14, *supra* (preference plan adopted by Oakland PHA which provides a preference for both working and non-working applicants. It is unclear how this preference will work in practice).

*Residency Preference*¹⁹

A preference based upon residency was also popular. Approximately 55 percent of the PHAs adopted it for both the public housing and Section 8 programs. The admission and occupancy regulations provide that any residency preference must be in the PHA Plan or supporting documents and must specify that any residency preference "will not have the effect of delaying or otherwise denying admission to the program based on the race, color, ethnic origin, gender, religion, disability, or age of any member of an applicant family."²⁰ In order for a PHA to make such a statement, it would be logical to conclude that the PHA must know whether an applicant is a resident or non-resident and whether the applicant is a member of a protected class. Advocates should therefore request that such information be included in the needs section of the PHA's Plan.²¹

¹⁹HUD defines a residency preference to include applicants who are working or who are notified that they will be working in the jurisdiction and allows PHAs to consider whether graduates or participants in training programs in a residency preference area are included. It prohibits PHAs from creating a durational residency preference. The geographic area for the residency preference cannot be smaller than a county or municipality. See, e.g., 24 C.F.R. § 960.206(b)(1) (2000).

²⁰*Id.* § 960.206(b)(1)(iii).

²¹*Id.* § 903.7(a) (requires the PHA to provide information regarding the status (i.e. race, ethnicity, etc.) of applicants on the PHAs waiting list. It does not, however, specifically state that information must also be provided on the residence of the applicants.)

ERRATA—SECTION 8 HOMEOWNERSHIP PROGRAM

Last month's article regarding the Section 8 Homeownership Program incorrectly describes when a single parent qualifies as a first-time homeowner and erroneously narrows the type of newly constructed units that are eligible for purchase. 30 HOUS. L. BULL.127, 130-131 (Sept. 2000).

The definition of a first-time homeowner includes a single parent who, while married, owned a home with his or her spouse, or resided in a home owned by his or her spouse. 65 Fed. Reg. 55,161 (Sept. 12, 2000) (to be codified at 24 C.F.R. § 982.4(b)). Further, all eligible housing units—not just manufactured homes—that are under construction when the family becomes eligible for the program can be purchased with Section 8 homeownership assistance. *Id.* at 55,164 (to be codified at 24 C.F.R. § 628(a)(2)). Lastly, footnote 33 should read: § 8(y) of the *United States Housing Act of 1937*, 42 U.S.C.A. § 1437(y)(1)(C) (West Supp. 2000). 30 HOUS. L. BULL.127, 131 (Sept. 2000). NHLP apologizes for these errors.

One advocate, involved in the plan adoption process of a PHA that is located in a white suburban community adjacent to an urban center with a substantial minority low-income population, raised the issue of the discriminatory effect of a residency preference for that PHA. A PHA staff member responded, after checking with HUD, that because more than half of the residents of the suburban PHA's public and Section 8 housing were minorities, the PHA did not have to be concerned about the policy being racially discriminatory. Such a response only underscores how inadequate a PHA's and HUD's understanding may be of fair housing issues and their obligation to affirmatively further fair housing.

It is not apparent from the PHA plans why PHAs established different priorities for the Section 8 and public housing programs.

It is not apparent from the PHA plans why PHAs established different priorities for the Section 8 and public housing programs. But, it is reasonable to conclude that for public housing admissions, PHAs are responding to the policy changes that are most focused on public housing. These include the effort to deconcentrate the incidence of poverty within public housing and a perceived need to reduce reliance on federal subsidies which is predicated on PHAs' belief that federal housing subsidies will shrink. PHAs may also believe that they will financially benefit if they are able to attract higher-income families.²² These factors may explain why so many PHAs have adopted preferences for public housing applicants who are working and in training programs. The fact that PHAs have retained the former federal preferences to a greater degree for public housing than for Section 8 may be explained by the fact that most RABs in the first year of the planning process had very few Section 8 representatives. The reason why working preferences were not embraced by the PHAs for the Section 8 program may be

explained by the fact that PHAs were concerned that such a preference might interfere with targeting requirements.²³

Other local preferences that were adopted by PHAs varied widely. Some of them reflected special purpose Section 8 or unique public housing needs. For example:

- preferences for the elderly and people with disabilities;
- a family reunification preference;
- graduates of self-sufficiency programs;
- public housing relocatees;
- homeownership families; or
- those referred from other social service agencies.

Yet other preferences appeared to be directly related to PHA obligations to reasonably accommodate tenants with disabilities, such as those who need to move because of a medical emergency or the inaccessibility of their current unit, or tenants who were institutionalized but whose lives have stabilized. PHAs also adopted other preferences based upon need, such as for people who:

- have no income because they have reached the welfare time limits;
- were over or under-housed;
- are facing life-threatening situations;
- are in the witness protection program;
- are affected by elevated levels of lead in their blood; and
- have secured court orders to move into public housing.

One PHA adopted a unique preference entitled a "venture" preference. It is designed to assist families who experienced a crisis after moving from public housing to the private market and needed to return to public housing to regain stability. Such a preference poses unique possibilities especially in the context of a PHA that is demolishing or converting public housing and providing tenants with vouchers. Such a preference may provide tenants with some security if they are in a tight housing market or fearful of the long-term consequences of accepting a voucher.²⁴ That security could be further enhanced if public housing tenants had a preference for vouchers that are released by returning venture tenants. In such a situation, the public housing tenant who ventured out with a voucher could effectively change places with another public housing tenant who wants to move out to pursue a job or for other reasons.²⁵

²²The proposed operating subsidy rule allows PHAs to retain 50 percent of all increases in rent from all sources including income from newly admitted families. See 65 Fed. Reg. 42,487, 42,501 (July 10, 2000), § 990.109(b)(1)(ii). It is not limited to increases in the income of families in occupancy. The proposed operating subsidy rule appears to be in conflict with the statute with respect to the treatment of increases in rent created by increases in family income. The statute focuses upon encouraging PHAs to increase the income of families in occupancy. See 42 U.S.C.A. § 1437g(e)(2)(B) (West Supp. 2000) (§ 519 QHWA). Section 519 entitled *Incentive to Increase Certain Rental Income* states that the operating subsidy formula shall include an incentive to encourage increases in earned income by families in occupancy. As proposed, the rule creates an inappropriate financial incentive for PHAs to admit the highest income applicants. Moreover, the formula places the incentive to increase the income of current tenants on a par with the incentive to seek out new admittees with higher income. Congress did not intend such a result. Instead, it wanted PHAs to focus their efforts and be rewarded for increasing the earned income of families in occupancy.

²³For the Section 8 programs, PHAs must target 75 percent of admissions to extremely low-income families. 42 U.S.C.A. § 1437n(b) (West Supp. 2000).

²⁴There are limits to the security that a venture preference might provide based upon the number and size of remaining public housing units and the turnover rate.

²⁵Because preferences may be changed by a PHA, tenants facing a public housing demolition or disposition should secure such a preference by obtaining a written agreement or contract.

One advocate interviewed by NHLP raised a cautionary note regarding preferences. She pointed out that preferences included in a plan will benefit clients only if the admission application and other intake documents used by a PHA are updated to include those preferences and the PHA staff are trained to understand their applicability. This underscores the need for advocates to carefully review for consistency all the documents that a PHA uses to implement policy changes, and not to rely solely on the Annual Plan Template.

Extension of Section 8 Voucher Search Time

Prior to November 22, 1999, the HUD regulation provided that the initial term of a voucher must be 60 days and prohibited PHAs from extending a recipient's voucher search term beyond 120 days.²⁶ The time limit could not be extended even when the PHA was making a reasonable accommodation due to an applicant's disability.²⁷ The revised regulation removes the 120-day cap on extensions of the voucher term and requires an extension for reasons relating to reasonable accommodation.²⁸ PHAs may now extend the term of the voucher beyond 120 days in accordance with PHA policy as described in the PHA Administrative Plan.²⁹

Lifting the 120-day regulatory limitation will benefit tenants who are having difficulty finding a suitable unit; a frequent occurrence in tight housing markets. This difficulty is exacerbated if the payment standard is inadequate,³⁰ if the family is seeking a unit in an area that is not racially or economically impacted or if the family is a former public housing tenant.³¹ In these situations, it is important to encourage

PHAs to provide tenants with sufficient time to locate units and landlords who will accept Section 8 vouchers.

The initial 60-day search term has been retained in the HUD regulations. However, extensions to the initial term are now determined locally and the reasons for the extensions must be included in the PHA Plan. As a result, the Template asks whether the PHA allows extensions and, if the answer is affirmative, to describe the circumstances under which an extension is granted.³²

Of the 25 PHAs for which information was available on this issue, approximately 60 percent reported giving families up to the old maximum of 120 days to use their Section 8 voucher. Most often these PHAs grant extensions in 30 or 60 day increments. Occasionally, in tight housing markets, the PHA provides an initial term of 120 days. If extensions are required, they are generally granted if a family experiences a medical emergency that prevents it from actively searching for housing during the initial 60 days, if the family is diligently searching but is still unable to find a unit, or for other good cause. Many PHAs explicitly state that extensions are given as an accommodation for a disability, although the Template does not require this information because such extensions are mandatory.

Sixteen percent of the PHAs increased the time to use a voucher to six months and another 16 percent allowed for extensions beyond 120 days.³³ Mirroring the regulations, several PHA Templates and Section 8 Administrative Plans say nothing about maximum time limits. While this suggests that these authorities are willing to give families more than 120 days for their housing search, it is not clear. One East Coast PHA took a more restrictive approach, which is also permitted by the regulations, providing a search term of 90 days.

Some of the advocates who were asked why their PHAs failed to extend the search time, stated that, in practice, the PHA gave extensions beyond what was provided for in the written policies and that the search time did not appear to be a problem locally. Another reason for the failure may be that PHAs were not aware of their authority to extend the search time, which came about as a regulatory change in late 1999. Also, the manner in which the Template asks the question—does the PHA give extensions on the 60-day notice period—does not aid in understanding the underlying issue.

ied the Section 8 program "succeeded in assisting many minorities in affording their homes, but failed in helping minorities to move out of areas of high poverty and minority concentration." *Id.* at Chapter 8. *See also, Section 8 Mobility Report Issued*, 30 HOUS. L. BULL. 78 (June 2000) which discusses the report by Margery A. Turner *et al.*, *Section 8 Mobility and Neighborhood Health: Emerging Issues and Policy Challenges* (The Urban Institute, Washington, DC, April 2000). The report is available at urbaninstitute.org. This report considered *inter alia* some of the problems faced by former public housing tenants who were issued vouchers.

³²PHA Plan Template, page 17, ¶ 3.B.(3) (HUD 50075) (Expires 03/31/2002).

³³Since the Template does not require PHAs to detail their search time policies, advocates must look at Section 8 Administrative Plans and the PHAs' practice to accurately understand PHAs' policies.

²⁶60 Fed. Reg. 34,695 (July 3, 1995) (§ 982.303) as amended by 60 Fed. Reg. 45,661 (Sept. 1, 1995) (120 day limit).

²⁷*Id.*

²⁸*Compare*, 60 Fed. Reg. 34,695 (July 3, 1995) (§ 982.303) as amended by 60 Fed. Reg. 45,661 (Sept. 1, 1995) (120 day limit) *with* 65 Fed. Reg. 56,893, 56,913 (Oct. 21, 1999) (§ 982.303) (no limitation, allows one or more extensions of the initial voucher term as defined in PHA Plan).

²⁹PHAs are also free to limit the term of a voucher to a time in excess of 60 days but less than 120 days. But such restrictions may interfere with the PHAs' obligation to affirmatively further fair housing.

³⁰*See Tenant-Based Section 8 Renewal Rule*, 30 HOUS. L. BULL. 4 (Jan. 2000) (a revised version of this article is posted on NHLP's Web site at nhlp.org (the article has a chart demonstrating the effect of a payment standard set at 90, 100 and 110 percent of FMR).

³¹*See CHAC Section 8 Program: Barriers to Successful Leasing Up* by Susan J. Poplin and Mary K. Cunningham (The Urban Institute, Washington D.C., April 1999). This study can be accessed at urbaninstitute.org/housing/chac.html. "Our focus group participants reported a range of different types of discrimination including: racial discrimination, biases against families with children, refusal to accept Section 8, and prejudices against [Chicago Housing Authority] residents." Participants also reported discrimination based upon receipt of public assistance. *Id.* at 16. *See also Equal Housing Opportunity in New York: An Evaluation of Section 8 Housing Programs in Buffalo, Rochester, and Syracuse*, New York State Advisory Committee to the U.S. Commission on Civil Rights (Oct. 1999). The New York study, available at usccr.gov/nysec8/main.html, undertook to see whether the Section 8 tenant-based program in upstate New York provided improved housing opportunities for minorities. The report concluded that for the areas stud-

Whether the time period allocated by the PHA is adequate to locate a unit is not apparent from the completed Template. For future plans, advocates should request PHAs to include information on the voucher turn-back rate by family size and the race of the family. In other words, the PHA should keep and make available data on the number of vouchers that must be issued in order to ensure that a voucher is actually used to lease a unit. If many vouchers are issued before a unit is leased-up, it is evidence of the difficulty applicants are having in finding units and would support a policy to extend the search time. The information on return rate by race and family size may also be reflective of civil rights impediments which the PHA has an affirmative obligation to address in the administration of the voucher program.

Any PHA that adopts a minimum rent must enable tenants to request a hardship exemption.³⁶ The statute enumerates certain mandatory criteria for granting an exemption and allows PHAs to adopt additional criteria.

Those PHAs that provide for extensions beyond the standard 60-day period must set forth the circumstances for which extensions are granted. Failure to do so may result in HUD returning the Annual Plan with instructions to correct and resubmit it.³⁴

Minimum Rent

QHWRA provides that each PHA may adopt a policy requiring public housing and Section 8 tenants to pay a minimum rent of between \$0 and \$50, including utilities.³⁵ Any PHA that adopts a minimum rent must enable tenants to request a hardship exemption.³⁶ The statute enumerates certain mandatory criteria for granting an exemption and allows PHAs to adopt additional criteria.³⁷

The Template asks each PHA to report, for both the public housing and the Section 8 programs, the dollar amount of the minimum rent and whether the PHA has adopted any discretionary minimum rent hardship exemption policies.³⁸ The Template does not ask a PHA that has adopted a minimum rent whether it has adopted the mandatory hardship exemptions.³⁹

Prior to QHWRA, PHAs also had discretionary authority to set minimum rents of \$0 to \$50.⁴⁰ The *HUD Baseline Report* found that about one-half of PHAs surveyed elected to charge a minimum rent of \$50 for their public housing units and that most of the remaining PHAs were charging a minimum rent of \$25. NHLP found that of the 25 PHAs in its sample that administer public housing units, 28 percent adopted a zero minimum rent. This percentage is substantially higher than the two-tenths of a percent of PHAs that the *HUD Baseline Report* found not to be charging a minimum rent.⁴¹ NHLP also found that 44 percent of the PHAs adopted a minimum rent of \$50 and 24 percent adopted a minimum rent of \$25. In contrast, the *HUD Baseline Report* found that 50.9 percent of the PHAs established a minimum rent of \$50 and 44.6 percent adopted a minimum rent of \$25. From this limited comparison, it would appear that housing advocates were quite successful in changing or maintaining a minimum rent of zero or reducing the minimum rent to \$25. Advocate success takes on added significance when one considers that the *HUD Baseline Report* found that only the extra-large PHAs adopted a policy of zero minimum rent. By contrast, in NHLP's limited sample, over 70 percent of the PHAs with a zero rent were not extra-large PHAs.

As Table B shows, of the 25 PHAs for which information was available, more than 75 percent had a minimum rent for at least one program. Sixty-four percent established minimum rents for both the public housing and Section 8 programs.⁴² Of these, 52 percent established the same rent level for both programs. Three PHAs had different minimum rent levels greater than zero for the two programs. In Los Angeles County and Sacramento County, California, the minimum rent level was \$50 for public housing and \$25 for Section 8. In Santa Clara County, California, the minimum rent levels were \$25 for public housing and \$50 for Section 8. It was not apparent from the available documents why these PHAs selected different minimum rents for the two programs.

Twenty-four percent of the PHA's established minimum rents of zero for both programs. In 15 percent of the 25 PHAs, advocates were able to negotiate minimum rents downward to zero after the PHAs initially proposed a higher minimum rent. For most of these situations, this was accomplished by arguing the equities, pointing out the potentially small percentage of tenants who would be affected and emphasizing the savings in PHA administrative time that would occur if staff did not have to process hardship exemptions.

³⁴See Letter from Donna J. Auyala, HUD Director, to Sandra B. Henriquez, HUD Administrator, Boston Housing Authority (May 15, 2000).

³⁵42 U.S.C.A. § 1437a(a)(3) (West Supp. 2000).

³⁶*Id.* § 1437a(a)(3)(B); 24 C.F.R. § 5.630(b) (2000).

³⁷42 U.S.C.A. § 1437a(a)(3)(B) (West Supp. 2000).

³⁸PHA Plans Template, pgs. 20 and 24, ¶¶ 4.A.(1)b and 4.B.(2)a (HUD 50075) (Expires 03/31/2002).

³⁹42 U.S.C.A. § 1437a(a)(3)(B) (West Supp. 2000).

⁴⁰Pub. L. No. 104-99, 110 Stat. 44 (Jan. 26, 1996) (authorized minimum rents of \$25-50). See PIH 96-6 (HA) (issued Feb. 13, 1996); Pub. L. No. 104-20, 110 Stat. 2874 (Sept 26, 1996) (provided that minimum rents may be \$0-50); PIH 96-81 (HA) (issued Sept. 30, 1996). The *HUD Baseline Report* stated that at the time of the report "most PHAs actually view the amount between \$25-50 as the decision range for setting minimum rents..." at 22.

⁴¹*HUD Baseline Report* at 24.

⁴²Two authorities, Long Beach, CA and the Connecticut Department of Social Services, administer Section 8 only.

For those PHAs that established minimum rents, it does not appear that they were influenced by the percentage of tenants who most likely would be affected by such a policy. Among some of the PHA's with the same minimum rent for both programs, wide disparities exist between the percentage of tenants affected by the minimum rent in each program. These disparities appear not to have influenced these authorities in setting the minimum rent for each program. For example in Frederick, Maryland, the \$50 minimum rent for both programs will affect approximately 15 percent of the public housing tenants and only 8 percent of the Section 8 tenants. For Sanford, Florida, approximately 15 percent of the public housing tenants and 6 percent of the Section 8 tenants will be subject to the \$50 minimum rent. In Norwalk, Virginia, the percentage of residents affected by the minimum rent of \$50 will be 10 percent of the public housing tenants and 6 percent of the Section 8 families. In Alameda County, California, 22 percent of the Section 8 tenants will be affected by a \$50 minimum rent for both programs while no public housing tenants will be affected.⁴³

The data regarding the percentage of tenants who pay various levels of rent at any particular PHA are available from the HUD Web site. These numbers could be used to bolster an argument that the minimum rent is too high. A minimum rent should affect only a small percentage of the programs' participants. The predominate rule should be that tenants should be paying 30 percent of their income for rent. If more than 10 to 15 percent of the participants would be required to pay the minimum rent, perhaps it is too high. Equitable arguments could also be made if the percentage of participants affected varies significantly between the two programs. In that case, perhaps it would be most equitable to set the minimum rent at different levels for the two programs so that the same or a similar percentage of participants in the two programs would be affected.

The position of the tenants and the RAB with respect to minimum rents appears to be a significant factor as to whether a PHA established a minimum rent. In the case of one East Coast PHA, housing advocates succeeded in reducing the minimum rent for the Section 8 program to zero. The PHA, however, retained a \$25 minimum rent for the public housing program in large part because the tenant organization believed it was important to retain this minimum rent level. The tenants apparently accepted the argument that everyone should pay some rent regardless of the hardship or changed circumstances. Residents of public housing at a large West Coast PHA were also divided on the issue of minimum rents. In that case, the PHA retained in its final plan its proposed minimum rents.

In discussing minimum rents, the *HUD Baseline Report* noted the tension between the PHAs that are concerned that a minimum rent would impose a hardship on tenants and those which feel that the fiscal solvency of the PHA depends

upon a minimum rent. Reasons cited by PHAs for setting minimum rents include the belief that minimum rents motivate tenants to increase income and provide tenants with a sense of "carrying their own weight."⁴⁴ PHAs also believe that there is "hardly any household with no real income."⁴⁵

Of the 25 PHAs for which information was available, more than 75 percent had a minimum rent for at least one program. Sixty-four percent established minimum rents for both the public housing and Section 8 programs.

An examination of the issue of the discretionary minimum rent hardship exemption policies shows that the PHA's ACOP and their Section 8 Administrative Plan are often inconsistent with the Template. In the case of nine PHAs for which both a Template and either a Section 8 Administrative Plan or an ACOP was available, several authorities expressed different policies in the various documents. For example, the Template asks whether a PHA adopted discretionary minimum rent hardship exemption policies. Five PHAs⁴⁶ listed increases in certain enumerated expenses as a reason for a hardship exemption in their ACOP or Administrative Plan, yet failed to include that information in the Template. In another instance, the PHA's Template mentions a discretionary exemption for disabled families without income, but does not mention the same exemption in the supporting documents.⁴⁷

As noted earlier, HUD decided that it would not require PHAs to include in their plans mandatory policies because such a requirement would make the plans unwieldy and, according to HUD, would add nothing if the statute were merely repeated.⁴⁸ This determination by HUD has resulted in problems that will adversely affect tenants and confuse PHA staff. A review of ACOPs and Section 8 Administrative Plans reveals that some PHAs did not allow for any minimum rent hardship exemption in these documents.⁴⁹ This oversight persisted despite the fact that the failure to comply with a statutory requirement was highlighted by advocates. Other PHAs mentioned the hardship exemption

⁴⁴*HUD Baseline Report* at 23.

⁴⁵*Id.*

⁴⁶Providence, RI, Woonsocket, RI, Stratford, CT, Alameda County, CA, and Stanislaus, CA.

⁴⁷Another example of problems with the Template is that it is not always consistent with the underlying documents. For example, for one PHA the Section 8 Administrative Plan stated that the minimum rent was zero, while the Template stated that the minimum rent was \$50.

⁴⁸64 Fed. Reg. 56,843, 56,866 (Oct. 21, 1999).

⁴⁹24 C.F.R. § 5.630 (2000) (sets forth the hardship exemption).

⁴³The fact that no public housing tenants will be affected can be partially explained by the fact that the Alameda County, CA PHA only reports a total of 232 public housing units of which 166 were included in the July MTCS.

in the underlying documents, but did not state in the ACOP that a tenant could not be evicted for nonpayment of rent during the period when the PHA was required to suspend the minimum rent. These failures will undoubtedly create problems because most PHA staff refer to local policy and guidance only, not to the published federal regulations.

Table B shows the range of minimum rents adopted by the 25 PHAs, the percentage and number of tenants affected for both public housing and Section 8 at the selected PHAs and the potential nationwide impact of hypothetical \$0, \$25 and \$50 minimum rents.

Rent Redeterminations

The regulations governing public housing interim rent recertification permit a tenant to request an interim recertification and require PHAs to adopt interim recertification policies that are in accordance with the PHA Plan.⁵⁰ The voucher program rules are effectively identical to those for public housing. PHAs must provide an interim rent recertification at the participant's request and also adopt an interim rent recertification policy that is consistent with the PHA's Section 8 Administrative Plan.⁵¹ HUD does not require interim rent recertification when a tenant's income increases. Under either program, the PHA may decide when, for whom, and under what circumstances to require interim rent recertification when tenant income increases.⁵²

In the Template, HUD seeks information regarding PHAs rent redetermination policies for only the conventional public housing program. For that program, the Template asks "how often must tenants report changes in income or family composition such that the changes result in an adjustment to rent?"⁵³ The boxes that a PHA may check to answer the question provided in the Template are:

- "never;"
- "at family option;"
- "anytime the family experiences an income increase;" or
- "anytime a family experiences an income increase above a threshold amount or percentage."

Rent policies that do not require immediate reporting and concomitant rent increases for any increases in income, support tenant efforts to work and are important for several reasons. First, such policies function as an income disregard. For tenants who are working, they provide an incentive to

increase income—through new or supplemental work, increased hours or overtime—without the immediate consequences of increased rent. Second, postponing the tenant's obligation to report changes in income until the family's annual recertification removes the reporting and recertification burden for the tenant. This burden is not insubstantial and may be confusing because work for public housing residents is often sporadic and paycheck amounts frequently vary. The reporting of all increases in income may require several visits to the PHA management office, often at times that conflict with a tenant's work schedule. If a recertification is required as a result of the reported increase, the tenant may be required to visit the PHA office again. The tenant may also be required to follow up with an employer to verify income changes—not a simple task for a new or low-level worker. Third, the benefit of not having to report interim income increases is that the possibility of tenants being charged with a retroactive rent adjustment for inadvertent or negligent failure to report such increases is minimized.⁵⁴

In support of a policy to eliminate or minimize a tenant's obligation to report interim increases in income, some advocates noted that the policy should be appealing to PHAs because it does not have a negative impact upon operating subsidies.⁵⁵ Operating subsidies are established annually and are based in part upon the average monthly dwelling rental charge per unit.⁵⁶ The operating subsidy does not fluctuate monthly with tenant income. Thus, a rent recertification policy is a cost-free way for PHAs to provide incentives to working tenants.⁵⁷ Moreover, such a policy may, over time, increase a PHA's rent collections because tenant rent will rise as tenant earned income becomes more secure.

Of the 25 PHAs for which information on this issue was examined, 28 percent do not require tenants to report interim income increases. An additional 24 percent only require tenants to report income increases if the tenant previously reported an income decrease that resulted in a decrease in rent or the tenant initially reported zero income. Twenty-four

⁵⁴PHAs' interim rent recertification policies assumed heightened significance with the recent HUD initiative to match income reported to HUD on behalf of tenants with income that tenants reported to the IRS and the Social Security Administration. For those tenants with identified income discrepancies, PHAs cannot seek retroactive rent adjustments if the PHAs' local policies did not require tenants to report the increased income or to make adjustments in rent as a result of the increases in income. For background information see *HUD Tenant Income Verification Program Temporarily Suspended Pending Improvements*, 30 HOUS. L. BULL. 93 (July 2000) and *HUD Proposes to Implement Income Verification Program for Tenants in Assisted and Public Housing*, 30 HOUS. L. BULL. 43 (Mar./Apr. 2000).

⁵⁵In contrast, discretionary earned income disregards initially may have a negative impact upon a PHA's operating subsidies. See the discussion on earned income disregards, *infra*, and 24 C.F.R. § 990.109(b)(ii) (2000).

⁵⁶24 C.F.R. § 990.109 (2000).

⁵⁷Only one of the PHA Plans that NHLP reviewed made a distinction between the interim reporting of earned and unearned income. The remainder applied the interim reporting requirements uniformly to earned and unearned income.

⁵⁰24 C.F.R. §§ 960.257(b) and (c) (2000).

⁵¹*Id.* § 982.516(b).

⁵²NHLP did not determine whether PHAs adopted policies for their voucher program that did not require tenants to report increases in income. Such policies should be considered as voucher holders will benefit in the same manner as public housing residents.

⁵³PHA Plans Template, pg. 22, ¶ 4.A. (HUD 50075) (Expires 03/31/2002).

TABLE B MINIMUM RENT

	PUBLIC HOUSING				SECTION 8			
Jurisdictions	\$0	\$25	\$50	% Affected ^a	\$0	\$25	\$50	% Affected ^a
Alameda County, CA067			✓	0%			✓	22%
Boston, MA002 ^d	✓			4%		✓		5%
Bridgeport, CT001			✓	3%			✓	1%
Camden, NJ010	✓			3%	✓			6%
Chicago, IL002	✓			10%	✓			34%
Cuyahoga County, OH003		✓		10%	✓			5%
Erie, PA013	✓			0%	✓			0%
Frederick, MD003			✓	15%			✓	8%
Kansas City, MO002	✓			9%	✓			2%
Kern County, CA008			✓	1%			✓	1%
Long Beach, CA068 ^{b,c}	Not applicable						✓	23%
City of Los Angeles, CA004	✓			0%	✓			1%
Los Angeles County CA002			✓	0%		✓		9%
New London, CT022		✓		1%		✓		0%
Norwalk, CT002			✓	10%			✓	6%
Oakland, CA003		✓		0%		✓		3%
Providence, RI001		✓		6%		✓		6%
Sacramento County, CA007			✓	1%		✓		1%
City of San Diego, CA063			✓	0%			✓	4%
Sanford, FL016 ^a			✓	15%			✓	6%
Santa Clara County, CA059		✓		0%			✓	3%
Stanislaus County, CA026			✓	0%			✓	1%
Stratford, CT027	✓			0%	✓			0%
Ventura County, CA092			✓	3%			✓	3%
Woonsocket, RI003		✓		1%		✓		4%
National Figures 1 ^e	✓			1%	✓			4%
National Figures 2 ^e		✓		7%		✓		7%
National Figures 3 ^e			✓	13%			✓	11%

^a Data calculated from MTCS (for June 2000 for Section 8 and May 2000 for Public Housing) from information on distribution by Total Tenant Payment. Percentage affected calculated based upon the number reported.

^b Administers Section 8 only.

^c Long Beach Section 8 Admin. Plan says \$0 rent and Template \$26-50.

^d Boston may have reduced Section 8 rent from \$25 to \$0.

^e National figures show percentage assuming differing minimum rents

percent require reporting or a change in the rent only after the income increases beyond a threshold amount. Only 24 percent require tenants to immediately report an increase in income which is then followed by an interim rent recertification. Most PHAs require tenants to report changes in family composition and process interim rent increases if a new family member has income.

Advocates who participated in the PHA Plan process have had success in persuading PHAs not to require reporting for income increases.

Advocates who participated in the PHA Plan process have had success in persuading PHAs not to require reporting for income increases. For example, in Camden, New Jersey, the tenant organization, supported by a housing advocate, was able to convince the PHA to change its rent redetermination policy so that tenants only have to report income increases at their annual recertifications. The advocates emphasized not only the benefit to the tenants but also the savings in administrative time that the PHA would realize if it only certified families' income once a year. In Allegheny, Pennsylvania, the PHA acknowledged that a shift in the recertification policy would result in a de facto earned income disregard for some tenants without a major negative impact on the PHA's budget. A discretionary earned income disregard, on the other hand, could have a negative impact on the PHA's budget.⁵⁸

Among the PHA Plans reviewed by NHLP, the percentage of PHAs with income recertification policies that minimized interim reporting of income increases was significantly higher than the percentage with similar rent recertification policies that HUD reported in the *HUD Baseline Report*. Overall, the HUD report found that nearly 60 percent of the PHAs required that increases in tenant income be reported immediately.⁵⁹ In contrast, only 24 percent of the PHAs that NHLP reviewed required an immediate reporting of increases in tenant income. NHLP's finding is consistent with HUD's recent acknowledgment that "more and more PHAs are choosing so-called fixed-rent systems under which most interim rent increases are eliminated."⁶⁰

⁵⁸24 C.F.R. § 990.109(b)(1)(ii) (2000); see 65 Fed. Reg. 42,487 (July 10, 2000) (§ 990.109(b)(2)(iii) proposed rule for *Allocation of Operating Subsidies Under the Operating Fund Formula*). See also discussion on earned income disregard, *infra*.

⁵⁹*HUD Baseline Report*, at 18.

⁶⁰*Changes in Admissions and Occupancy Policies*, ¶ V.B.8 (materials created by HUD for training of tenants in June and July 2000 on changes in public housing law produced by QHWRA).

Payment Standards

Nearly a year ago, HUD published a regulation concerning Section 8 voucher renewals stating that HUD will fund additional costs attributable to increases in a PHA's voucher payment standard.⁶¹ The practical effect of the regulation is that PHAs may exercise their discretion and increase the payment standard to 110 percent of Fair Market Rent (FMR) and receive subsidies in subsequent years that account for the cost increase.⁶² As a result, PHAs are not confronted with the dilemma of serving fewer residents if the payment standard is increased.⁶³ Moreover, they are now presented with an effective tool for making more units available to families at a rent burden of 30 percent of income for rent and utilities. An adequate payment standard should be set at a level adequate to assist families who are seeking to rent units in areas outside of poverty and minority concentrations. An adequate payment standard will also aid the lowest-income families. These are families who may be prohibited from using their voucher because, as long as a lower payment standard is in place, the family's share of the rent exceeds the maximum limit of 40 percent of adjusted income.⁶⁴ A higher payment standard means that in tight housing markets, fewer tenants are subject to the 40 percent cap.

In reviewing the payment standards that PHAs reported in their annual plans, many PHAs seemed to be taking advantage of new HUD rules that allow them to set their payment standard above 100 percent of FMR. Of the 27 PHAs whose plans were examined concerning this issue, 48 percent set their payment standard above 100 percent of the FMR for at least some units or areas within their jurisdiction. For example, the Alameda County, California PHA received permission from HUD to set its payment standard at 120 percent of the FMR for the five most expensive cities

⁶¹For background information see *Tenant-Based Section 8 renewal Rule*, 30 HOUS. L. BULL. 4 (Jan. 2000).

⁶²PHAs may also seek HUD approval to increase the payment standard to 120 percent of FMR. To receive authorization to use an exception payment standard, housing agencies must demonstrate that the exception is justified by actual rental costs in a portion of the FMR area, and provide evidence sufficient for HUD to determine that the exception is needed to overcome difficulties in using vouchers or to help families find housing outside areas of high poverty. PHAs also may receive HUD approval to use a payment standard above 110 percent to enable a person with a disability to lease appropriate housing.

⁶³At least two PHAs justified maintaining a lower payment standard based upon the false premise that fewer families would be served if a higher payment standard were adopted. This justification could be explained because many PHAs did not understand the new renewal formula. But in one instance, it is apparent that housing advocates explained the changes in the law with no immediate success or apparent understanding of the issue by the local PHA.

⁶⁴24 C.F.R. § 982.508 (2000). If the payment standard is low, it may be hard for a tenant to find a unit within the payment standard. If the tenant must rent a unit for a rent that exceeds the payment standard, that tenant will, by definition, be paying more than 30 percent of her income for rent. The voucher rules cap what a tenant may pay at initial occupancy at 40 percent of adjusted income. *Id.*

in its jurisdiction, and set the payment at 110 percent for all other areas. One-third of the authorities set their payment standard at 100 percent of FMR. Eighteen percent of the PHAs had a payment standard that was set at 90 percent of FMR and one PHA had a payment standard that included a range of 90 to 100 percent of FMR.

Many PHAs seemed to be taking advantage of new HUD rules that allow them to set their payment standard above 100 percent of FMR.

While it is encouraging that nearly 50 percent of the PHAs reviewed their markets and set payment standards for some or all of their units above 100 percent of FMR, there is a need for continued advocacy at the local level. PHAs need to be informed of the benefits, as well as the lack of financial disincentives, in setting the payment standard above 100 percent of FMR to ensure that vouchers are used by the vast majority of applicants and participants. Because rental markets may change rapidly, this is an issue that should be revisited frequently.

The need to increase the payment standard also should be reviewed frequently because of its fair housing implications. In some jurisdictions, a low payment standard may allow families to lease only units located in areas that are racially and economically impacted. In three East Coast jurisdictions, advocates reported that while housing is available within the payment standard, it is often in poor condition and in segregated neighborhoods. In these areas, the low payment standard often prohibits voucher holders from moving to better housing outside areas of minority concentration.

During the plan adoption process, advocates from Boston identified a problem associated with the interrelationship between the payment standard, the maximum family share at initial occupancy and the utility allowance. The HUD regulations provide that new or current participants moving to a new unit cannot pay more than 40 percent of their adjusted income for rent.⁶⁵ Rent is defined as gross rent which includes rent, plus a reasonable allowance for utilities.⁶⁶ Under this formula, the higher the utility allowance the less the family can pay for rent and remain under the 40 percent cap. In a tight housing market where tenants have difficulty finding a unit within the payment standard, advocates seeking a higher utility allowance should simultaneously seek an increase in the payment standard. If the two are not increased simultaneously, the lowest-income tenants will be hampered in their efforts in finding a unit that is within 40 percent of adjusted family income.

⁶⁵*Id.* § 982.508.

⁶⁶*Id.* § 982.4 (2000) (gross rent).

Earned Income Disregards

In QHWRA, Congress provided for an expanded mandatory earned income disregard for public housing residents.⁶⁷ This new earned income disregard provides that during a four-year period incremental earnings are fully disregarded for 12 months and disregarded at 50 percent for an additional 12 months. To be eligible for the disregard, a family's income must increase as a result of:

- the employment of a family member who was unemployed for one or more years;
- earned income increases during the time that the family member participated in a Family Self-Sufficiency (FSS) program or job training program; or
- earned income increases within six months of receipt of welfare benefits.

Although the new earned income disregard took effect in October 1999, the old and more limited 18-month earned income disregard remains in effect for tenants through March 2001.⁶⁸

There are other mandatory disregards which benefit working families in particular. These disregards include, but are not limited to:

- exclusions for child care expenses to allow a member of the family to work or attend school;⁶⁹
- amounts received under training programs funded by HUD;⁷⁰
- incremental earnings from participation in state or local employment training programs;⁷¹
- exclusions for reasonable attendant care and auxiliary apparatus expenses that exceed three percent of income for a member of the family with a disability that allows any member of the family to work;⁷²
- earned income of a child or full-time student;⁷³ and
- payments received for the care of foster children or adults.⁷⁴

⁶⁷42 U.S.C.A. § 1437a(d) (West Supp. 2000).

⁶⁸The former earned income disregard will also be important in the current HUD effort to establish a baseline for 1998 for determining whether tenant income has been accurately reported and rents set accordingly. For background information, see *HUD Tenant Income Verification Program Temporarily Suspended Pending Improvements*, 30 HOUS. L. BULL. 93 (July 2000); *HUD Proposes to Implement Income Verification Program for Tenants in Assisted and Public Housing*, 30 HOUS. L. BULL. 43 (Mar./Apr. 2000).

⁶⁹24 C.F.R. § 5.611(a)(4) (2000).

⁷⁰*Id.* § 5.609(c)(8)(i).

⁷¹*Id.* § 5.609(c)(8)(v).

⁷²*Id.* § 5.611(a)(3)(ii).

⁷³*Id.* §§ 5.609(c)(1) and (11).

⁷⁴*Id.* § 5.609(c)(2).

In addition to the mandatory earned income disregards, PHAs may establish discretionary earned income disregards for public housing tenants. Discretionary earned income disregards were originally authorized by the 1996 *Continuing Resolution*, continued by the 1997 *Appropriation Act* and made permanent in QHWRA.⁷⁵ Accordingly, HUD has published regulations on the implementation of discretionary earned income disregards.⁷⁶

PHAs may continue to be reluctant to adopt discretionary earned income disregards because of the administrative burdens that they create and because they must assume the risk that such policies will eventually result in increased income for the PHA.

The Template does not ask any questions regarding either the old or the new mandatory earned income disregard. Because of the slow implementation of the prior mandatory earned income disregard provisions,⁷⁷ HUD should have required PHAs to report on their compliance with the new earned income disregard. The Template does ask if the PHA has adopted any additional earned income disregards and, if so, to explain what these additional disregards are.

Few PHAs are implementing policies that amount to a discretionary earned income disregard. Of the 22 PHAs for which NHLP had information, only three adopted discretionary earned income disregards. The Chicago Housing Authority is implementing a state law that requires an 18-month 100 percent earned income disregard. This disregard is reported as a discretionary earned income disregard because it is not mandated by federal law. The Housing Authority for Erie, Pennsylvania, deducts FICA, state and local taxes—approximately 11.45 percent of earned income—plus unreimbursed health insurance premiums. In Woonsocket, Rhode Island, the PHA has a policy that allows tenants to exclude the amount that their employers deduct for health insurance from their income. At the insistence of the RAB, the PHA for Frederick, Maryland, agreed to establish a committee to study the issue of discretionary disregards. Unfortunately, the local housing advocate does not know whether the PHA has convened the committee or is otherwise working on this issue.

⁷⁵42 U.S.C.A. § 1437a(b)(5)(B) (West Supp. 2000).

⁷⁶24 C.F.R. § 5.609(d) (2000).

⁷⁷See *Earned Income Disregards for Public Housing Tenants*, 28 HOUS. L. BULL. 1 (Jan. 1998) and *PHAs, Rents and the Working Poor*, 28 HOUS. L. BULL. 89 (June 1998).

Two PHAs stated that they were interested in adopting discretionary earned income disregards but declined to do so because of concerns that the disregards would have a substantial impact on the overall PHA income. For example, in Cleveland, Ohio, the PHA adopted a written policy disregarding the income of a previously unemployed family member, for certain increases in income, and for medical expenses. However, the PHA will only implement these disregards if it can be guaranteed reimbursement from HUD.⁷⁸ A large West Coast PHA, in response to comments urging discretionary earned income disregards, set forth the cost of such disregards based upon the number of potentially eligible tenants and, based on that cost, declined to adopt any discretionary earned income disregards.

PHAs may continue to be reluctant to adopt discretionary earned income disregards because of the administrative burdens that they create and because they must assume the risk that such policies will eventually result in increased income for the PHA. The proposed operating subsidy rule continues to provide that PHAs that adopt discretionary earned income disregards will be required to maintain two sets of books — one that shows the PHAs income with the optional disregard and the other without — because HUD will not provide operating subsidies to pay for any loss of income attributable to the discretionary earned income disregard.⁷⁹ On the other hand, because PHAs will be able to retain 50 percent of rental revenue increases, they may be encouraged to adopt discretionary earned income disregards with the expectation that such disregards will increase tenant-paid rent.⁸⁰

Although PHAs are reluctant to adopt discretionary earned income disregards, they should be encouraged to develop innovative rental policies that reward work and encourage economic self-sufficiency. One option in addressing the problem of the risk of reduced income without any guarantee of increased income would be to implement an earned income disregard program incrementally. For example, a PHA could begin by implementing a program for all families who add another wage earner to the family or for all tenants at a selected property. If the experiment works, the PHA could expand it. If it does not, the program would be small enough to minimize losses. PHAs could also combine the discretionary earned income disregard with a more flexible interim rent recertification policy. Again, as with the

⁷⁸From reviewing the Templates and the available ACOPs, it is apparent that some of the PHAs did not know how to fill out the Template. As a result, about 23 percent of the PHAs checked boxes which would imply that they had adopted a non-mandatory earned income disregard. In fact, they thought that they were only stating that they were implementing the mandatory earned income disregard.

⁷⁹65 Fed. Reg. 42,487, 42,500 (July 10, 2000)(§ 990.109(b)(2)(iii)). See also *HUD Baseline Report*, at pg. 15, which suggests that PHAs were reluctant to adopt the discretionary earned income disregards because of the added layer of complexity of the disregards and the requirement that they maintain two sets of books: one that shows the PHAs income with the optional disregard and the other without.

⁸⁰65 Fed. Reg. 42,487, 42,500 (July 10, 2000)(§ 990.109(b)(1)(ii)).

example of adding wage earners to the family, the PHA could require that the family report the change in family composition, but not recertify the family income if there is a new wage earner until the annual recertification.

The fact that only three of the 21 PHAs whose plans NHLP reviewed on earned income disregards adopted a discretionary earned income disregard is consistent with the information found in the *HUD Baseline Report*, which concluded that the "the overwhelming majority of PHAs" have not adopted discretionary earned income disregards.⁸¹

Local Issues

A variety of local victories also occurred during the PHA Plan process. Many of these concern the public housing program, although there were some victories on the Section 8 side as well. They are presented here so that advocates around the country can be aware of particular local policies in the event that their local PHA is interested in adopting similar ones. On the public housing side, in Boston, advocacy succeeded in getting the PHA to commit to a firm vacancy reduction goal. The agreed upon plan commits the PHA to conduct a study of exactly where the vacant units are and develop a strategy to make sure that vacancies are reduced. Advocates also successfully urged sending other PHA policies through the RAB and attempted to increase RAB involvement in the Public Housing Assessment System (PHAS) and Section Eight Assessment Program (SEMAP) and require the PHA to itemize modernization projects. In Cleveland, housing advocates were able to come to an agreement with the PHA to have a demolition and replacement policy included in the PHA Plan. This official policy calls for a one-for-one replacement of all units, except for one-bedroom units where the replacement rate will be one-for-three. The inclusion of this policy in the plan insures that any proposed changes will be subject to the public comment provisions. In Kansas City, Missouri, advocacy resulted in an agreement by the PHA to hold grievance hearings in eviction cases for drug or criminal activity, something that Missouri law does not require.

Local issues concerning the Section 8 program also included some victories. In Chicago, advocacy produced an extension of the rent abatement period for violation of housing quality standards (HQS) to 180 days from the previous 30 days. This allows tenants additional time to find other housing before the Section 8 contract terminates and they become responsible for paying the market rate rent. Advocacy also resulted in the establishment of a revolving loan fund to help families pay initial security deposits. Also in Chicago, advocates were able to procure a change in the PHA's Section 8 Administrative Plan to assure that no innocent family member is evicted for another's criminal activity. In Boston, the PHA agreed to efforts to increase

participation by Section 8 tenants in the PHA plan process. In Sacramento, California, advocates are currently working with the PHA on a plan to have the PHA pay for the credit checks of Section 8 applicants.

Conclusion

Many of the PHA Plans reviewed by NHLP included policies that benefitted extremely low-income tenants and applicants. Nearly half of the 25 PHAs for which NHLP had data retained admission preferences based upon need and 15 percent retained at least three of the former federal preferences. Some PHAs created intriguing preferences such as the venture preference. Many PHAs whose plans were reviewed by NHLP are aware of the issue of allowing adequate search time for voucher holders with nearly one-third providing an extension beyond the former cap of 120 days and others providing extensions in practice beyond any stated limits. PHAs also adopted rent policies that favored extremely low-income tenants and working tenants. Of the 25 PHA Plans that NHLP reviewed, nearly one-quarter established a minimum rent of zero for both programs. This percentage is substantially greater than the percentage of PHAs nationwide that HUD determined in 1998 had adopted a zero minimum rent. There was a substantial percentage of PHAs that adopted interim rent redetermination policies that favored tenants (including those who are working) whose income increased during the year. There was less success on the adoption of discretionary earned income disregards, but even in this area, some of the PHAs did assume the risk and provided additional benefits for the working poor. It also appears that the PHAs that interacted with housing advocates took advantage of the benefits of increasing the voucher payment standard. Finally, advocates were successful in achieving gains with respect to a variety of local issues which typically were not included in the HUD Template.

Many of these positive results can be attributed to advocacy during the plan process. In other cases, the positive results were the result of longer-term advocacy that resulted in initial policies which could be supported because they protected extremely low-income tenants and applicants. In the next issue, the *Bulletin* will discuss the first year PHA Plan process and lessons for the second year. ■

⁸¹HUD Baseline Report at page 16.

DENVER ADOPTS PRESERVATION ORDINANCE

Following other state and local governments who are confronting the challenge of preserving affordable housing under inadequate federal policies, the city of Denver has recently adopted an ordinance establishing additional procedural protections for the city's existing federally-assisted housing stock.¹ The ordinance, strongly supported by the *Denver Save Our Section 8 Coalition*, also provides similar protections for other types of affordable housing supported by state or local programs or funds. The protections generally consist of local notice requirements beyond those required by federal law, along with inspection rights created in favor of the local government and explicit recognition of the city's ability to pursue an acquisition through voluntary negotiation or condemnation. Like other recent state and local preservation laws, the Denver ordinance represents an important step in local recognition of the preservation issue, establishing a framework within which advocates can later press for responsive project-specific strategies, utilizing a patchwork of possible resources.

Notice Requirements for Owners of Properties Receiving Federal Project-Based Assistance

Denver's ordinance imposes notice requirements on owners whose project-based federal assistance contracts are set to expire and/or who seek to opt out.² While the law's definition of a covered "federal preservation project" apparently includes properties with federally-subsidized mortgages that do not also receive project-based Section 8, the definition of covered events focuses on Section 8 contract expiration and "opt-out."³ These requirements include:

- a one-year notice (apparently written) to the city and to each tenant of pending Section 8 expiration;
- in the case of an intended opt-out involving nonrenewal of an expiring long-term Section 8 contract, 210 days notice to the city and each affected tenant;
- in the case of an intended opt-out involving nonrenewal of a short-term one-year Section 8 "extension" contract, 150 days notice to the city and each affected tenant; and
- all opt-out notices must specify whether the owner intends to withdraw from Section 8 or to convert to a "nonparticipating use" (apparently one not involving project-based Section 8), and whether the owner is involved in negotiations with HUD regarding a contract extension.

Notice Requirements for Owners of Properties with State or Local Assistance

The ordinance also covers "local preservation projects," defined as properties with at least 10 rental units that received subsidies or bond financing from specified state and local government sources to serve low or moderate-income households (below 80 percent of area median income (AMI)), with affordability restrictions still in effect. Owners of these properties planning to take action that would make the housing no longer affordable must first:

- provide 90-days written notice to the city and to the tenants that meets the standards established by the city; and
- refrain from selling or contracting to sell the property during the 90-day period.

During this period, the city or its designee may offer to purchase or attempt to coordinate a purchase by a new preservation owner, and during this period, "no-cause" evictions are prohibited.

Other Restrictions on Owners of Properties Receiving Federal Project-Based Assistance

- In addition to the notice requirements, the ordinance imposes certain duties on owners that enable the city to work towards preservation of the property by gathering relevant information and assume the expiring Section 8 contract: owners who seek to opt out must consent to reasonable inspection of the property and reports on file with government entities. This provision is intended to enable the city to assess the fair market value of the property, the viability of transfer and renewal of the Section 8 contract, and the impact on tenants.
- To the extent allowed by HUD, owners must maintain any Section 8 contract in good standing during the notice periods and any condemnation proceeding; and

¹The Denver ordinance, adopted in late September 2000, can be found at denvergov.org/content/template17889.asp. For discussion of other state and local preservation initiatives, see *Preserving Federally Assisted Housing at the State and Local Level: A Legislative Toolkit*, 29 HOUS. L. BULL. 183 (Oct. 1999).

²In this regard Denver's ordinance follows other jurisdictions that have imposed state or local notice requirements beyond the federal notice requirements, such as the states of California (Cal. Gov. Code § 65863.10) (nine months; 12 months after January 1, 2001), Connecticut (P.A. No. 88-262), Maine (Rev. Stat. Ann. tit. 30-A, § 4973) (90 days), Maryland (Ann. Code Art. 83B § 9-103) (one to two years, plus detailed statement of reasons and tenant impact), Minnesota (Stat. 566.17 (one year), and Minn. 1998 Laws, Chap. 389, Art. 14, § 6 (effective July 1, 1998)), Rhode Island (Pub. L. ch. 88-508), Washington (Rev. Code § 59.28) (one year), and the local governments of Portland (City Code 30.01/Ordinance 174180), and San Francisco (Admin. Code § 60).

³Thus, it remains unclear whether, for example, the law covers intended prepayments of Section 236 HUD-subsidized mortgages that do not also involve Section 8 rental assistance expirations or terminations.

- Owners cannot take any action (beyond the opt-out notice) that would preclude the city or its designee from succeeding to the contract or negotiating for purchase during the notice periods and any condemnation proceeding.

Other Actions by the City

The law allows, but does not require, the city to undertake other preservation-related activities (sometimes expressly restating existing authorities) in addition to receiving notices, developing notice standards for the local preservation projects, taking action to inspect properties and their public records, and pursuing enforcement actions. These include:

- taking action to pursue condemnation of the property through eminent domain;
- creating and maintaining inventories of federal and local preservation properties covered by the law;
- developing rules and regulations to implement the law; and
- imposing a minimum 20-year affordability requirement on any properties receiving future city affordable housing subsidies, and developing implementing strategies for this requirement.

Earlier versions of the bill would have required the city to impose 50-year affordability requirements in exchange for city funding, as well as providing financial resources for all tenants experiencing involuntary displacement from federally-assisted properties.

Owner Noncompliance

Owners that fail to comply with any provisions are liable for civil fines, calculated in relation to resulting costs and damages, capped at the full replacement costs for each assisted unit lost. Any fines collected would be paid into a city housing replacement fund. ■

RADIO SHOW FOCUSES ON HOUSING SHORTAGE

The National Housing Law Project and a number of other low-income housing advocacy organizations worked recently with the National Radio Project (NRP) on a show NRP produced called "Shrinking Supply: Low-Income Housing in the US." The show, part of NRP's *Making Contact* series, airs on radio stations throughout the country. You can go to the NRP Web site to find out if and when the show may air locally or you can listen to it via the same website at radioproject.org.

HUD OFFERS TRANSITION TIME AND FINANCIAL ASSISTANCE FOR THE IMPLEMENTATION OF THE LEAD SAFE HOUSING REGULATION

On September 11, 2000, the Department of Housing and Urban Development (HUD) issued its *Notice of Transition Assistance*, setting forth its transition assistance policy for implementing HUD's new *Lead Safe Housing Regulation*.¹ The regulation was issued last year and became effective on September 15, 2000.² It requires the detection and removal of lead-based paint from certain housing units, with special emphasis on units that are occupied by children under the age of six or by children already found to have an elevated blood lead level.³ The *Lead Safe Housing Regulation* applies to federally-owned or assisted housing built before 1978, including:

- federally-owned housing;
- project-based assisted housing;
- public housing;
- housing occupied by families receiving tenant-based assistance, such as Section 8 certificates and vouchers;
- multi-family housing requesting federal mortgage insurance; and
- housing that receives federal assistance for rehabilitation, reducing homelessness and other special needs (such as CDBG, Shelter Plus Care, Emergency Shelter Grants and other federal assistance programs.)⁴

Although September 15, 2000 was the effective date of the rule, under the September 11, 2000 notice HUD is providing certain jurisdictions a "transition period" if more time is needed to obtain qualified service providers to carry out the regulation. HUD is also providing certain program par-

¹*Notice of Transition Assistance*, 65 Fed. Reg. 54,858 (Sept. 11, 2000).

²64 Fed. Reg. 50,139 (Sept. 15, 1999).

³In promulgating the new regulations, HUD cited the dangers of lead poisoning, including damage to the brain and nervous systems, reduced intelligence, reading and learning disabilities and behavioral problems. *Id.* at 50,141. HUD found that fetuses, infants and children under six, especially those children from low-income families living in older homes, are at the highest risk. *Id.*

⁴*Id.* at 50,208 - 50,231. Exempt housing types include: (1) housing built after 1978; (2) elderly or disabled housing; (3) studios, single room occupancies, dormitories or military barracks; (4) property that has received a "lead free" certificate from a certified lead-based paint inspector; (5) property where lead-based paint is removed; (6) unoccupied housing that is due to be demolished; (7) non-residential property and (8) any rehabilitation or housing improvement that does not disturb a painted surface. *Id.* at 50,206.

ticipants an extension of time to ensure that adequate service providers are in place and to target available resources to housing most in need. Working in conjunction with housing providers and health advocates, HUD also will be providing \$84 million to conduct lead testing in federally funded low-income housing and more than \$20 million to train additional inspectors and other specialists to carry out the new regulation.⁵ Specific administrative notices to all program participants describing the available sources of funding should be issued shortly.

The transition assistance framework has three components. The first component is for program participants in jurisdictions that lack adequate capacity to implement the new regulation within six months of the effective date. To qualify, these jurisdictions must submit a *Statement of Inadequate Capacity* to HUD by November 15, 2000 explaining (with specific description of the inadequacies and supporting documentation) that qualified personnel or firms are not available, or cannot be obtained at a reasonable cost, to comply with the lead-based paint requirements by March 15, 2001.⁶ Thereafter, the jurisdiction must submit a detailed *Transition Implementation Plan* by mid-December, 2000, describing how it will obtain an adequate supply of personnel and/or contractors by the end of the transition period. If an extension is granted, jurisdictions will not be expected to comply with the *Lead Safe Housing Regulation* before March 15, 2001. However, jurisdictions will be required to comply with HUD's lead-based paint regulations in effect prior to September 15, 2000. HUD will publish a list of the jurisdictions that have applied for transition assistance in both the Federal Register and on its lead Web site.⁷

The second component is an automatic extension for all properties built after 1960 receiving tenant-based certificate or voucher assistance — even if the units are occupied by a family with a child less than six years of age.⁸ As the extension is automatic, HUD permission is not required, but again, program participants are required to comply with existing HUD lead-based paint regulations in effect before September 15, 2000.⁹

The third component involves properties occupied by elderly persons which are receiving more than \$25,000 in federal rehabilitation assistance.¹⁰ These properties are also

granted a one-year extension and HUD approval is not required. During the transition period, however, participants must comply with the requirement that is set forth in the *Lead Safe Housing Regulation* for federal rehabilitation assistance between \$5,000 and \$25,000.¹¹

All other program participants must comply with the regulation that became effective September 15, 2000. For further information regarding lead-based paint hazards and the *Lead Safe Housing Regulation*, please refer to the *Interpretive Guides* published by HUD and the Environmental Protection Agency available on HUD's lead Web site.¹² ■

HUD, JUSTICE, AND TREASURY SIGN MOU ON FAIR HOUSING COMPLIANCE IN TAX CREDIT PROJECTS

On August 14, 2000, the Department of Housing and Urban Development (HUD) and the Department of the Treasury announced an interdepartmental memorandum of understanding (MOU) among HUD, the Treasury and the Department of Justice (Justice) to increase *Fair Housing Act*¹ compliance in Low Income Housing Tax Credit (LIHTC) developments.² The MOU calls for technical assistance, research, and very modest reporting and monitoring efforts.

The LIHTC Program

The LIHTC program, created under the *Tax Reform Act of 1986*,³ is "currently the largest federal program to fund the development and rehabilitation of housing for low-income households."⁴ A number of participants are involved

⁵65 Fed. Reg. 54,858, HUD Press Release 00-227 (Aug. 24, 2000) on file at NHLP.

⁶A sample *Statement of Inadequate Capacity* will be available on the HUD lead Web site at hud.gov/lea.

⁷hud.gov/lea.

⁸65 Fed. Reg. 54,859 (Sept. 11, 2000).

⁹*Id.*, see also 24 C.F.R. § 982.401(j), *Housing Quality Standards — Lead-Based Paint Performance Requirement*. In June 2000, HUD issued a notice to remind public housing authorities (PHAs) of the current requirements regarding the protection of children with known elevated blood lead levels (EBL). See HUD Notice PIH 2000-23 (HA) (June 29, 2000). Although the notice expired September 14, 2000, it sets forth a detailed description of inspection, testing and treatment of the lead-based paint program requirements which are still in effect for tenant-based units during the transition period.

¹⁰65 Fed. Reg. 54,859 (Sept. 11, 2000).

¹¹See 64 Fed. Reg. 50,173 (Sept. 15, 1999).

¹²Office of Healthy Homes and Lead Hazard Control, U.S. Department of Housing and Urban Development, *Interpretive Guidance: The HUD Regulation on Controlling Lead-Based Paint Hazards in Housing Receiving Federal Assistance and Federally Owned Housing Being Sold*, (September 21, 2000), Office of Lead Hazard Control, U.S. Department of Housing and Urban Development and Office of Pollution Prevention and Toxics, U.S. Environmental Protection Agency, *Interpretive Guidance for the Real Estate Community on Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing*, (Aug. 2, 2000).

¹⁴2 U.S.C.A. § 3601, *et seq.* (West 1995).

²*Memorandum of Understanding among the Department of the Treasury, the Department of Housing and Urban Development, and the Department of Justice (MOU)* (Aug. 9, 2000). Available from the Department of Justice Web site at: usdoj.gov/crt/housing/mou.htm.

³Pub. L. No. 99-514, § 252, 100 Stat. 1085, 2189-208.

⁴*General Accounting Office, Tax Credits: Opportunities to Improve Oversight of the Low-Income Housing Program (Tax Credits)*, § 2, (Mar. 1997) (cited in Florence Roisman, *Mandates Unsatisfied: The Low-Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011 (1998)).

in the development and financing of LIHTC projects, which have notoriously complex financing structures.⁵

The Treasury, through the IRS, is ultimately responsible for administering the program but the actual allocation of tax credit eligibility is done by state agencies, usually housing finance agencies.⁶ Prospective developers typically submit applications to these state agencies to construct or rehabilitate specific projects through the program. Specified proportions of the units in these projects must be occupied by households at or below either 50 or 60 percent of the area median income (AMI).⁷ Private corporate investors, usually recruited by syndicators, provide the equity financing for LIHTC projects and receive the tax credits.⁸

MOU Provisions on Interagency Technical Assistance and Training

The MOU, which went into effect in September 2000, calls for three kinds of fair housing training and technical assistance:

- interdepartmental training;
- training of state housing finance agencies and other entities by HUD and Justice; and
- a pilot program in which HUD will train architects regarding accessibility requirements.

Under the MOU, HUD and Justice will provide technical assistance to the IRS on "emerging civil rights and discrimination matters" involving the administration of the LIHTC program.⁹ HUD and Justice will also provide "training on request" to the IRS on the *Fair Housing Act*. In turn, the IRS will provide training to HUD and Justice on "general tax administration issues" under the LIHTC program.¹⁰

State housing finance agencies and "other entities" such as developers, management companies, and syndicators, will be able to request training from HUD and Justice on the *Fair Housing Act*.¹¹ The MOU specifically states that these trainings will address accessibility criteria set forth in 24 C.F.R. § 5.703.¹² Secondly, HUD is to encourage state and local fair housing agencies to invite state housing finance agencies and others to participate in state and local civil rights trainings.¹³

⁵See Michael A. Stegman, *The Excessive Costs of Creative Finance: Growing Inefficiencies in the Production of Low-Income Housing*, 2 HOUS. POLICY DEBATE 357 (1991).

⁶See 26 U.S.C.A. § 42(m)(1)(A)(i) (West 1999).

⁷See 26 U.S.C.A. § 42(g)(1)-(g)(8) (West 1999).

⁸See *TAX CREDITS* at § 2, 27-8.

⁹MOU at § 2.

¹⁰*Id.*

¹¹See *id.* at § 3.

¹²See *id.*

¹³See *id.*

The third training provision of the MOU describes HUD's development of a pilot program to train architects regarding accessibility requirements. According to the MOU, HUD has "begun the process of developing" the program "in one region of the country" and the program may be expanded to four regions, but none of these regions are specified.¹⁴

MOU Provisions on LIHTC Program Research

The MOU states that HUD and the Treasury will cooperate in research on LIHTC properties sponsored by either department.¹⁵ No topics for research are specified.

MOU Provisions on Fair Housing Monitoring and Reporting

The press release introducing the MOU states that the three departments "will establish a monitoring and compliance process to ensure that low-income housing tax credit properties meet the requirements of the *Fair Housing Act*."¹⁶ The MOU itself mentions monitoring only once. It states that the three departments will work with national associations of investment syndicators "to enhance practices by syndicators in monitoring and promoting compliance with the Act and the low-income housing tax credit program."¹⁷

The MOU also calls for the three departments to cooperate with state housing finance agencies in "identifying and removing unlawful barriers to occupancy" faced by Section 8 voucher holders in LIHTC properties.¹⁸ The MOU does not provide any description of these barriers or how they will be identified or removed.

The MOU does provide detail on interagency reporting requirements of fair housing violations. HUD or Justice will notify state housing finance agencies of LIHTC properties for which there is:

- a charge by the Secretary of HUD for a violation of the *Act*;
- a probable cause finding under a substantially equivalent fair housing state law or local ordinance by a substantially equivalent state or local agency;
- a lawsuit under the *Act* filed by Justice; or
- a settlement agreement or consent order entered into between HUD or Justice and the owner of a low-income housing tax credit property.¹⁹

¹⁴*Id.* at § 4.

¹⁵See *id.* at § 5.

¹⁶HUD No. 00-222 (Aug. 14, 2000), *Steps to Increase Fair Housing Act Compliance Monitored*, available on-line at hud.gov/pressrel/pr00-222.html.

¹⁷MOU at § 7.

¹⁸*Id.* at § 6.

¹⁹See *id.* at § 1.

State housing finance agencies will then notify the IRS of these properties pursuant to 26 U.S.C.A. § 42(m)(1)(B)(iii).²⁰ The IRS will then notify project owners that *Fair Housing Act* violations may result in a loss of tax credit eligibility.²¹ The MOU does not describe what efforts, if any, the federal agencies will take to uncover fair housing violations in LIHTC projects.

Conclusion

Florence Roisman, (Professor of Law at Indiana University), has written an extensive article on the lack of fair housing enforcement in the LIHTC program.²² It was not until January of this year that the Treasury's LIHTC regulations were amended even to mention the *Fair Housing Act*.²³

Attention to fair housing compliance in LIHTC properties ought to be a positive step. The MOU does recognize unlawful barriers faced by Section 8 voucher families and does provide procedures through which information will be shared between the departments about known fair housing violations in LIHTC properties. However, federal agencies are already required to cooperate with HUD to further the purposes of the *Fair Housing Act* and to act affirmatively to further fair housing themselves.²⁴

The MOU describes the procedures the departments will take in drafting notices²⁵ in greater detail and the steps that they will take to ensure that project owners comply with fair housing requirements. Ultimately, the MOU is of little real value to the extent that it simply reiterates the departments' existing duties without providing specific details about fair housing enforcement. ■

²⁰The MOU states that IRS Form 8823, *Low-Income Housing Credit Agencies Report of Noncompliance*, will be used in such situations. See *id.*

²¹See *id.*

²²See Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011 (1998).

²³See 65 Fed. Reg. 2323, 2327, amending 26 C.F.R. § 1.42-5(c)(1)(v) (Jan. 14, 2000), *Compliance Monitoring and Miscellaneous Issues Relating to the Low-Income Housing Credit*. This amendment will not take effect until January 2001. See *id.* at 2323.

²⁴See 42 U.S.C.A. § 3608(d) (West 1999).

²⁵See MOU at § 1.

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 August of 2000. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

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

HUD Regulations

Multifamily Housing Mortgage and Housing Assistance Restructuring Program (Mark-to-Market); Correction 65 Fed. Reg. 53,899 (Sept. 6, 2000)

Summary: This document corrects several errors in the March 22, 2000, final rule for the Mark-to-Market program administered by HUD's Office of Multifamily Housing Assistance Restructuring (OMHAR).

Effective Date: April 21, 2000.

Section 8 Homeownership Program; Final rule 65 Fed. Reg. 55,134 (Sept. 12, 2000)

Summary: This final rule implements the "homeownership option" authorized by Section 8(y) of the *United States Housing Act of 1937*, as amended by Section 555 of the *Quality Housing and Work Responsibility Act of 1998*. Under the Section 8(y) homeownership option, a public housing agency (PHA) may provide tenant-based assistance to an eligible family that purchases a dwelling unit that will be occupied by the family. This final rule follows publication of an April 30, 1999 proposed rule, and takes into consideration the public comments received on the proposed rule.

Effective Date: October 12, 2000.

¹At access.gpo.gov/su_docs.

²At hudclips.org/cgi/index.cgi.

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

⁴At rdinit.usda.gov/regs/.

Discontinuation of the Section 221(d)(2) Mortgage Insurance Program; Proposed Rule
65 Fed. Reg. 58,338 (Sept. 28, 2000)

Summary: This proposed rule would discontinue HUD's Section 221(d)(2) mortgage insurance program. Through this program, HUD insures mortgage loans made by private lenders to finance the purchase, construction, or rehabilitation of low-cost, one- to four-family housing. The Section 221(d)(2) program is rarely used by homebuyers, primarily due to its low mortgage limits. Further, the program provides few homeownership opportunities not already made available by other HUD mortgage insurance programs. Accordingly, HUD proposes to no longer enter into new contracts for mortgage insurance under the program. The proposed rule would remove those provisions of the Section 221(d)(2) regulations concerning eligibility for participation in the program, and replace them with a savings clause. The rule, however, would retain those regulatory provisions regarding the contract rights and servicing responsibilities for existing program participants.

Comment Due Date: November 27, 2000.

HUD Federal Register Notices

Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance; Notice of Transition Assistance
65 Fed. Reg. 54,858 (Sept. 11, 2000)

Summary: This notice describes the transition assistance that will be provided in connection with the implementation of HUD's new requirements for notification, evaluation and reduction of lead-based paint hazards in federally owned residential property and housing receiving federal assistance (*Lead Safe Housing Regulation*). [For more information on this rule, see article on pg. 165, *supra*.]

Effective Date: September 11, 2000.

Service Notice of Availability of Funding and Requests for Proposals for Guaranteed Loans Under the Section 538 Guaranteed Rural Rental Housing Program; Notice
65 Fed. Reg. 178 (Sept. 13, 2000)

Summary: This Notice of Fund Availability (NOFA or Notice) announces the time frame and submission requirements and deadlines to submit proposals in the form of "NOFA responses" for the Section 538 *Guaranteed Rural Rental Housing Program* (GRRHP). Eligible lenders, as defined in paragraph VII(D) of this NOFA are invited to submit NOFA proposals for the development of affordable rental housing to serve rural America. Only responses submitted by eligible lenders, on the lender's letterhead, and signed by both the applicant and the lender will be reviewed. This document describes the overall application process, including the selection and identification of any priorities for the selection of proposed applications, and the process by which the Rural Housing Service (RHS or Agency) will score and rank

the proposals. Information will also be included concerning the submission requirements. Lenders may submit their application concurrently with their NOFA response.

Effective Date: The deadline for receipt of NOFA responses was September 20, 2000.

Statutorily Mandated Designation of Difficult Development Areas for Section 42 of the Internal Revenue Code of 1986; Notice
65 Fed. Reg. 57,526 (Sept. 22, 2000)

Summary: This document designates "Difficult Development Areas" for purposes of the *Low-Income Housing Tax Credit* (LIHTC) under Section 42 of the *Internal Revenue Code of 1986* ("the Code"). HUD makes new *Difficult Development Area* designations annually.

Effective Date: The notice is effective for allocation of credits made after December 31, 2000.

Fair Market Rents for Fiscal Year 2001; Notice
65 Fed. Reg. 57,658 (Sept. 25, 2000)

Summary: Section 8(c)(1) of the *United States Housing Act of 1937* requires the Secretary to publish FMRs annually to be effective on October 1 of each year. FMRs are used to: establish payment standards for the *Housing Choice Voucher program*; determine initial contract rents in new commitments for Section 8 project-based assistance (e.g., the project-based voucher program); determine whether comparability applies to the adjustment of contract rents during the term of an existing HAP contract in the Section 8 new construction, substantial rehabilitation and moderate rehabilitation programs; and as a limit on renewal rents for certain Section 8 projects. The FMRs also apply to any other programs requiring their use. Today's notice establishes final FY 2001 FMRs for all areas. These FMRs reflect the estimated 40th percentile rent levels trended to April 1, 2001.

Effective Date: October 1, 2000.

Responsibility of Certain Entities To Notify the Immigration and Naturalization Service of Any Alien Who the Entity "Knows" Is Not Lawfully Present in the United States; Notice
65 Fed. Reg. 58,301 (Sept. 28, 2000)

Summary: Section 404 of the *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Public Law 104-193, as amended, requires certain federal and state entities, at least four times annually, to notify the Immigration and Naturalization Service (Service) of any alien the entity "knows" is not lawfully present in the United States. The federal agencies responsible for implementing Section 404 are providing notice of how this provision is being implemented. Under this notice, an entity is not required to make quarterly reports to the Service unless it has knowledge of an individual who is not lawfully present in the United States.

HUD Notices

Guidelines for Calculating and Retaining Section 236 Excess Income Notice H 00-17 (Sept. 5, 2000)

Summary: This notice applies to all Section 236 projects whose mortgages are insured or held by HUD, former non-insured State Agency Section 236 assisted projects whose mortgages were refinanced under the Section 223(f) program and non-insured State Agency projects whose mortgages are assisted under the Section 236 program. This notice supercedes Notice H 99-28 and provides guidelines for implementation of Section 532 (b) of the Department's FY 2000 Appropriations Act, P.L. 106-74. Instructions are provided for an owner's participating in retention of Excess Income for projects with assistance through the Section 236 *Interest Reduction Payments Program*. There is presently a regulation at 24 CFR 236.60 (Rev. April 1, 1995) which has been saved by 24 CFR 236.1 (c) of the current CFR. Such regulation, in general, provides that excess income is to be remitted to HUD. HUD is in the process of updating the regulations to reflect Section 532(b) and other statutory changes made after 1995. One of the objectives of the notice and the ones heretofore issued permitting owners to retain Excess Income has been for the Department to obtain practical case by case experience in connection with recently expanded statutory authority in this area. The Department's intention is to utilize the experience gained through this and previous notices to promulgate a new regulation. The Assistant Secretary has issued a waiver of the current regulation to cover these notices pending promulgation of this replacement regulation.

Admission and Occupancy Provisions of the Quality Housing and Work Responsibility Act of 1998 (QHWRA) for Multifamily Housing Programs Notice H 00-18 (Sept. 7, 2000)

Summary: This notice provides guidance on the Final Rule, *Changes to Admission and Occupancy Requirements in the Public Housing and Section 8 Housing Assistance Programs*, FR-4485, published March 29, 2000. The rule implemented changes to admission and occupancy requirements made by the QHWRA of 1998. Unless otherwise stated, the guidelines in this notice apply to all multifamily properties receiving Section 8 project-based assistance.

Use of Housing Choice Vouchers in Assisted Living Facilities Notice PIH 2000-41 (Sept. 1, 2000)

Summary: This notice informs HUD field staff and PHAs that program applicants or participants may use housing choice vouchers in assisted living facilities in accordance with program rules. The use of housing choice vouchers in an assisted living facility will supplement the Medicaid Home and Community Based Waiver Program under Section 1915(c) of the Social Security Act to pay for residential care. These waivers allow Medicaid-eligible individuals at risk of being placed in hospitals, nursing facilities, or intermediate

care facilities the alternative of being cared for in their homes and communities. The use of housing choice vouchers in assisted living facilities also allows the frail elderly to obtain supportive services in order to remain independent and avoid premature institutionalization.

PHA Plan Guidance; Streamlining of Small PHA Plans; Extension of Notices PIH 99-33 and PIH 99-51 Notice: PIH 2000-43 (Sept. 18, 2000)

Summary: This notice transmits PHA Plan guidance to PHAs. With regard to instructions for submitting second PHA Plans, this notice extends the current PHA Plan instructions and templates previously issued as part of Notices PIH 99-33 (HA) and PIH 99-51 (HA). This notice also provides supplemental instructions that will update PHAs' Plan submissions to reflect the new fiscal year, state the results of first year activities, incorporate information related to recently-implemented regulations, and permit joint PHA Plan submissions from consortia. In addition to these basic updates, the guidance in this notice reflects HUD's efforts to improve the PHA Plan process based upon information gathered in the first year of implementation. First, this notice implements an important streamlining initiative for small PHAs: the new *Small PHA Plan Update*. Second, the notice enhances resident participation by identifying the Resident Advisory Board (RAB) membership and Resident Member of the Governing Board in the Plan. Finally, the notice provides clarification on the issues raised during the first year of PHA Plan implementation (including the consequences of failure to submit a Plan).

USDA/RHS Regulations

Rural Housing Service Environmental Policies and Procedures; Proposed rule 65 Fed. Reg. 55,784 (Sept. 14, 2000)

Summary: The RHS and the Rural Business-Cooperative Service (RBS) jointly propose to replace their current environmental regulation with a new environmental regulation, to implement the *National Environmental Policy Act* (NEPA), to comply with the Council on Environmental Quality (CEQ) *Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*, and to implement other environmental statutes and Executive Orders. This action is being taken to improve both the efficiency and the effectiveness of the environmental review process for RHS and RBS, and to update that process, by reflecting the changes to agency programs and to the environmental laws, Executive Orders, and regulations applicable to those programs. This action represents an important contribution to the USDA's efforts to streamline its operations and realize more efficient use of staff time. Hereinafter, RHS and RBS are collectively referred to as the "Agency."

Comments Due Date: November 13, 2000.

USDA/RHS Administrative Notices

On Farm Labor Housing Support Materials

RD AN No. 3570 (1930-C) (Sept. 21, 2000)

Summary: The purpose of this Administrative Notice (AN) is to issue guidance on the support materials required to comply with the recent court order in *Roman vs. Korson*. The intended outcome is to provide information needed to meet the court order and to demonstrate whether or not the provisions of the court order are being met. The reporting information contained in this AN is needed to carry out a court order. The court order is published as Attachment F of AN 3526 (1930-C), dated April 10, 2000. The last element of the court order required that supporting materials for each borrower be provided to supplement the quarterly reporting material required to be reported by Attachment E of AN 3526 (1930-C). Effective immediately, the attached report will be completed on a quarterly basis. The first report must be prepared to reflect information as of June 30, 2000. Negative reports are required. The reporting information is due for receipt in the National Office within 30 days of the ending report date (e.g., for the June 30, 2000, report information must be submitted prior to July 31, 2000). ■

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