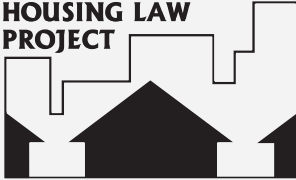


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# Housing Law Bulletin

Volume 35 • September 2005

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## ***Responding to Katrina: How Federal Housing Program Administrators Have Reacted***

—see page 197

## ***Eighth Circuit Affirms Residents' Victory in Missouri Demolition Case***

—see page 201

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**Cover:** McDonough Homes, a 580-unit family public housing development in St. Paul Minnesota. Constructed in 1952 (insert), with additions in 1962 and 1964, the development has undergone modernization and is currently undergoing a \$35 million renovation. Photo courtesy of Saint Paul Public Housing Agency. Photographer: Steven Wewerka.

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## Responding to Katrina: How Federal Housing Program Administrators Have Reacted

As Hurricane Katrina swept across the Gulf Coast, a record number of American families were displaced from their homes. Simultaneously, the devastation surfaced a host of often overlooked socioeconomic concerns, including the timing and adequacy of the federal response, the threatened diversion of resources away from programs already earmarked for low-income people, and the shape of rebuilding efforts in the hurricane-ravaged region. The following briefly discusses how several federal agencies operating housing programs have reacted so far.

### Department of Housing and Urban Development (HUD)

HUD has established a toll-free number at 1-888-297-8685 for the public to get information on housing needs. HUD has also compiled a list of frequently asked questions to be used by public housing agencies (PHAs) as they provide assistance to families displaced by Hurricane Katrina. Among the topics addressed are admission, eligibility, preferences, portability and operating funds.<sup>1</sup>

In addition, consistent with the principles set forth in HUD Notice 04-22, HUD has provided specific guidance to PHAs and underwriters in their interactions with disaster-affected residents.<sup>2</sup> Most notably, HUD has provided guidance in the following areas:

- *Assistance to Disaster-Affected Families:* HUD has stated that "the Department's first priority is to assist existing public housing and voucher program participants who have been affected by Hurricane Katrina. Once that need is met, PHAs may begin serving other disaster victims who are non-participants."<sup>3</sup> Moreover, with regard to portability, HUD has stated that PHAs should "not let portability billings get in the way of providing vouchers to displaced voucher holders from any of the PHAs affected by Katrina."<sup>4</sup>

<sup>1</sup>HUD, *Guidance for Public Housing Agencies in Assisting Families Displaced by Hurricane Katrina*, at [http://afhh.org/res/res\\_pubs/HUD\\_Katrina\\_facts.pdf](http://afhh.org/res/res_pubs/HUD_Katrina_facts.pdf) (last visited Sept. 19, 2005).

<sup>2</sup>HUD, *Disaster Guidance by Multifamily Housing After a Presidentially-Declared Disaster*, at [http://hudclips.org/sub\\_nonhud/cgi/pdf-forms/04\\_22h.doc](http://hudclips.org/sub_nonhud/cgi/pdf-forms/04_22h.doc) (last visited Sept. 16, 2005).

<sup>3</sup>HUD, *Assistance to Disaster-Affected Families for Public Housing and Voucher Programs*, at <http://www.hud.gov/offices/pih/publications/katrinaguidefam.cfm> (last visited Sept. 16, 2005).

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

- *Guidance to Lenders*: On August 31, 2005, the Office of Housing published a mortgagee letter reminding lenders of the 203(h) disaster program and encouraging servicers to delay foreclosure in counties declared federal disaster areas and to consider hurricane damage in the context of any requests for loss mitigation assistance.<sup>5</sup>

HUD is also in the process of identifying vacant multi-family housing, public housing units, and HUD-owned homes within a 500-mile radius of the affected areas that could be used as temporary housing. In addition, Community Development Block Grant, HOME, and Emergency Shelter Grant grantees may reprogram previously awarded grants to redirect their focus to disaster recovery activities but grantees must request the reprogram from HUD. This and other information relating to HUD's recovery assistance can be found at [www.hud.gov/katrina/index.cfm](http://www.hud.gov/katrina/index.cfm).

Rather than push aggressively to meet the enormous affordable housing needs wrought by the disaster, HUD appears content to sit back on the sidelines and encourage local agencies to allocate units that become available to displacees, while developing a proposal that would grant the Secretary broad authority to waive existing statutes and regulations.

### Department of Agriculture (USDA)

The USDA has offered guidance for Multi-Family Housing owners and residents affected by Hurricane

<sup>5</sup>See HUD, *Underwriting and Servicing Policies to Assist Victims of Presidentially-Declared Major Disaster Areas*, at [http://www.hudclips.org/sub\\_nonhud/cgi/pdfforms/05\\_33ml.doc](http://www.hudclips.org/sub_nonhud/cgi/pdfforms/05_33ml.doc) (last visited Sept. 16, 2005).

Katrina, specifically addressing issues involving:

- assistance for displaced tenants from Rural Development (RD) properties;
- guidance to owners who may accept displaced tenants from RD financed properties; and
- assistance for properties destroyed or damaged.<sup>6</sup>

In addition, the USDA designated a toll-free number at 1-800-414-1226 to assist homeowners, renters and others in need of housing assistance. Information is also available on the USDA Web site at [www.usda.gov/usda/katrina.xml](http://www.usda.gov/usda/katrina.xml).

The USDA also worked with local organizations to identify at least 1,000 vacant housing units in Missouri that are available to house displaced residents.

### Internal Revenue Service (IRS)

Ostensibly to free up housing for displacees, the Treasury Department and the Internal Revenue Service announced a waiver of tax credit income eligibility rules that prohibit owners of tax credit properties from providing housing to otherwise income-ineligible Katrina displacees. IRS Notice 2005-69 (eff. Aug. 29, 2005). (*Note*: the Secretary's statutory authority for this waiver remains unclear.) Additional information regarding the IRS's response to Hurricane Katrina can be found at [www.irs.gov/newsroom/article/0,,id=108362,00.html](http://www.irs.gov/newsroom/article/0,,id=108362,00.html).

<sup>6</sup>See USDA, *MFH Guidance Relating to Hurricane Katrina*, <http://www.rurdev.usda.gov/rd/disasters/MFHKatrinaGuidance.pdf> (last visited Sept. 16, 2005).

## Senate Passes \$3.5 Billion Emergency Housing Voucher Bill

On September 15, 2005, the United States Senate unanimously passed an amendment that would create an emergency housing voucher program totaling \$3.5 billion. The proposed program would provide aid to more than 350,000 families left homeless by Hurricane Katrina with emergency housing vouchers averaging \$600/month for up to six months. Under the amendment, any family displaced by Katrina would be eligible to receive a temporary voucher which would pay for renting safe and decent housing, including payment for rent, security and utility deposits, relocation expenses, and moving expenses back to their permanent homes. Moreover, these vouchers would be portable and could thus be used to rent available housing anywhere in the country.

The Department of Housing and Urban Development will directly administer this program so it can reach the hundreds of thousands of displaced residents scattered throughout the country. In addition, in an apparent effort to facilitate the distribution of funds to those in need, the amendment temporarily waives the voucher income certification process and provides that recipients may continue to receive payments until family members return to work.

The bill now goes to a Senate-House Conference Committee so that differences between an earlier proposed House spending bill (absent the housing aid) and the Senate bill can be worked out. Senator Paul S. Sarbanes (D-MD), who originally offered the amendment, has urged House leaders to accept the Senate voucher language. Housing advocates must impress upon House members the need to accept this much-needed funding in the final package.

The amendment was attached to the Commerce-Justice-Science Appropriations bill for FY 2006. A summary of the amendment can be found at [sarbanes.senate.gov/pages/press/090805\\_katrina\\_housing\\_summary.html](http://sarbanes.senate.gov/pages/press/090805_katrina_housing_summary.html). ■

## Department of Veterans Affairs (VA)

The Department of Veterans Affairs (VA) has evacuated the most critically ill patients from the VA medical center in New Orleans, and is establishing procedures for family members to locate evacuated patients. Officials are also finalizing procedures for veterans from the hurricane area to receive benefit checks and prescription drugs, and to ensure that VA employees continue to be paid.

In addition, in response to the critical need for housing for those displaced by Hurricane Katrina, the VA until further notice has removed all VA-owned properties from the market nationwide. Visit [www1.va.gov/opa/katrina](http://www1.va.gov/opa/katrina) and <http://www.homeloans.va.gov> for this and other information on the VA's response to Hurricane Katrina.

## Fannie Mae

Lenders have been encouraged to help borrowers in several ways through Fannie Mae's disaster relief provisions, including suspending mortgage payments for up to three months, reducing the payments for up to eighteen months, or in more severe cases, creating longer loan repayment plans. Such assistance is provided on a case-by-case basis, and is designed to meet the individual needs of borrowers. In addition, Annys Shin of the Washington Post recently reported that key House leaders have tentatively agreed to require Fannie Mae and Freddie Mac to set aside a portion of their profits to finance rebuilding efforts in the hurricane-ravaged Gulf Coast region.<sup>7</sup> Under the proposed legislation, Fannie and Freddie would set aside 3.5% of their profits over the next five years. During the first two years, priority would be given to projects in areas affected by Hurricane Katrina. It has been estimated that this recovery fund could generate approximately \$700 million to \$800 million during that time.

<sup>7</sup>Annys Shin, *Fannie, Freddie Bill Tied to Katrina Aid*, WASH. POST, Sept. 15, 2005 at D4.

## Freddie Mac

Freddie Mac has recently announced several forms of temporary relief targeted at borrowers who previously resided in the "Major Disaster Areas." The list of relief programs introduced by Freddie Mac include:

- three-month suspension of payments and other measures for borrowers in the affected areas;
- immediate release of hazard insurance monies; and
- authorizing mortgage servicers who are not in Major Disaster Areas to waive the assessment of penalties or late fees against borrowers with disaster-damaged homes, and not report any forbearance or delinquencies caused by the disaster to the nation's credit bureaus.

More information regarding these and other Freddie Mac relief programs can be found at [www.freddiemac.com/singlefamily/hurricanekatrina.html](http://www.freddiemac.com/singlefamily/hurricanekatrina.html).

## Ginnie Mae

Ginnie Mae has encouraged its issuers to provide forbearance to mortgagors in the Presidentially declared disaster areas.<sup>8</sup> In exchange, Ginnie Mae has agreed to provide assistance to Mortgage-Backed Securities (MBS) issuers with significant concentrations of loans within the affected areas. This assistance includes help in making payments to MBS investors where homeowners are unable to make payments, and the elimination of delinquent loans in the affected areas from delinquency statistics used in risk monitoring. More information regarding this program can be found at [www.ginniemae.gov/apm/apm\\_pdf/05-15.pdf](http://www.ginniemae.gov/apm/apm_pdf/05-15.pdf). ■

<sup>8</sup>To date, President George W. Bush has declared certain regions of Alabama, Mississippi, Louisiana and Florida as disaster areas.

## Feds Announce Temporary Disaster Housing Programs

On September 23, HUD and FEMA each announced programs to provide temporary housing assistance to Katrina displacees. FEMA's Transitional Housing Assistance program, a component of its authorized Individuals and Households Program (IHP), will provide lump-sum payments of \$2358, without income eligibility requirements, to cover temporary housing assistance to qualified displacees whose homes were made uninhabitable or inaccessible by the hurricane. This sum, usable for housing anywhere, represents three months' worth of assistance (calculated at the national average monthly Fair Market Rent of \$789). After three months, FEMA will recertify the family and may recalculate the subsidy based on local market rents. Receipts will be required for this assistance, which will count toward the overall household limit of \$26,200 for all IHP benefits and the overall temporary housing benefit period of eighteen months. HUD's program, the Katrina Disaster Housing Assistance Program, also using FEMA funds, will provide rental assistance at the local FMR for up to eighteen months through local PHAs in the area chosen by the displacee. Families eligible for the HUD program will include those who, before Katrina, were residing in some form of HUD-assisted housing (public housing, vouchers or HUD-subsidized or assisted multifamily properties), or who were homeless. No tenant contribution will be required. More details will be forthcoming soon. Check the HUD and FEMA Web sites, or [www.nlihc.org](http://www.nlihc.org).

## NLIHC Recommendations for Federal Katrina Response

Working through its policy committee (of which NHLP is a member), the National Low-Income Housing Coalition (NLIHC) has sent letters to President Bush and Congress outlining key steps necessary to address the housing crisis created by Hurricane Katrina. The recommendations are based on extensive discussions and feedback from NLIHC members and representatives of other housing, homeless and community development organizations across the country. The NLIHC letter was placed in the record at the September 16 hearing on the housing needs of displaced people before the House Subcommittee on Housing and Community Opportunity. Its highlights are as follows:

Hurricane Katrina has created a housing crisis that is national in scope and that exacerbates the existing shortage of affordable housing for the lowest-income families. President Bush should issue an Executive Order that establishes a central federal housing entity to coordinate the housing-specific functions of the Department of Housing and Urban Development, Rural Housing Service, Federal Emergency Management Agency and the Internal Revenue Service. This entity must direct the housing response and deal with the rebuilding needs of the disaster areas, as well as the housing needs in states where displaced people have relocated.

NLIHC stresses the need for rapid re-housing, ensuring shelters are emptied with all deliberate speed, with special attention paid to the significant numbers of elderly, disabled and other people with special needs in the displaced population.

All current recipients of federal housing must immediately receive applicable assistance in their new communities without re-screening or use of emergency assistance funds. Moreover, displaced people and local people with critical housing needs who receive assistance or are waiting for assistance must not be pitted against one another for scarce resources.

Congress should appropriate new funds for emergency housing vouchers, housing production and rehabilitation, and to assist people in establishing new homes. Specifically, NLIHC urges supplemental funding of \$3.5 billion for emergency vouchers, with provisions for the waiver of certain rules, and additional supplemental funding of \$3.5 billion, distributed through the HOME program, for emergency capital funds to rebuild in affected areas and add stock to communities where displaced people have relocated. Supplemental funding is also needed to assist all residents of federal housing programs with utility costs that are sure to increase due to rising energy costs created by the hurricane.

Plans for long-term solutions to the housing crisis should be grounded in knowledge about the unique situations, circumstances and likely plans of each displaced household, and a case-by-case assessment system should be put into place immediately.

All displaced people must have the right to return to the communities from which they came. Therefore, rebuilding must include sufficient housing that is affordable to all those who were displaced and should be based on lessons learned about the value of racially and economically integrated neighborhoods. All planning and redevelopment decisions must include and engage representatives from all affected communities. Likewise, all displaced people must have the right to remain in any new community to which they have relocated and housing assistance must be provided to income-eligible households so that decisions to remain or return are not unduly distorted.

Rebuilding in affected areas will require major federal expenditures. Congress must be prepared to invest in rebuilding and at a minimum, forgo any further federal tax cuts.

To view the complete letters, see [www.nlihc.org/news/091205.html](http://www.nlihc.org/news/091205.html). Any additional or revised recommendations will be made immediately available to advocates via the NLIHC Web site at [www.nlihc.org](http://www.nlihc.org). ■

# Eighth Circuit Affirms Residents' Victory in Missouri Demolition Case

On August 18, the United States Court of Appeals for the Eighth Circuit handed down a victory for civil rights and affordable housing in *Charleston Housing Authority v. USDA*, 419 F.3d 729 (8th Cir. 2005). The case involved a challenge by residents and Housing Comes First, a Missouri fair housing organization,<sup>1</sup> to the Charleston (Missouri) Housing Authority's plan to vacate and demolish Charleston Apartments, a fifty-unit housing complex financed under the Department of Agriculture (USDA) Section 515 affordable rural rental housing program. This litigation was described in a previous issue of the *Housing Law Bulletin*.<sup>2</sup>

Plaintiffs asserted claims based on the housing authority's violations of the Fair Housing Act,<sup>3</sup> the Emergency Low Income Housing Preservation Act (ELIHPA),<sup>4</sup> and other provisions of federal law.<sup>5</sup> In 2004, after a bench trial, the United States District Court for the Eastern District of Missouri issued judgment in Plaintiffs' favor on their fair housing claims, but rejected Plaintiffs' other claims.<sup>6</sup>

The district court also issued judgment in a related case brought by the housing authority against the USDA. The housing authority contended that the refusal of USDA to accept prepayment of its Section 515 loan was unlawful. The district court rejected the housing authority's claims.

## Demolition Plan Unlawful Based on Disparate Racial Impact

In a first-of-its-kind appellate ruling, the Eighth Circuit concluded that the district court did not err in finding that the housing authority's plan to vacate and demolish Charleston Apartments had a disparate impact on minorities in violation of the Fair Housing Act.<sup>7</sup> At trial,

plaintiffs presented evidence that nearly all of the residents of the Section 515 development were African American, as were a majority of the households on the Charleston Apartments waiting list and a disproportionate number of households with unmet housing needs in Mississippi County, Missouri.

## ELIHPA Upheld

The Eighth Circuit also affirmed the district court's decision regarding the housing authority's prepayment claims against USDA.<sup>8</sup> In so doing, the Eighth Circuit followed its prior decision in *Parkridge Investors, L.P. v. Farmers Home Admin.*, 13 F.3d 1192, 1195 (8th Cir.1994), and upheld the validity of ELIHPA. In upholding ELIHPA, the decision stakes out a clear, contrary position to those suggested in recent decisions by other federal courts in Oregon and Idaho.<sup>9</sup>

## Remand for Further Proceedings Regarding Relief

Citing the passage of time, the Eighth Circuit remanded the case to the district court for further proceedings regarding injunctive remedies.<sup>10</sup> Plaintiffs had sought a court order requiring the housing authority to rent-up and maintain all vacant units in the Charleston Apartments complex.

## Conclusion

Charleston Housing Authority has broken federal law and violated the civil rights of African-American families. The question now is what injunctive relief the district court will order on remand.

Despite residents' repeated objections, Charleston Housing Authority has allowed Charleston Apartments to sit largely vacant and neglected for years while this litigation has proceeded. The district court has shown some reluctance to issue a specific injunctive order in the past.<sup>11</sup>

Plaintiffs in the case are represented by Ann Lever and Dan Claggett of Legal Services of Eastern Missouri and Lew Polivick of Legal Services of Southern Missouri, with the additional participation of the National Housing Law Project. Plaintiffs retained as their demographics expert Professor Andrew Beveridge of the City University of New York. ■

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<sup>1</sup>Residents and Housing Comes First will be referred to below as "Plaintiffs."

<sup>2</sup>NHLP, *District Court Rules Demolition of RHS Development Violates Fair Housing Act*, 34 Hous. L. Bull. 59, 72 (2004).

<sup>3</sup>42 U.S.C.A. § 3604(a) (West 2003).

<sup>4</sup>42 U.S.C.A. § 1472 (West 2003) (restricting the ability of project owners to prepay loans insured under the Section 515 program).

<sup>5</sup>See NHLP, *District Court Rules Demolition of RHS Development Violates Fair Housing Act*, 34 Hous. L. Bull. 59, 72 (2004) (describing other claims).

<sup>6</sup>*Owens v. Charleston Hous. Auth.*, 336 F. Supp. 2d 934 (E.D. Mo. 2004) (Perry, J.).

<sup>7</sup>*Charleston Hous. Auth. v. USDA*, 419 F.3d 729, 742 (8th Cir. 2005) (Murphy, Bright, Melloy, J.).

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<sup>8</sup>*Id.* at 738-40.

<sup>9</sup>See, e.g., *Kimberly Assocs. v. United States*, 261 F.3d 864 (9th Cir. 2001); *Goldammer v. Veneman*, 2005 WL 1307698 (D. Or. 2005).

<sup>10</sup>*Charleston Hous. Auth.*, 419 F.3d at 742-3.

<sup>11</sup>NHLP, *District Court Rules Demolition of RHS Development Violates Fair Housing Act*, 34 Hous. L. Bull. 59, 73 (2004).

# Fiscal Year 2006 HUD Appropriations Update

by Anthony Ha\*

Both the House and the Senate have made progress on Department of Housing and Urban Development (HUD) appropriations for the upcoming Fiscal Year (FY) 2006. On July 21, the Senate Appropriations Committee approved its version of the FY 2006 HUD funding bill, following the full House's passage of its version bill on June 30.<sup>1</sup> In full committee, Senate Transportation, Treasury, and HUD Subcommittee Chair Christopher Bond (R-MO) and Ranking Member Patty Murray (D-WA) offered a successful amendment to increase the bill's overall funding by \$446 million, with the majority of the increase going to HUD programs.<sup>2</sup> The full Senate is expected to consider the bill in September, unless the congressional leadership charts a different path for the unfinished FY 2006 appropriations bills.

Both the House and the Senate Committee rejected the Bush Administration's plans to consolidate community and economic development programs at the Commerce Department while cutting their funding.<sup>3</sup> In addition, neither of these bills addresses the President's proposal to institute a long-term spending cap on certain programs including housing through 2010.<sup>4</sup>

The House bill includes \$15.63 billion for overall tenant-based rental assistance, \$5.1 billion for overall project-based rental assistance, \$3.6 billion for the public housing operating fund, and \$2.6 billion for the public housing capital fund.<sup>5</sup> The Senate bill includes \$15.636 billion for tenant-based rental assistance, \$5.07 billion for project-based rental assistance, \$3.56 billion for the operating fund, and \$2.33 billion for the capital fund.<sup>6</sup> These amounts represent an increase in tenant-based rental assistance and in

the operating fund from FY 2005. Both versions nominally decrease the amount allocated for project-based assistance, although the House bill increases the capital fund while the Senate bill decreases it. Overall, the House and Senate bills represent a substantial improvement over the President's proposed budget cuts, but neither fully compensates for funding lost in the past few years.

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*The House and Senate bills represent a substantial improvement over the President's proposed budget cuts, but neither fully compensates for funding lost in the past few years.*

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In addition, the Administration's draft State and Local Housing Flexibility Act of 2005, which had proposed fundamental changes to the public housing and voucher programs that would have allowed higher rents for tenants and diminished targeting for extremely low-income families, never emerged from committee in either chamber.<sup>7</sup> Despite concerns that elements of that proposal might appear in the FY 2006 appropriations bills, this did not yet occur — at least for FY 2006. The Senate Committee expressed reservations so long as the proposal fails to guarantee adequate funding or continued targeting to extremely low-income families, noting that the authorizing and appropriations committees must evaluate these and other controversial issues.<sup>8</sup>

## Voucher Program Remains in Precarious Situation

### Voucher Funding Level

Last year's inadequate voucher funding level required an across-the-board cut of 4% to public housing authority (PHA) voucher programs, the nation's largest low-income housing program, resulting in lost vouchers and reduced benefits for others. This year, although both the House and the Senate Committee increased funding to \$15.6 billion (including the now customary \$4.2 billion as an advance appropriation for the following fiscal year, FY 2007)—\$870 million above the FY 2005 level, the failure to address past years' shortfalls and the required remedial funding formulas could leave the program in a precarious position.<sup>9</sup>

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<sup>7</sup>Both the Senate (S. 771 I.S.) and House (H.R. 1999 I.H.) versions of the proposal are available at <http://thomas.loc.gov>. See NHLP, *Administration Issues Radical Proposal to Deregulate Public Housing and Voucher Programs*, 35 Hous. L. Bull. 125, 125 (2005).

<sup>8</sup>S. Rep. No. 109, 109<sup>th</sup> Cong., 1st Sess. 145 (2005).

<sup>9</sup>H.R. 3058 E.H., 109<sup>th</sup> Cong., 56 (2005); H.R. 3058 R.S., 109<sup>th</sup> Cong., 294 (2005).

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\*Anthony Ha is an urban studies student at Stanford University and an intern at NHLP.

<sup>1</sup>The full title of the bill is "The Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006." Both the version of the bill passed by the House (H.R. 3058 E.H.) and the version reported in the Senate (H.R. 3058 R.S.) are available at <http://thomas.loc.gov>.

<sup>2</sup>Senate Committee Reports FY06 HUD Bill, MEMO TO MEMBERS (National Low Income Housing Coalition), July 22, 2005.

<sup>3</sup>See OMB, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2006 (2005), at <http://www.whitehouse.gov/omb/budget/fy2006>.

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

<sup>5</sup>H.R. 3058 E.H., 109<sup>th</sup> Cong., 55, 60, 64, 62 (2005).

<sup>6</sup>H.R. 3058 R.S., 109<sup>th</sup> Cong., 249, 299, 303, 301 (2005).

In each version of the bill, the voucher account covers several different uses: renewals of expiring voucher contracts (Senate version about \$14.1 billion, House about \$14.2 billion, after passage of a Democratic floor amendment to increase funding by \$100 million); tenant protection vouchers (Senate \$192 million, House \$166 million);<sup>10</sup> family self-sufficiency coordinators (Senate \$48 million, House \$45 million); PHA administrative fees (Senate \$1.3 billion, House \$1.225 billion); and other miscellaneous funds. The overall \$15.6 billion level is actually about \$200 million less than the President's request. In different ways, both bills provide \$45 million for HUD to address certain problems resulting from last year's funding formula, but probably not for replenishing reserves that have been drastically reduced.<sup>11</sup>

### **Voucher Funding Scheme Uncertain, but Senate Version Clearly Preferable**

One of the most devastating changes made to the program by Congress in 2005 was the shift from an actual cost-based system to a strict dollar- or budget-based system.<sup>12</sup> This system, similar to a block grant, destroys the link between the cost of the program and the amount of funding received. In addition to this change in funding scheme, Congress' failure to appropriate sufficient funds resulted in an additional 4% across-the-board cut in 2005.

For FY 2006 funding, the House bill would continue to use last year's three-month FY 2004 snapshot scheme as a base, while the preferable Senate bill would allocate funding based on verified voucher leasing and cost data for the most recent twelve months of data.<sup>13</sup>

According to a recent analysis by the Center on Budget and Policy Priorities, the proposed House funding policy would cause more than 500 PHAs to be overfunded by a total of \$79 million, while more than 1,000 agencies would be left underfunded, jeopardizing nearly 28,000 vouchers currently in use.<sup>14</sup> However, primarily because of the addition of the estimated \$80 million cost of

Section 811 tenant-based renewals to the voucher renewal pot with no additional funding, the Senate's funding level appears insufficient to fund all vouchers currently in use and restore those lost due to prior funding shortfalls. Reserves should also be replenished so that PHAs can address unanticipated circumstances.

### **Section 8 Project-Based Funding Looking Stable**

Section 8 project-based rental assistance subsidizes rents for approximately 1.3 million families in over 19,000 projects.<sup>15</sup> The House bill would provide about \$5.1 billion for this account, of which \$4.94 billion covers the renewal or amendment of project-based contracts, and \$147 million for contract administrators.<sup>16</sup> The Senate bill would provide almost the same amounts.<sup>17</sup> While at first glance this appears to be a reduction from the \$5.3 billion FY 2005 level, the Senate level could also include recaptures from prior funds, which some have estimated at several hundred million dollars, thus actually increasing the total amount available for this account.<sup>18</sup>

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*One of the most devastating changes made to the program by Congress in 2005 was the shift from an actual cost-based system to a strict dollar- or budget-based system.*

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The Senate Committee repeated its ongoing concern that HUD is not committed to maintaining Section 8 project-based housing and may be encouraging owners to opt out of the program, and directed both HUD and the Government Accountability Office (GAO) to report on efforts to preserve this housing before June 30, 2006.<sup>19</sup>

### **Public Housing Would Again Suffer Shortfalls**

#### **Operating Fund**

Funds needed by PHAs to run public housing effectively would again prove inadequate under the House and Senate bills. The operating subsidy, used for day-to-day operations, would be funded at \$3.6 billion under the

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<sup>10</sup>Reportedly to assist the relocation of public housing tenants facing conversions and demolitions under existing and anticipated regulations, the President had sought almost double the number of tenant protection vouchers. See Budget of the United States Government: Fiscal Year 2006, App. for Department of Housing and Urban Development 528 (2005).

<sup>11</sup>H.R. 3058 E.H., 109<sup>th</sup> Cong., 57 (2005); H.R. 3058 R.S., 109<sup>th</sup> Cong., 295-96 (2005), and S. Rep. No. 109, 109<sup>th</sup> Cong., 1st Sess. 143-144 (2005). On the reserve cuts, see NHLP, *Section 8 Narrowly Escapes Funding Cuts in 2005 HUD Budget*, 35 Hous. L. Bull. 3, 6 (2005).

<sup>12</sup>NHLP, *Section 8 Narrowly Escapes Funding Cuts in 2005 HUD Budget*, 35 Hous. L. Bull. 1, 3 (2005).

<sup>13</sup>H.R. 3058 E.H., 109<sup>th</sup> Cong., 57 (2005); H.R. 3058 R.S., 109<sup>th</sup> Cong., 294-95 (2005).

<sup>14</sup>BARBARA SARD, ET AL., CBPP, HIGH STAKES FOR THE HOUSING VOUCHER PROGRAM IN THE 2006 APPROPRIATIONS BILL (2005), available at <http://www.cbpp.org/8-24-05hous.htm>.

<sup>15</sup>See OMB, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2006, at 527 (2005) (HUD appendix).

<sup>16</sup>H.R. 3058 E.H. 109<sup>th</sup> Cong., 60-61 (2005).

<sup>17</sup>H.R. 3058 R.S., 109<sup>th</sup> Cong., 299-300 (2005).

<sup>18</sup>*Id.*, 300.

<sup>19</sup>S. Rep. No. 109, 109<sup>th</sup> Cong., 1st Sess. 144 (2005).

House bill and about \$43 million less under the Senate bill.<sup>20</sup> Although the Senate's level would exceed the President's request by \$150 million,<sup>21</sup> it remains \$22 million short of FY 2004's levels, despite obvious cost increases since then.

When the President released his proposed operating fund cuts, the National Association of Housing and Redevelopment Officials noted that because of the funding crisis in 2003, during which time many PHAs were forced to lay off staff, curtail their programs and use up existing financial resources, some PHAs may now be without any reserves to fill the void left by these shortfalls.<sup>22</sup>

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*The President again proposed eliminating the HOPE VI program.*

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### Capital Fund

The Senate Committee would reduce the public housing capital fund from its \$2.7 billion 2004 level to \$2.33 billion, a two-year reduction of about \$370 million.<sup>23</sup> Such reductions would force PHAs to further postpone planning and execution of much-needed rehabilitation. The House bill, on the other hand, would provide about 10% more, about \$2.6 billion.<sup>24</sup>

### HOPE VI Continued

Consistent with his proposals in recent years, the President again proposed eliminating the HOPE VI program. This year's request also sought rescission of last year's appropriations, ostensibly because "HOPE VI has surpassed its primary goal to demolish 100,000 severely distressed public housing units by 2003."<sup>25</sup>

Both the House and the Senate Committee did more than reject this suggestion—the House allocated \$60 million

for HOPE VI, and the Senate Committee went even further, increasing HOPE VI funding to \$150 million.<sup>26</sup>

### President's Plan to Transfer and Cut CDBG Rejected

Under the Administration's proposed changes to HUD and other programs, eighteen grant programs would have been terminated or merged—most notably, the well-known Community Development Block Grant program, but also the Section 108 loan program, the Brownfields economic development initiative, the HUD rural housing and economic development program, and many of HUD's other community and development programs.

The House and Senate Committee have rejected this plan, while providing various sums for these smaller HUD programs.<sup>27</sup>

Another skirmish has surrounded the location and funding for one of HUD's homeownership programs. The President sought to move the Self-Help Homeownership Opportunity Program (SHOP)—a program that assists low-income homebuyers willing to contribute "sweat equity" toward construction of their homes—out of the Community Development Fund and granted it \$30 million. The House bill moved SHOP back into the Community Development Fund, but cut funding down to \$23 million.<sup>28</sup> The Senate Committee cut SHOP by another \$8 million, to \$15 million.<sup>29</sup>

Youthbuild, which the President's proposal would have transferred to the Department of Labor, will likely remain under HUD. The Senate Committee stated that while the program has never had adequate oversight at HUD, there were no assurances of improvement at Labor, and further requested a GAO assessment.<sup>30</sup>

### Native American and Native Hawaiian Block Grants

The Senate would provide \$622 million for the Native American housing program, while the House proposes only \$600 million in the face of the President's \$583 million request.<sup>31</sup> Both bills would provide \$8.8 million for Native Hawaiian housing.<sup>32</sup>

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<sup>20</sup>H.R. 3058 E.H., 109<sup>th</sup> Cong., 64 (2005); H.R. 3058 R.S., 109<sup>th</sup> Cong., 303 (2005). The funding levels appear greatly in excess of the FY 2005 levels because last year's shift of funding to a calendar year basis enabled about a 25% reduction in appropriations.

<sup>21</sup>OMB, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2006, at 531-32 (2005) (HUD appendix), at <http://www.whitehouse.gov/omb/budget/fy2006/appendix.html>.

<sup>22</sup>NAHRO, *President's Budget Would Eliminate CDBG*, NAHRO MONITOR, Feb. 15, 2005.

<sup>23</sup>H.R. 3058 R.S., 109<sup>th</sup> Cong., 301 (2005).

<sup>24</sup>H.R. 3058 E.H., 109<sup>th</sup> Cong., 62 (2005).

<sup>25</sup>See OMB, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2006, at 530-32 (2005) (HUD appendix), at <http://www.whitehouse.gov/omb/budget/fy2006/appendix.html>.

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<sup>26</sup>H.R. 3058 E.H., 109<sup>th</sup> Cong., 65 (2005); H.R. 3058 R.S., 109<sup>th</sup> Cong., 304-305 (2005).

<sup>27</sup>H.R. 3058 E.H., 109<sup>th</sup> Cong., 70-71 (2005); H.R. 3058 R.S., 109<sup>th</sup> Cong., 308, 313 (2005).

<sup>28</sup>H.R. 3058 E.H., 109<sup>th</sup> Cong., 72 (2005).

<sup>29</sup>H.R. 3058 R.S., 109<sup>th</sup> Cong., 310 (2005).

<sup>30</sup>S. REP. No. 109, 109<sup>th</sup> Cong., 1st Sess. 151 (2005).

<sup>31</sup>H.R. 3058 E.H., 109<sup>th</sup> Cong., 65 (2005); H.R. 3058 R.S., 109<sup>th</sup> Cong., 305 (2005).

<sup>32</sup>H.R. 3058 E.H., 109<sup>th</sup> Cong., 67 (2005); H.R. 3058 R.S., 109<sup>th</sup> Cong., 310 (2005).

# FY 2006 Appropriations Summary

**The President's fiscal year 2006 HUD budget request calls for an 11.5% cut from FY05.**

HUD Program (set-asides indented)	FY04 Enacted (in millions)	FY05* Enacted (in millions)	FY06 Request (in millions)	FY06 House passed bill (in millions)	FY06 Senate Appropriations Committee (in millions)
Tenant-based rental assistance	14,186	14,766	15,845	15,631	15,636
Project-based rental assistance	4,792	5,298	5,072	5,100	5,072
Public Housing Capital Fund	2,695	2,579	2,327	2,600	2,327
Resident Opportunity & Self Sufficiency	55	52.5	24	24	45
Public Housing Operating Fund	3,579	2,438	3,407	3,600	3,557
HOPE VI	149	143	-143	60	150
Native American Housing Block Grants	650	621	583	600	622
Elderly Housing (Section 202)	774	741	741	741	742
Disabled Housing (Section 811)	249	238	120	238	240
HOME Investment Partnership Program	2,006	1,900	1,981	1,900	1,900
HOME formula grants	1,859	1,789	1,730	1,790	1,751
American Dream Downpayment Assistance	87	50	200	50	50
Housing Counseling Assistance	40	42	40	41	42
Community Development Block Grants	4,921	4,671	0	4,217	4,324
Self-Help Homeownership Opportunity	27	25	30	23	15
Youthbuild	65	62	0	50	55
Economic Development Initiative	276	262	0	290	290
Native Hawaiian Housing Block Grant	9	9	9	9	9
Homeless Assistance Grants	1,260	1,240	1,440	1,340	1,415
Housing for Persons with AIDS	295	281	268	290	287
Rural Housing and Economic Development	25	24	0	10	24
Empowerment Zones/Enterprise Communities	15	10	0	0	0
Brownfields Redevelopment	25	24	0	26	15
Fair Housing Assistance Program	28	26	16	26	26
Fair Housing Initiatives Program	20	20	16	20	20
Lead-Based Paint Hazard Reduction	174	167	119	167	167
Salaries and Expenses	1,116	1,030	1,153	1,152	1,145
Homeland Security – Emergency Food and Shelter Grants	153	151	153	153	153
USDA – Section 515	116.5	99	27	100	90
USDA – Rural Rental Assistance	584	587	650	650	653
USDA – Housing Preservation Grants	10	9	10	0	10
Treasury – CDFI	61	54	8	55	N/A

*\*FY05 numbers reflect an across the board cut of 0.8%.*

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## Elderly Housing Level Funded

Both bills provide almost identical amounts for housing for seniors under Section 202, about \$741 million, the same as last year.<sup>33</sup> These funds would cover capital advances, amendments, project rental assistance contracts and service coordinators.

### Section 811 Funding Would Be Restored

Perhaps the largest percentage cut proposed by the President was a 50% decrease in Section 811, which provides permanent housing for persons with disabilities.<sup>34</sup> Congress again demurred: the House increased Section 811 to \$238 million—the fiscal year 2005 level—and the Senate added another \$2 million.<sup>35</sup>

However, under the Senate bill, the renewal of tenant-based rental assistance previously provided under Section 811 would come from Section 8 voucher funding.<sup>36</sup> Because of the high budget authority required for these renewals, advocates have long sought to shift their ever-increasing costs to the Section 8 voucher fund to preserve Section 811 funds for new construction. But the Senate's transfer of these renewal needs to the overall voucher renewal fund without providing the additional funds necessary to pay for them would leave the voucher renewal account unable to accomplish the goal of renewing all expiring vouchers.

### HOPWA Funding Would See Small Increase

The President had proposed to reduce the Housing Opportunities for Persons with AIDS (HOPWA) program from FY 2005's \$281 million to \$268 million, which, by the Administration's estimate, would have supported 67,000 units—11,000 units short of the 78,000 families HUD claims to have served in 2004.<sup>37</sup>

The Senate bill would increase HOPWA funding to \$287 million.<sup>38</sup> This falls short of the \$290 million proposed by the House, not to mention the \$295 million allocated in FY 2004.<sup>39</sup>

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<sup>33</sup>H.R. 3058 E.H., 109<sup>th</sup> Cong., 75 (2005); H.R. 3058 R.S., 109<sup>th</sup> Cong., 316 (2005).

<sup>34</sup>See OMB, Budget of the United States Government: Fiscal Year 2006, at 549 (2005) (HUD appendix), at <http://www.whitehouse.gov/omb/budget/fy2006/appendix.html>.

<sup>35</sup>H.R. 3058 E.H., 109<sup>th</sup> Cong., 76; H.R. 3058 R.S., 109<sup>th</sup> Cong., 318-319 (2005).

<sup>36</sup>H.R. 3058 R.S., 109<sup>th</sup> Cong., 319 (2005).

<sup>37</sup>See OMB, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2006, at 549 (2005) (HUD appendix), at <http://www.whitehouse.gov/omb/budget/fy2006/appnedix.html>.

<sup>38</sup>H.R. 3058 R.S., 109<sup>th</sup> Cong., 307-308 (2005).

<sup>39</sup>H.R. 3058 E.H., 109<sup>th</sup> Cong., 69 (2005).

## HOME Also Looking Stable

The HOME program, HUD's primary program to finance the development of affordable housing and assist first-time buyers, provides funds to states and localities to build or rehabilitate housing for rent or ownership, or for tenant-based rental assistance to low- and moderate-income households.

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*Perhaps the largest percentage cut proposed by the President was a 50% decrease in Section 811, which provides permanent housing for persons with disabilities.*

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Both the House and the Senate bill fund HOME at \$1.9 billion, the same as last year but less than the \$2 billion in FY 2004 and the \$1.98 billion proposed by the President.<sup>40</sup>

Both bills include a set-aside for \$50 million for the American Dream Downpayment Initiative, which aims to increase the homeownership rate among low-income and minority individuals by providing downpayment, closing costs, and rehabilitation assistance.<sup>41</sup>

HUD had received a poor report card in its own 2004 Performance and Accountability Report, which indicated that the number of homeowners assisted under HOME between 2003 and 2004 dropped by an astounding 25,185.<sup>42</sup>

### Homeless Assistance Programs

The President's requested \$1.44 billion for Homeless Assistance Grants was shorted by both bills, with the House providing \$1.34 billion and the Senate \$1.41 billion.<sup>43</sup> These funds cover many homeless assistance programs, including emergency shelter grants, supportive housing, mod rehab SROs, and Shelter Plus Care.

### Lead Based Paint and Fair Housing

In both the House and Senate bills, the Lead Based Paint Hazard Reduction program would be funded at \$167 million—far more than the \$119 million requested, but still \$7 million less than FY 2004.<sup>44</sup> And in both bills,

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<sup>40</sup>H.R. 3058 E.H., 109<sup>th</sup> Cong., 71 (2005); H.R. 3058 R.S., 109<sup>th</sup> Cong., 313 (2005).

<sup>41</sup>H.R. 3058 R.S., 109<sup>th</sup> Cong., 314 (2005).

<sup>42</sup>HUD, PERFORMANCE AND ACCOUNTABILITY REPORT: FY 2004 (2004), available at <http://www.hud.gov/offices/cfo/pafinal.pdf>.

<sup>43</sup>H.R. 3058 E.H., 109<sup>th</sup> Cong., 73 (2005); H.R. 3058 R.S., 109<sup>th</sup> Cong., 314 (2005).

<sup>44</sup>H.R. 3058 E.H., 109<sup>th</sup> Cong., 84 (2005); H.R. 3058 R.S., 109<sup>th</sup> Cong., 325-326 (2005).

the Fair Housing Activity Fund for fair housing assistance and initiatives would receive \$46 million, the same level as FY 2005.<sup>45</sup>

### **New Technical Assistance Board Proposed**

The Senate bill would also create a new affordable housing and economic development assistance board to provide technical assistance to local nonprofits, funding it by transferring \$45 million from other HUD programs.<sup>46</sup> The funds would be used to assist nonprofits in preserving and expanding the stock of low-income housing and for economic development activities.<sup>47</sup>

For additional budget information, please see the accompanying chart prepared by the National Low Income Housing Coalition, and reprinted with permission. The *Housing Law Bulletin* will report on Congress' final decisions to reconcile these conflicting provisions when appropriations action is completed later this year. ■

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<sup>45</sup>H.R. 3058 E.H., 109<sup>th</sup> Cong., 84 (2005), H.R. 3058 R.S., 109<sup>th</sup> Cong., 325 (2005).

<sup>46</sup>H.R. 3058 R.S., 109<sup>th</sup> Cong., 319 (2005).

<sup>47</sup>*Id.*

## **Update on Prescription Drug Benefits and Income-Based Rents: What You Need to Know**

**By Jessica Ritter\***

By now, many have heard about the Medicare prescription drug benefits, including the credits and discount cards, authorized by the recent Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA).<sup>1</sup> Figuring out how the MMA's benefits affect the

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<sup>1</sup>Pub. L. No. 108-173, § 1860D-31(g)(6) (2003) (codified at 42 U.S.C. § 1395w-141(g)(6)). More information regarding the Medicare Prescription Drug Discount Card and Transitional Assistance can be found at

income-based rents of public and subsidized housing tenants isn't always immediately clear. This is what you need to know.

### **MMA Income Disregard**

Prior to their enrollment in a Medicare prescription drug plan, which should occur around January 1, 2006, the MMA provides very low-income senior and disabled Medicare recipients with interim benefits—a \$600 credit and a discount toward prescription drug costs.<sup>2</sup> Last year, the Department of Housing and Urban Development (HUD) and other agencies issued guidances that clearly prohibited public and subsidized housing providers from reducing housing assistance as a result of a Medicare tenant's receipt of either this interim credit or discount.<sup>3</sup>

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*Figuring out how the MMA's benefits affect the income-based rents of public and subsidized housing tenants isn't always immediately clear.*

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These guidances were issued pursuant to express provisions in the MMA stating that benefits must be disregarded in determining eligibility and benefits for other federal programs.<sup>4</sup> The HUD guidance stated that Medicare tenants paying income-based rents in HUD programs<sup>5</sup> must be allowed to deduct as medical expenses the full unsubsidized cost of their prescription drugs during the

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the Department of Health and Human Services Web site at <http://www.cms.hhs.gov/media/press/release.asp?Counter=990>.

<sup>2</sup>Qualification for the \$600 credit in 2005 is limited to those with incomes beneath 135% of the federal poverty line. See Many Medicare Discount Cards Offer Big Savings, Medicare News (June 23, 2004), available at <http://www.cms.hhs.gov/media/press/release.asp?Counter=1094>.

<sup>3</sup>See NHLP, *New Prescription Drug Benefits Should Not Affect Income-Based Rents*, 34 HOUS. L. BULL. 175, 185 (Sept. 2004) (reviewing Income Calculation Regarding Medicare Prescription Drug Cards and Transitional Assistance, HUD Notices PIH-2004-11 and H-04-11 (July 15, 2004)). HUD later issued additional guidance concerning verification methods for the MMA benefits. See Income Calculation and Verification Guidance Regarding Medicare Prescription Drug Cards and Transitional Assistance, HUD Notices H-04-24 and PIH-04-24 (Nov. 10, 2004).

<sup>4</sup>42 U.S.C.A. § 1860D-31(G)(6) (West WESTLAW current through P.L. 108-279 approved 7-22-04) ("The availability of negotiated prices or transitional assistance under this Section shall not be treated as benefits or otherwise taken into account in determining an individual's eligibility for, or amount of benefit under, any other Federal program.")

<sup>5</sup>The HUD programs affected by the MMA include public housing, Housing Choice Voucher Program, Section 221(d)(3) BMIR, Section 236, Rental Assistance Program (RAP), Section 101 Rent Supplement, project-based Section 8, assistance contracts under Section 202 and Section 811.

interim period, without offsetting either the credit or the value of any discount.<sup>6</sup> The same should have also been true for any residents paying income-based rents in multi-family housing financed under programs run by the Rural Housing Services of the Department of Agriculture.<sup>7</sup>

Despite the HUD guidance, some housing providers may not have properly implemented the income disregard for these interim MMA benefits when calculating rents or may not implement the disregard for the entire period during which the interim benefits are being used. It is important to note that the interim benefits under the MMA credit and discount program end no later than May 15, 2006, or any earlier date that the tenant enrolls in an MMA prescription drug plan.

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*Despite the HUD guidance, some housing providers may not have properly implemented the income disregard for these interim MMA benefits when calculating rents or may not implement the disregard for the entire period during which the interim benefits are being used.*

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### **New MMA Benefits Are Not Subject to Disregard**

With the approach of the January 1 target for enrollment in MMA prescription drug plans,<sup>8</sup> housing providers and advocates should understand that benefits obtained under an MMA drug plan selected by a tenant paying income-based rents will be treated differently than interim benefits. *The drug plan benefits are not covered by the*

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<sup>6</sup>“PHAs and Owners and Management Agents must . . . [when applicable] include as a medical deduction the Medicare assistance provided for the cost of drugs pursuant to prescription drug cards, negotiated drug price, or transitional assistance subsidies.” Income Calculation Regarding Medicare Prescription Drug Cards and Transitional Assistance, HUD Notices PIH 2004-11 and H 04-11 (July 15, 2004). Under applicable federal law, medical expenses for elderly and disabled families in excess of 3% of annual income are deductible for purposes of determining adjusted income to which the 30% ratio is then applied. *See, e.g.*, 42 U.S.C.A. § 1437a(b)(5)(A)(ii) (West 2003); 24 C.F.R. § 5.611 (2005).

<sup>7</sup> 7 C.F.R. pt. 1930, subpt. C, ex. B, ¶ II S (2004) (“Any funds which a Federal statute specifies must not be used as the basis for denying or reducing Federal financial assistance or benefits to which the recipient would otherwise be entitled.”). With respect to the MMA, RHS should have taken steps by July 26, 2004, to develop and implement a clear guidance by issuing an administrative notice applicable to subsidized RHS tenants, as well as homeowners with RHS Section 502 direct loans. Memorandum from Joshua B. Bolten, Director, OMB, to the Heads of Executive Departments and Agencies (July 18, 2004).

<sup>8</sup> Enrollment can occur as early as November 15, 2005.

*MMA income disregard.*<sup>9</sup> Thus, because a tenant’s deductible medical expenses may well decline from their former level paid prior to enrollment in an MMA prescription drug plan—just as they would under other insurance benefits—the tenant’s adjusted income may increase, in turn precipitating a rent increase. (Note that any drug plan premiums or co-payments continue to be counted as deductible medical expenses for the housing programs.) Similarly, because medical expenses drop, food stamps may also decrease.

However, despite the loss of the statutory disregard for the benefits of the drug plan, the net benefit to the tenant certainly exceeds the amount of the rent increase and food stamp decrease. The amount of the net drug plan benefit (pre-plan drug costs less any premiums and co-payments) will be about three times the lost federal housing and food stamp benefits. Tenants need not report enrollment in a prescription drug plan and its impact on deductible medical expenses until their next annual recertification following enrollment.

The Department of Health and Human Services has recently issued a useful “tip sheet” explaining these impacts, which HUD has posted on its Web site.<sup>10</sup> The tip sheet also explains other important aspects of the prescription drug plan and enrollment. Note, however, that the tip sheet omits a potentially significant point by failing to account for impact of the 3% of the annual income floor on deductibility.<sup>11</sup> ■

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<sup>9</sup> See note 4, *supra*.

<sup>10</sup> HUD, *Information Partners Can Use on: Housing Assistance from the Department of Housing and Urban Development; New Medicare Prescription Drug Coverage*, (June 20, 2005), available at [http://www.hud.gov/offices/hsg/mfh/rhiip/medicare\\_prescriptiondrugcoverage.pdf](http://www.hud.gov/offices/hsg/mfh/rhiip/medicare_prescriptiondrugcoverage.pdf).

<sup>11</sup> For those elderly households whose medical expenses do not exceed 3% of income, rents will not increase at all as a result of the new program. All of the drug coverage they receive will increase their “in pocket” cash. For those elderly households whose medical expenses exceeded 3% of income before enrollment, but drop below that level afterward, income-based rents will increase, but only by 30% of the amount by which their former medical expenses exceeded 3% of their income. Again, what that means is that the “in pocket cash” will be slightly more than what is shown on the tip sheet. Only when a household’s unreimbursed medical expenses continue to exceed the 3% threshold after enrollment in a Medicare drug plan will the rent increase equal the amount calculated on the tip sheet (i.e. 30% of the covered medical expense, net of co-payments).

# Rural Housing Service Calls for Repeal of ELIHPA

## Proposal Would Effectively Extinguish the Section 515 Program

Described as a bill “to establish a program to revitalize rural multifamily housing,” the Rural Housing Service (RHS) recently released a legislative proposal that could have detrimental effects on rural residents and the entire Section 515 Rural Rental Housing (RRH) program if it receives congressional support.<sup>1</sup> Although the proposal has not yet been introduced, it has already drawn criticism from tenant representatives, nonprofit developers and the for-profit community.

The proposal’s major components include an attempt to implement a voucher program for displaced residents; create loan restructuring and revitalization options for owners “in good standing”;<sup>2</sup> institute \$25 minimum rents;<sup>3</sup> and repeal prepayment restrictions and procedures<sup>4</sup> found in the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA).<sup>5</sup> Selected comments about the agency’s proposal follow.

### Backdrop

There are approximately 435,000 units of Section 515 RRH housing in rural areas throughout the country.<sup>6</sup> Approximately 58% of the households occupying these units are headed by a person who is elderly or disabled.<sup>7</sup> The remaining units are occupied by low-, very low- and extremely low-income families. The average income of households living in Section 515 housing is \$9,075.<sup>8</sup>

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<sup>1</sup>The Rural Housing Service (RHS) is an agency within the Department of Agriculture (USDA). RHS administers USDA’s housing programs, including the Section 515 Rural Rental Housing Program. 42 U.S.C.A. § 1485 (West 2003) (providing loan authority for the Section 515 Rural Rental Housing Program). RHS, RURAL HOUSING SERVICE LEGISLATIVE PROPOSAL (2005) [hereinafter PROPOSAL], at <http://www.rurdev.usda.gov/rd/cong/MFHRevitalization.pdf>.

<sup>2</sup>PROPOSAL, *supra* note 1, at 5.

<sup>3</sup>*Id.* at 7.

<sup>4</sup>*Id.* at 10.

<sup>5</sup>42 U.S.C.A. § 1472(c) (West 2003).

<sup>6</sup>ICF CONSULTING, RURAL RENTAL HOUSING—COMPREHENSIVE PROPERTY ASSESSMENT AND PORTFOLIO ANALYSIS FINAL STUDY REPORT, Memo 2 (2004) [hereinafter CPA STUDY], at <http://www.rurdev.usda.gov/rhs/mfh/Property%20Assessment/Property%20Assessment.htm>.

When compared to the Government Accountability Office’s (GAO) figure, this number shows a decline since January 2003, when the stock included 464,604 units. GAO, GAO 04-424, STANDARDIZATION OF BUDGET ESTIMATION PROCESSES NEEDED FOR RENTAL ASSISTANCE PROGRAM 4 (2004), at <http://www.gao.gov/new.items/d04424.pdf>.

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

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

RHS’ proposal seeks to extinguish Section 515 preservation at the same time other low-income housing resources are diminishing. The National Low Income Housing Coalition (NLIHC) recently released information that shows that there is a 1.6 million-unit national housing shortage for people who are extremely low-income.<sup>9</sup> This under-housed population includes precisely those households who qualify for the Section 515 program. The housing shortage is even worse in rural areas, where decent and affordable housing continues to be scarce. In many communities, Section 515 housing is the only available decent and affordable housing. More often than not, there is no other comparably affordable housing to which people can move unless they are willing and able to relocate to distant communities, away from their jobs, families and services.

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*RHS’ proposal seeks to extinguish Section 515 preservation at the same time other low-income housing resources are diminishing.*

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RHS contracted with ICF Consulting in 2003 to conduct a study of the agency’s Section 515 Rural Rental Housing Stock.<sup>10</sup> The study, *Rural Rental Housing – Comprehensive Property Assessment and Portfolio Analysis, Final Study Report* (CPA), was published in November 2004.<sup>11</sup> It concludes by identifying problems and offering a number of recommendations.<sup>12</sup> Among its recommendations is the institution of a revitalization and restructuring program for the aging stock.<sup>13</sup> A great deal of the agency’s legislative proposal adopts recommendations of the CPA study.

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<sup>9</sup>*Point of View*, 10 MEMO TO MEMBERS 23 (NLIHC, Washington, D.C.), June 10, 2005, at [http://www.nlihc.org/mtm/mtm10\\_23.html#1](http://www.nlihc.org/mtm/mtm10_23.html#1); see also NLIHC, LOSING GROUND IN THE BEST OF TIMES: LOW INCOME RENTERS IN THE 1990s, at 8 (March 2004), at [http://www.nlihc.org/research/losing\\_ground.pdf](http://www.nlihc.org/research/losing_ground.pdf) (discussing a previous shortage of 1.27 million units for extremely low-income renters).

<sup>10</sup>NHLP, *Long-Awaited Rural Rental Housing Report Released*, 35 Hous. L. Bull. 1, 11-16 (2005).

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

<sup>12</sup>*Id.*

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

## Wholesale Repeal of ELIHPA Prepayment Restrictions

Without recognizing resident needs or the value of the already diminishing stock to communities, RHS buries the proposal's farthest-reaching provision at the end of the draft bill. The agency entitles the section that repeals ELIHPA "Conforming Amendments to Title V of the Housing Act of 1949."<sup>14</sup> It states: "Section 502 of the Housing Act of 1949 (42 U.S.C. 1472) is amended by striking subsection (c)."<sup>15</sup> Subsection (c) consists of the ELIHPA prepayment procedures and restrictions.<sup>16</sup> In the agency's section-by-section analysis of its proposal, RHS blandly states that the provision removes the current prepayment restrictions.<sup>17</sup> But, make no mistake—the "conforming" provision decimates all prepayment protections and exposes residents to displacement.

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*Make no mistake—the "conforming" provision decimates all prepayment protections and exposes residents to displacement.*

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### Prepayment of Post-1989 Loans

The analysis accompanying the agency's proposal fails to explain the nexus between the need to repeal all prepayment restrictions in their entirety and the objective of revitalizing the current housing stock, the supposed purpose of the proposal. By entirely repealing the prepayment provisions, the proposal's effect would even reach post-1989 loans that have, contractually, never been permitted to prepay. Although there have been no indications that post-1989 loan contracts would be amended to allow prepayment, it is clearly conceivable that owners of any newly constructed projects or parties to newly serviced loans would be permitted to receive lucrative RHS loan benefits as well as the ability to exit the program at-will by way of prepayment.

### No Resident Notice

Although the proposal would provide owners with the unfettered right to prepay and withdraw from the Section 515 program at any time, the RHS proposal includes

no resident notice provisions. With approximately 58% of Section 515 projects designated for the elderly and disabled, notice is essential and should be at least twelve months before an owner should be allowed to prepay.

Resident notice must be early enough to allow residents to confront relocation issues (i.e., commuting to work and school, accessing services, etc.). Not only is it fitting to provide residents with adequate notice, but other community stakeholders should be alerted to the upcoming prepayment as well. Local agencies and other service providers require adequate time to develop mechanisms through which they may assist households in finding housing and relocating.

### No Resident Relocation Assistance

The proposal's unrestricted prepayment provision would provide no relocation assistance for residents. Whenever residents are forced to relocate from their homes by reason of an owner's prepayment and premature withdrawal from the program, they should be provided relocation benefits to enable them to relocate to other decent and affordable housing.

### Unconditioned Prepayment Can Lead to Unprotected Residents

The agency adopts the CPA's estimate that owners of 10% of the Section 515 stock would prepay if the prepayment restrictions were repealed. This figure is probably too conservative. ICF Consulting, the company that conducted the sample study, arrived at a 10% estimate based on analyses of markets where prepayment would be *economically* viable.<sup>18</sup> It noted that it did not consider other motivating circumstances that might cause an owner to seek prepayment.<sup>19</sup> Taking into account additional circumstances, such as aging owners or those who simply want out of the program, it is not unreasonable to expect more widespread prepayment.<sup>20</sup>

### Little Protection for Tenants

RHS justifies unfettered prepayment in large part on the tenant protection provisions included in the proposal, consisting primarily of tenant-based vouchers.<sup>21</sup> However,

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<sup>18</sup>CPA STUDY, *supra* note 6, at 35-37.

<sup>19</sup>*Id.*

<sup>20</sup>See GAO, GAO 2-392, MULTIFAMILY RURAL HOUSING: PREPAYMENT POTENTIAL AND LONG-TERM REHABILITATION NEEDS OF SECTION 515 PROPERTIES, at 2 (2002) (estimating that approximately 24% of the projects would prepay within eight years if restrictions were repealed), at <http://www.gao.gov/new.items/d02397.pdf>.

<sup>21</sup>Presentation by Russ Davis, RHS Administrator, Knowledgeplex Expert Chat, Aug. 9, 2005 [hereinafter KnowledgePlex Expert Chat], available at <http://www.content.knowledgeplex.org/kp/audio-video/multimedia/refiles/rurallhousing.wmv> (last visited Aug. 22, 2005).

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<sup>14</sup>PROPOSAL, *supra* note 1, at 10.

<sup>15</sup>*Id.*

<sup>16</sup>42 U.S.C.A. § 1472(c) (West 2003).

<sup>17</sup>RHS, SECTION-BY-SECTION ANALYSIS OF LEGISLATION TO REVITALIZE RURAL MULTIFAMILY HOUSING (2005) [hereinafter RHS ANALYSIS], at [www.rurdev.usda.gov/rd/cong/MFHRevitalizationAnalysis.pdf](http://www.rurdev.usda.gov/rd/cong/MFHRevitalizationAnalysis.pdf).

the agency fails to condition the prepayment of Section 515 loans upon the adequate supply of and funding for these vouchers.

Tenant representatives, nonprofit organizations and others have advocated for funding of such vouchers, which are already authorized under current law.<sup>22</sup> However, coupled with a repeal of prepayment restrictions, the proposal's voucher provisions fail to provide the fix that many advocates seek. While the proposed voucher program may provide some residents with a certain level of support as currently drafted, it will not meet the needs of displaced elderly, disabled and family households.<sup>23</sup>

### No Right to Remain

RHS has unequivocally stated that the voucher program described in its proposal does not seek to be an enhanced voucher program such as is in place in the Department of Housing and Urban Development's (HUD) assisted multifamily housing programs.<sup>24</sup> A reading of the RHS provisions makes this distinction clear.

Unlike in the case of HUD enhanced vouchers, RHS does not seek to provide residents with the right to remain in their current housing after prepayment. Without the right to remain, residents who receive vouchers may still face immediate displacement if the owner decides not to accept vouchers or increases rents beyond levels affordable for the projects' extremely low-, very low- and low-income residents.

### Other Needed Protections

Even if an owner accepts vouchers from its current residents and sets post prepayment rents at affordable levels, nothing in the voucher proposal precludes the owner from assigning new or increased incidental costs, such as security deposits. Similarly, nothing in the voucher proposal requires good cause for eviction. Although vouchers may be used for rental housing expenses, no housing quality standards accompany RHS' voucher proposal.

These shortcomings should be addressed. In addition, all residents of prepaid projects should be deemed automatically eligible for vouchers. The local administering agency should be precluded from imposing any further screening or eligibility requirements upon residents.

To the extent the proposal purports to permit voucher portability, voucher use should be extended beyond "eligible living spaces anywhere in the United States" to include territories as well (where Section 515 properties also exist).<sup>25</sup> If true portability is to be realized, the proposal's voucher-level formula cannot create static levels through factors such as "the comparable rent for a living unit similar to the tenant's unit in the prepaid property based on the *fair market* rental rates for the area *at the time of prepayment* adjusted for inflation . . ."<sup>26</sup>

Voucher users who cannot afford additional housing expenses should not be forced to pay the minimum rent fee imposed by the agency. The agency has provided no nexus between tenant protection vouchers and the need to institute minimum rents. Based upon other reasons set forth later in this article, this provision should be struck. Residents who are displaced because of owner prepayment actions should not be further penalized.

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*Residents who are displaced because of owner prepayment actions should not be further penalized.*

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### Voucher Use for Single Family Home Purchases

While the prospect of a resident's ability to use a voucher toward the purchase of a home is promising, actual utilization may be particularly challenging given Section 515 residents' rural locales. These voucher holders should be given priority for securing RHS Section 502 loans.<sup>27</sup> Without this priority, timely loan qualification will be unlikely. Additionally, in order to ensure that extremely low-income households can afford to purchase a home, the payment subsidy mechanism for the loan should be based on the household income while disregarding the voucher subsidy. Once purchases close, these voucher holders should be allowed to retain their vouchers even if they default on their home loans so that they are able to return to affordable rental housing.

### Distribution of Vouchers for Loan Accelerations and Foreclosures

Residents of projects that have had loans accelerated and paid off because of defaults should qualify for vouchers as well. Like residents of otherwise prepaid

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<sup>22</sup>HAC & NHLP, FINAL REPORT OF THE TASK FORCE ON RURAL RENTAL HOUSING PRESERVATION 23 (2005), available at <http://www.nhlp.org/html/rhs/PreservationTaskForceReport%20Final.pdf>; NATIONAL RURAL HOUSING COALITION, RURAL RENTAL HOUSING ISSUES 3 (2004) (on file with author); 42 U.S.C.A. § 1490r (West 2003) (limiting the number of annual contracts to cover 5,000 units per year.)

<sup>23</sup>PROPOSAL, *supra* note 1, at 8-10.

<sup>24</sup>42 U.S.C.A. § 1437f(t) (West 2003).

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<sup>25</sup>PROPOSAL, *supra* note 1, at 9.

<sup>26</sup>*Id.* at 10 (emphasis added).

<sup>27</sup>42 U.S.C.A. § 1472 (West 2003).

projects, these residents lie equally exposed to displacement because their projects are withdrawn from the program at the time of the pay-off or foreclosure sale.<sup>28</sup> After withdrawal, the agency does virtually nothing to ensure that rents remain affordable for the project's residents.

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*After withdrawal, the agency does virtually nothing to ensure that rents remain affordable for the project's residents.*

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## Vague Revitalization and Restructuring Provisions

Although revitalization of the Section 515 stock should receive serious consideration and funding, RHS' vague provisions regarding revitalization and restructuring make it difficult to understand how the program would be implemented or to what extent owners would be encouraged to participate. In this regard, more extensive analysis of this portion of the proposal cannot truly be complete until RHS' plans are clarified. However, there are certain aspects to the current proposal that warrant some critical attention and further thought.

### Lacks Long-Term Use Restrictions

If the revitalization program is to serve the dual goal of rehabilitation and preservation, as informally mentioned various times by the agency, the program should commit to setting minimum terms for its new restrictive use provisions (RUPs). When an owner volunteers for the revitalization program and takes advantage of its financial offerings (i.e., reduction or elimination of interest, partial or full debt deferral, debt forgiveness, subordination, reamortization of payments, grants),<sup>29</sup> the owner simultaneously agrees to commit to new RUPs. These RUPs require the owner to continue operation of the project for its original affordable-housing use over a certain term of years.

The agency's analysis states that RUPs will be set at twenty years.<sup>30</sup> However, the proposal states that "an agreement by the project owner to continue the property use restrictions with respect to the project in accordance

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<sup>28</sup>7 C.F.R. § 3560.456; USDA, HB-3-3560, MULTI-FAMILY HOUSING SERVICING HANDBOOK, § 2 (2005) (Liquidation Procedures), at <http://www.rurdev.usda.gov/regs/hblist.html>.

<sup>29</sup>PROPOSAL, *supra* note 1, at 2.

<sup>30</sup>RHS ANALYSIS, *supra* note 17, at 2 ("The agreement will include the owner's agreement to new restrictions for a period of 20 years").

with the section 515 housing program for a period not to exceed the greater of 20 years or the remaining term of the 515 loan . . . ."<sup>31</sup> The proposal is silent on the minimum term for these new long-term use agreements.

Without a statutorily set minimum term for RUPs, the agency will be free to determine how short of a period participating owners will be required to continue operation of the newly funded projects before they are allowed to prepay. These terms may quite well vary across different RHS administrations. Without a minimum term, it becomes difficult to predict the utility of the revitalization program for preservation purposes.

### Project Qualification Should Be Based on Need

According to the proposal, for a project to qualify for the revitalization program, an owner must be deemed an owner "in good standing."<sup>32</sup> While one would not wish to see a noncompliant owner reap the financial rewards of the revitalization and restructuring program, it is conceivable that a noncompliant owner project may very well be one in need of revitalization for the sake of the residents. Factors such as whether the management is adequate or the cost of revitalization exceeds the agency's modest ceiling (50% of the cost of replacement housing) are not the best criteria for deciding whether to revitalize a project.<sup>33</sup> The primary aim of the revitalization program should be reconsidered, and more focus should be directed toward the Section 515 program's ultimate users: the residents. With careful thought, this can be achieved while remaining responsible to financial and budgetary considerations.<sup>34</sup>

The proposal limits participation to RHS loans that were made prior to January 1, 1992.<sup>35</sup> The agency's analysis provides no further information about this eligibility standard, but RHS' Administrator has stated that the date coincides with the effective date of the Federal Credit Reform Act. According to the Administrator, this date selection would make matters easier from a budgetary standpoint.<sup>36</sup> He also mentioned that the agency found no

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<sup>31</sup>PROPOSAL, *supra* note 1, at 3.

<sup>32</sup>*Id.* at 2.

<sup>33</sup>*Id.* at 6.

<sup>34</sup>The project eligibility requirements have also raised concerns in the for-profit community. Inferred in the criticism is that some owners may not be determined to be in good standing due to financial reasons, not created by his or her own actions, but because of program administration. John B. Meyers, Memorandum "In re: August 205 RD Legislative Proposal," Aug. 15, 2005, 3 (on file with author).

<sup>35</sup>PROPOSAL, *supra* note 1, at 2.

<sup>36</sup>KnowledgePlex Expert Chat, *supra* note 21. The Federal Credit Reform Act provides accounting rules with which federal agencies must comply. Pub. L. No. 101-508, tit. XIII, § 13201(a), 104 Stat. 1388-610 (1990) (effective fiscal year 1992) (codified at 2 U.S.C. §§ 661 *et seq.*).

need for long-term rehabilitation on ten- to thirteen-year-old projects (post-1992 projects).<sup>37</sup>

It is unclear what the effect of this selected date may be, particularly considering post-1989 projects, whose owners have always been precluded from prepaying. A deeper understanding of the effect of the Federal Credit Reform Act upon the agency's proposal remains unclear.

### Resident Participation

For a plan that seeks to remedy and improve physical housing conditions under which residents live, the proposal fails to provide for participation by those very same residents in any fashion. Resident participation is particularly important in light of the program's process of determining whether an owner should be labeled in good standing. If this owner-eligibility requirement remains, residents should be notified when an owner applies to participate in the revitalization program. They should be invited to meet with the agency and provide their views about the project's revitalization needs. Residents should also be made aware of how revitalization will affect their occupancy and be permitted to provide input on this matter as well.

### Displacement and Relocation

Ideally, revitalization should take place without any resident displacement. However, if revitalization forces resident displacement, the provisions should make it clear that displaced tenants are entitled to relocation benefits. To the extent that relocated residents are forced to pay higher rents, some form of rental assistance should be provided. It also should be stated that any resident who is displaced due to revitalization has an absolute right to return to the project once revitalization is complete.

### Rent Increases

While residents should be allowed the opportunity to live in projects that are decent and safe, revitalization and restructuring efforts should not cause rents to increase to levels that make them unaffordable or cause displacement. The rent structure set out in the restructuring provisions is arbitrary, too high and will likely have a severe adverse impact on Section 515 residents whose incomes are very low and essentially fixed. For residents who do not receive the agency's Rental Assistance (RA) deep subsidy,<sup>38</sup> the proposal permits annual rent increases up to 40% of the area median income (AMI).<sup>39</sup>

This standard, which fails to take into consideration the income of a project's residents as well as the availabil-

ity and depth of other project subsidies, can eventually displace residents from their homes. The proposal entirely discounts the fact that approximately 57% of the residents in RHS housing live on fixed incomes. These households' incomes do not rise proportionately with other incomes, and they cannot afford to absorb annual rent increases that are based upon income increases of the broader population. The proposal also discounts the fact that many projects that are not receiving RA receive Interest Credit subsidies (which effectively reduce the owners' interest rates on the RHS loans to 1%)<sup>40</sup> or other subsidies such as HUD Section 8 assistance.<sup>41</sup>

Significantly, the proposal fails to take into consideration the fact that, through the restructuring process, RHS can modify a project's rent structure to serve households of various incomes. By reducing debt, increasing other subsidies, or making grants, the agency can set project rents to serve households that can afford rents set at 20, 30 or 40% of AMI.

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*For a plan that seeks to remedy and improve physical housing conditions under which residents live, the proposal fails to provide for participation by those very same residents in any fashion.*

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It is also arguable that the use of the AMI standard in rural areas inaccurately reflects rural income instead of that of the jurisdiction's larger geographic area, which often includes urban areas with higher incomes. If that is the case, AMI figures for many rural areas may actually be inflated and allow landlords to set rents at levels that are not truly affordable by residents whose incomes are at 40% of AMI.

### Minimum Rents

Without explaining in any level of detail in its section-by-section analysis, RHS summarily states that "[a]ll tenants receiving rental assistance will be subject to a minimum \$25 per month rental payment."<sup>42</sup> The minimum rent provision imposes an unjustified and unnecessary hardship on extremely low-income residents and should be eliminated.

Given the extremely low average income of residents in Section 515 housing, a minimum rent of \$300 per year is overly burdensome and unnecessary. The agency has

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<sup>37</sup>*Id.*

<sup>38</sup>42 U.S.C.A. §1490a(1)(c) (West 2003).

<sup>39</sup>PROPOSAL, *supra* note 1, at 7.

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<sup>40</sup>42 U.S.C.A. §§ 1490a(1)(B) (West 2003).

<sup>41</sup>42 U.S.C.A. §1437f (West 2003).

<sup>42</sup>PROPOSAL, *supra* note 1, at 10.

cited no report that documents any widespread fraud in the forty-year operation of the Section 515 program. While there may be individual cases where residents have under-reported income, there is no data showing that such under-reporting is isolated to persons whose income is so low that they are entitled to pay no rent.

Although resident under-reporting exists in certain instances, examination of HUD reports has failed to confirm that such under-reporting is the primary reason for overpayment of subsidies.<sup>43</sup> Overpayment of subsidies has also been attributed to administrator and landlord billing errors.<sup>44</sup> Some believe that these errors too often result in residents paying excessive rents (i.e., instances in which qualifying resident deductions are not taken into account). Income reporting issues, if they exist, should be resolved by better income verification processes and not by the imposition of a minimum rent on the lowest-income residents in the Section 515 program.

### Next Steps

These are only a few areas of concern regarding RHS' legislative proposal. It is unknown when RHS' proposal will take effect, if at all. At the time of this writing, the next steps include the introduction of the proposal in bill form. Until the proposal is acted upon by Congress or the President, the RHS Administrator has indicated that the agency will continue to administer the program under its current authorizations and appropriations, including the agency's current revitalization demonstration program.<sup>45</sup> Advocates have begun discussion on various modes of providing legislative education and advocacy on issues contained in the proposal. NHLP will continue to report on the status of the RHS proposal. ■

<sup>43</sup>See GAO, GAO 05-224, HUD RENTAL ASSISTANCE: PROGRESS AND CHALLENGES IN MEASURING AND REDUCING IMPROPER RENT SUBSIDIES 4-5 (2005).

<sup>44</sup>*Id.*

<sup>45</sup>KnowledgePlex Expert Chat, *supra* note 21. Email from Brenda Morton (on behalf of RHS Administrator in response to KnowledgePlex Expert Chat questions), USDA Rural Development, to Jennifer Kerslake, Expert Chat Coordinator, KnowledgePlex (Aug. 18, 2005, 04:38 PM EST) (on file with author).

The current demonstration program was announced through RHS' Administrative Notice 4036. USDA, Revitalizing the Multi-Family Housing (MFH) Portfolio Demonstration of New Revitalization Concepts, AN 4036 (Dec. 28, 2004) (expiring Feb. 28, 2004) (on file with author).

## Recent Cases

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

### Constitutional Law — Due Process Federal Courts — Private Right of Action Housing Choice Voucher Program

*Selma Hous. Dev. Corp. v. Selma Hous. Auth.*, 2005 WL 1981290 (S.D. Ala. Aug. 16, 2005). In this procedural due process suit brought via 42 U.S.C. § 1983, the federal district court ruled, *inter alia*, that a Housing Choice Voucher landlord had no protectable property interest in renewal of its Housing Assistance Payment contracts with a public housing authority. The court also rejected the landlord's other claims regarding utility allowances, breach of a management contract and fraud, and granted summary judgment in favor of the housing authority.

### Eviction — One-Strike and Related Issues

*People v. Becker*, 2005 WL 1939767 (N.Y. City Crim. Ct. Aug. 5, 2005). The New York City Criminal Court granted a criminal defendant's motion, pursuant to Criminal Procedure Law § 440.10(1)(h), to vacate a judgment of conviction for disorderly conduct entered after a guilty plea. The court concluded that inaccurate advice from Defendant's attorney regarding the effect of the conviction on Defendant's housing constituted ineffective assistance of counsel. Defendant's co-op filed ejectment action against him, which alleged Defendant's guilty plea as its basis.

### Fair Housing — Affirmative Duties Fair Housing — Disparate Impact Public Housing — HOPE VI

*Darst-Webbe Tenant Assoc. Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898 (8th Cir. 2005). In this long-running fair housing suit against the Department of Housing and Urban

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

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

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

Development (HUD) and a housing authority regarding a HOPE VI public housing redevelopment plan, the Eighth Circuit affirmed the district court's judgment in favor of defendant housing authority. The Eighth Circuit, *inter alia*, deferred to the district court's finding that any racially disparate impact caused by the HOPE VI plan was justifiable because the plan was "necessary" to attain "legitimate, non-discriminatory policy objectives," with which the plan had a "manifest relationship." The Eighth Circuit deferred to HUD with regard to plaintiff residents' claim under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, that HUD failed to comply with its affirmative duty to further fair housing under the Fair Housing Act, 42 U.S.C. § 3608(e)(5). In particular, the Eighth Circuit pointed to HUD's consideration of an analysis of impediments to fair housing report, which addressed various housing and demographic data for St. Louis. *See also* NHLP, *Eighth Circuit Reverses Unfavorable District Court Ruling in HOPE VI Fair Housing Case*, 33 HOUS. L. BULL. 391, 396 (2003).

### Federal Courts — Private Right of Action Housing Choice Voucher Program

*Caswell v. City of Detroit Hous. Comm'n*, 418 F.3d 615 (6th Cir. 2005). The Sixth Circuit modified its prior holding in *Loschiavo v. City of Dearborn*, 33 F.3d 548 (6th Cir.1994) in light of the Supreme Court's decisions in *Alexander v. Sandoval*, 532 U.S. 275 (2001), and *Gonzaga University v. Doe*, 536 U.S. 273 (2002). Following *Sandoval* and *Gonzaga*, the Sixth Circuit held, *inter alia*, that Housing Choice Voucher regulations requiring public housing authorities to continue to make housing assistance payments during the pendency of an eviction action were not privately enforceable by a voucher holder via 42 U.S.C. § 1983.

### Landlord-Tenant — Retaliation

*Correa v. Ward*, 91 Conn. App. 142 (2005). In this appeal from a judgment of eviction, the Appellate Court of Connecticut held that Connecticut General Statutes § 47a-20a provide the only means by which a statutory presumption of retaliatory eviction could be overcome. Section 47a-20a states that "[n]otwithstanding the provisions of section 47a-20 [providing a presumption of retaliation], the landlord may maintain an action to recover possession of the dwelling unit if" one of four conditions are met. The appellate court held that defendant tenant's alleged conduct—namely, the use of "foul language" and a failure to pay for one-half of the cost of a new stove—did not fall within the scope of the conditions set forth in the statute. ■

## Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD) and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued in August of 2005. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

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

### HUD Federal Register Proposed Rules

#### 70 Fed. Reg. 45,492 (Aug. 5, 2005) Disposition of Multifamily Housing Projects by HUD; Purchaser's Compliance with State and Local Housing Laws and Requirements

**Summary:** This proposed rule would revise HUD's regulations governing the disposition of multifamily projects that are HUD-owned or secured by a HUD-held mortgage which are being foreclosed to implement statutory amendments made by the Consolidated Appropriations Act, 2004. The proposed rule would require a potential purchaser of such a project to certify that all other properties owned by the purchaser, and located in the same city or town as the project being purchased, are in substantial compliance with applicable state or local government housing statutes, regulations, ordinances and codes. A potential purchaser of a multifamily project from a state or local government that previously had acquired the property from HUD would also be required to submit evidence of substantial compliance with applicable state or local housing requirements. The proposed rule would also expand the scope of the participation and compliance requirements for HUD's Federal Housing Administration programs to include purchasers of multifamily housing projects from state or local governments, in cases where

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

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

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

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

the property had previously been acquired by the state or local government from HUD.

*Comment Due Date:* October 4, 2005.

## HUD Federal Register Notices

### **70 Fed. Reg. 44,354 (Aug. 2, 2005) Public Housing Graduation Incentive Bonus Program; Correction**

*Summary:* On June 2, 2005, HUD published its notice of funding availability (NOFA) for the Public Housing Graduation Incentive Bonus Program. In the NOFA, HUD inadvertently identified the Fort Worth, Texas, public housing authority (PHA) as an eligible medium PHA rather than an eligible large PHA. This notice corrects this error.

### **70 Fed. Reg. 49,140 (Aug. 22, 2005) Statutorily Mandated Designation of Difficult Development Areas for Section 42 of the Internal Revenue Code of 1986**

*Summary:* This document designates "Difficult Development Areas" for purposes of the Low-Income Housing Tax Credit under Section 42 of the Internal Revenue Code of 1986 (26 U.S.C. 42). The United States Department of Housing and Urban Development (HUD) makes new Difficult Development Area designations annually. The designations of "Qualified Census Tracts" under Section 42 of the Internal Revenue Code published December 12, 2002, as supplemented on December 19, 2003, remain in effect.

### **70 Fed. Reg. 50,138 (Aug. 25, 2005) Proposed Fair Market Rents for Fiscal Year 2006 for Housing Choice Voucher, Moderate Rehabilitation Single Room Occupancy and Certain Other HUD Programs; Supplemental Notice on 50th Percentile Designation**

*Summary:* On June 2, 2005, HUD published a notice on proposed fair market rents (FMRs) for Fiscal Year 2006. In the June 2, 2005, notice, HUD advised that it would also publish a separate notice to identify any areas that may be newly eligible for fiftieth percentile FMRs as well as any areas that remain eligible or that are no longer eligible for fiftieth percentile FMRs, as provided in HUD's regulations. This notice provides this information. It identifies twenty-four areas eligible for fiftieth percentile FMRs, which consists of areas that remain eligible for fiftieth percentile FMRs plus areas that are newly eligible.

*Comments Due Date:* September 26, 2005.

## HUD Housing Notices

### **Notice H 2005-15 (August 19, 2005) Extension of Notice H 04-13, Guidelines for Calculating and Retaining Section 236 Excess Income**

*Summary:* Notice H 04-13, which was issued July 22,

2004, and expired on July 31, 2005, is being extended to August 31, 2006.

*Expires:* August 31, 2006.

### **Notice H 2005-16 (August 29, 2005) Fiscal Year 2005 Annual Operating Cost Standards— Section 202 Supportive Housing for the Elderly and Section 811 Supportive Housing for Persons with Disabilities Programs**

*Summary:* This notice provides Operating Cost Standards which HUD Office staff should use for calculating the annual per person/per unit amount of a Project Rental Assistance Contract when making Fiscal Year 2005 subsidy fund reservations for Capital Advance applications under the subject programs. These Standards have been updated using the National Consumer Price Index of housing changes for 2004. Each HUD Office should adjust these Standards downward to accommodate any lower-cost area within its jurisdiction when locally developed cost data so indicate.

*Expires:* August 31, 2006.

## HUD PIH Notices

### **Notice PIH 2005-29 (HA) (August 3, 2005) Project-Based Vouchers on the Family Report (Form HUD-50058)**

*Summary:* This notice implements new data entry requirements for project-based vouchers on the Family Report (form HUD-50058). With the Public Housing Information Center latest release, Section 11 of the Family Report (Section 8: Project Based Certificates and Vouchers) has been fixed to accept data on project-based vouchers. Prior to the latest release only data on project-based certificates and obsolete pre-merger certificates could be entered in Section 11 of the form.

*Expires:* August 31, 2006.

### **Notice PIH 2005-30 (HA) (August 5, 2005) Revised Implementation of the Housing Choice Voucher Program Administrative Fee Reduction and Recapture Provisions of the Fiscal Year 2003 Appropriations Act**

*Summary:* This notice sets forth HUD's revised implementation of the Housing Choice Voucher program administrative fee provisions of the HUD Fiscal Year 2003 Appropriations Act ("2003 Act"), Pub. L. No. 108-7, 117 Stat. 11, and serves as a correction and revision to the previously published Financial Management Center Bulletin #07-04, published August 26, 2004. This notice supersedes the information provided on administrative fee payment reductions and recaptures contained in HUD Notice PIH 2003-23.

*Expires:* August 31, 2006.

**Notice PIH 2005-31 (HA) (August 22, 2005)  
Federal Fiscal Year (FFY) 2006 Initial Determination and  
Obligation of Operating Subsidy**

*Summary:* This notice informs public housing agencies and field offices of the procedures HUD will initially use to determine and obligate operating subsidy for Federal Fiscal Year 2006 considering two major impacts on the Operating Fund Program: the calendar year transition in accordance with the Consolidated Appropriations Act of 2005 (Public Law 108-447), and the pending publication of a new operating fund rule.

*Expires:* August 31, 2006.

**Notice PIH 2005-32 (HA) (August 31, 2005)  
Demolition/Disposition Processing Requirements Under  
the 1998 Act**

*Summary:* This notice updates Notice 99-19 to reflect changes to the requirements for demolition and disposition processing, as well as revisions made to the associated application form HUD-52860 in 2002. The purpose of the notice is as follows: (1) to clarify the applicability of Section 18 to a HOPE VI related demolition; (2) to inform Public Housing Agencies of the changes to Section 18 of the United States Housing Act of 1937, as amended, by Section 531 of the Quality Housing and Work Responsibility Act (QHWRA) of 1998, (P.L. 105-276); (3) to provide guidance on the criteria HUD will use to process demolition/disposition applications; and (4) to discuss the new certification required under QHWRA. QHWRA was signed on October 21, 1998. It should be noted that HUD published a proposed rule on December 15, 2004, (69 FR 75188) entitled "Demolition or Disposition of Public Housing Projects." The rule proposed to implement revisions to Section 18 of the 1937 Act made by the QHWRA of 1988. The comment period ended February 14, 2005 and a final rule should be issued shortly.

*Expires:* August 31, 2006.

## **RHS Federal Register Notices**

**70 Fed. Reg. 45,355 (Aug. 5, 2005)  
Notice of Funds Availability (NOFA) Inviting Applications  
for the Rural Community Development Initiative (RCDI)**

*Summary:* This notice announces the availability of approximately \$6 million of grant funds for the RCDI program through the Rural Housing Service. Applicants must provide matching funds in an amount at least equal to the federal grant. These grants will be made to qualified intermediary organizations that will provide financial and technical assistance to recipients to develop their capacity and ability to undertake projects related to housing, community facilities, or community and economic development. This notice lists the information needed to submit an application for these funds.

*Dates:* The deadline for receipt of an application is 4 p.m. eastern standard time November 3, 2005. The application

date and time are firm. RHS will not consider any application received after the deadline

## **RD Administrative Notices**

**RD AN No. 4103 (1980-D)  
Single Family Housing Guaranteed Loan Program  
(August 12, 2005)**

*Summary:* The purpose of this AN is to clarify agency requirements under RD Instruction 1980-D, section 1980.324(a) for routine charges and fees that lenders may charge borrowers. The agency wishes to prevent lenders from charging excessive fees for guaranteed loans and to protect low- and moderate-income borrowers from paying excessive loan fees, or borrowing funds for fees that are not reasonable and customary. This AN does not apply to maximum interest rate requirements. Maximum interest rates should be handled according to RD Instruction 1980-D, section 1980.320.

*Expiration Date:* August 31, 2006.

## **RD Unnumbered Letters**

**Management Control Review by Civil Rights (05-09-05)**

*Summary:* The Civil Rights Staff (CRS) of the Program Compliance Branch conducted a Management Control Review (MCR) of the Rural Housing Service Single Family Housing Section 502 Direct Loan Program to assess the internal controls associated with the civil rights portion of the program. The purpose of this unnumbered letter is to inform the public of weaknesses identified in the MCR conducted by CRS and provide guidance to agency staff on actions that may need to be taken to eliminate those weaknesses. State Offices are encouraged to provide training on these topics during any planned training sessions.

*Expiration Date:* May 31, 2006.

**Multi-Family Housing Programs: Establishment of  
Management Fees (05-26-05)**

*Summary:* Pursuant to 7 CFR 3560.102(i) and HB-2-3560, Chapter 3, "Property Management," management fees will consist of a base per occupied unit fee and add-on fees for specific housing project characteristics. Management agents may be eligible to receive the full base per occupied unit fee for any month or part of a month during which the unit is occupied. The management agent is compensated only once per month per occupied unit. The management fee is based on the specifically identified "bundle of services" stated in 7 CFR 3560.102(i)(1). There will be no deviation from the "bundle of services." In order to establish the base fee, each state will survey and collect management fee data from other assisted housing sources such as local Housing and Urban Development field offices, State Housing Finance Agencies, housing authorities, local housing organizations, and nonprofits.

To provide consistency, the states are divided into ten regions as established by the Institute of Real Estate Management. Each Region will identify a coordinating state. This state will be responsible for the coordination between the states, the dissemination of information to the states and all submissions to the National Office.

*Expiration Date:* June 30, 2006.

#### **Handling Medical Debts in the Section 502 Direct Loan Programs (05-31-05)**

*Summary:* On December 4, 2003, the President signed into law the Fair and Accurate Credit Transactions Act (FACT Act), which significantly modified the Fair Credit Reporting Act (FCRA), ensuring fair treatment for all Americans when applying for credit, enhancing the accuracy of consumers' financial information, and combating identity theft. The FACT Act adds a new section to the FCRA to prohibit creditors from obtaining or using medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit. As outlined in the proposed rule regarding Fair Credit Reporting Medical Information Regulations dated April 28, 2004, designated agencies are required to prescribe regulations that permit creditors to obtain or use medical information for eligibility purposes where necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs. The designated Agencies (that preclude Rural Development) have yet to issue their final rule. While the use aspect is still under review, consumer reporting agencies are presently prohibited from providing a lender with a credit report that contains identifying information for medical debts (be it a collection, judgment, etc.). The name of the medical service provider and the nature of the medical service is suppressed or coded so that lender decisions are not based on discriminatory factors. Suppression or coding of identifying information for medical debts does not eliminate the need for consideration. Medical debts that are chronically late, placed in collection (be it paid in full within six months of application or outstanding with no satisfactory payment arrangement), or turned into judgments remain indicators of unacceptable credit handling that must be addressed (unless the applicant's credit score is 660 or higher).

*Expiration Date:* May 31, 2006

#### **Borrowers in Litigation Seeking Incentives (June 23, 2005)**

*Summary:* It has come to our attention that a number of multi-family borrowers are seeking damages through litigation, and also seeking incentives to avert prepayment. In order to ensure a proper incentive process and avoid double compensation paid to the borrower, the borrower must choose to either pursue loan prepayment OR seek damages for not being permitted to prepay. The borrower may do either one, but NOT BOTH. To allow the

borrower to pursue both avenues would result in potential windfall recoveries.

*Expiration Date:* June 30, 2006.

#### **Unused Rental Assistance (RA) Guidance (July 18, 2005)**

*Summary:* Per the authority of 7 CFR Part 3560, paragraph 3560.259 (a) (4) the Agency will transfer unused RA in accordance with this issuance. State Directors are responsible for identifying unused RA, establishing when unused RA should be withheld from the Administrator's Reserve pending specific events, and how unused RA held in reserve will be transferred according to priorities established by the Administrator. The intent behind establishment of the Reserve is maximum utilization of available RA. The effective use of RA is a major goal of Rural Development. State Directors must report quarterly on the status of the unused RA in their State.

*Expiration Date:* July 31, 2006. ■

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