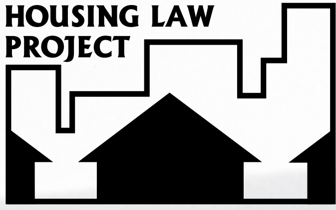

Housing Law Bulletin

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Promoting Implementation of the Family Self-Sufficiency Program

—*see page 193*

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Cover photo:
Roslynn "Lady" DeCuir, chef /owner of Lady's Catering and a participant in the Oakland Housing Authority's Family Self-Sufficiency program.

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Promoting Implementation of the Family Self-Sufficiency Program

Introduction

The Family Self-Sufficiency (FSS) program is designed to promote employment and increase the savings of Section 8 voucher and public housing residents. Participating public housing authorities (PHAs) work with welfare agencies, schools, businesses, and other local partners to develop comprehensive programs that give participating FSS family members the skills and experience that will enable them to obtain employment that pays a living wage. Key features of the program include case management services and an escrow account.

The Center on Budget Policy and Priorities (CBPP) recently published a well-documented and very helpful report, *The Family Self-Sufficiency Program: HUD's Best Kept Secret for Promoting Employment and Asset Growth,*[1] which highlights the fact that the program is severely underutilized and also puts forth arguments in support of a broader acceptance and implementation of the program. The report describes the basic structure of the FSS program, outlines how PHAs would benefit from its broader implementation and enumerates the benefits of the program for participants. In addition, the report describes how the program promotes the goals of welfare reform, how collaboration between housing and welfare agencies can make the program more effective and also discusses the perceived barriers to the program's implementation.

Significantly for advocates, the report notes that less than half (approximately 1,400) of the more than 3,000 PHAs nationwide operate the FSS program and that those PHAs that do often limit the program's size.[2] Thus, it is estimated that fewer than 5 percent of the public housing and Section 8

[1]Hereinafter CBPP report or report. The report, written by Barbara Sard, is available at www.cbpp.org/4-12-01hous.htm. *See also* a question and answer sheet on the FSS program, revised Mar. 28, 2001 and published by the Center on Budget Policy and Priorities, hereinafter referred to as Q&A at www.cbpp.org/5_5_99hous.htm. Also, HUD has posted two short question and answer documents on FSS at www.hud.gov:80/pih/programs/ph/wtw/4Y.html (a brief description of the program and the importance of the change regarding the definition of welfare benefits) and www.hud.gov:80/offices/pih/divisions/ffmd/faq/fm_of.cfm#5 (how the escrow amount is treated for purposes of the public housing operating subsidy and what happens to forfeited escrow amounts). In addition, *see Voucher Program Guidebook Housing Choice*, HUD Guidebook 7420.10G, Chpt. 23, Family Self-Sufficiency, which describes the elements of the program and includes a sample *Family Self-Sufficiency Program Individual Training and Services Plan* and examples of how to calculate the escrow credit. For background *see also*, Bishop, *The Family Self-Sufficiency Program: An Advocates Guide* (Sept. 1994) (hereinafter FSS Advocates Guide) (This Guide was written prior to some major changes in the regulations and statute, but some of the information is nevertheless helpful and current.)(The FSS Advocates Guide is available from NHLP).

[2]CBPP Report, footnote 3.

voucher families that are most likely to participate in the program—families with children—currently participate.[3] Because most PHAs that operate an FSS program limit it to Section 8 participants, the number of public housing participants is even smaller. About 7,000 of the 564,000 public housing residents with children (approximately 1.2 percent) participate in the program.[4] In addition, the report points out that approximately 1,650 PHAs are required by statute to run an FSS program and that they should be serving approximately 139,500 families.[5] However, in November 2000, the Department of Housing and Urban Development (HUD) reported that there may be as few as 54,000 participants in the mandatory and voluntary FSS programs combined.[6]

PHAs that have not implemented a mandatory program, either at all, or of the size required by HUD, may have requested and received a waiver or an exception from HUD.[7] Any request for an exception to the FSS minimum program size expires three years from the date granted.[8] A PHA that wants to extend the exception must submit a new request and certification to HUD[9] that sets forth the reasons why the PHA believes that the program is not feasible. These reasons may include the lack of:

- supportive services;
- funding for administrative costs;
- cooperation by other state and local entities; or
- interest on the part of eligible families.[10]

Certifications are maintained by HUD and should be available to the public for review.[11] The local HUD office should assist a PHA that is having difficulty implementing a program and no request for a waiver should be granted prior to the PHA making an effort to implement a program of the required size.[12] HUD will not approve an exception for a Section 8 FSS program, "unless it determines that local circumstances preclude the operation of an FSS program of any size."[13] Advocates seeking to encourage or require a PHA to fulfill its mandated program should seek the assistance of the local HUD office and, if applicable, obtain copies of the certificate.

Approximately 1,650 PHAs are required to run an FSS program and they should be serving approximately 139,500 families. However, there may be as few as 54,000 participants in the mandatory and voluntary FSS programs combined.

The chart on page 199 shows the type of information that is available about the FSS programs from a selected sample of PHA plans that are posted on HUD's Web site.[14] The information in the chart is consistent with the findings of others that:

- most FSS programs are small;
- most PHAs are not meeting their mandatory goals;

[3]*Id*. at 5.

[4]*Id*. footnote 3. HUD estimates that only 240 to 255 PHAs are operating public housing FSS programs.

[5]PHAs that received new public housing units or incremental Section 8 tenant-based assistance between 1993 and 1998 or special incentive funds in 1992 are required to administer an FSS program unless they have received an exemption from HUD. 42 U.S.C.A. §§ 1437u(b)(1)(West 1994) (required program) and 1437u(b)(2)(West 1994)(exception to required program). Vouchers received by PHAs during this period as a result of conversion of project-based Section 8 subsidies or public housing assistance to tenant-based assistance are not subject to the FSS requirements. *The Quality Housing and Work Responsbility Act of 1998* (QHWRA) eliminated PHAs' mandatory obligation to expand their FSS programs for assistance extended to them after October 21, 1998, the effective date of QHWRA. 42 U.S.C.A. §§ 1437u(b)(4)(West Supp. 2001). QHWRA did not affect PHAs' obligations with respect to their preexisting 1992, and 1993-1998 FSS obligations. However, PHAs may reduce the prior obligation to run a program of a fixed size by the number of families that successfully complete the program after October 21, 1998, the effective date of QHWRA. *Id.*

[6]CBPP report, footnotes 4 and 19. *The Executive Summary of the HUD Budget for FY 2002*, pg. 14, states that there are approximately 55,000 participants.

[7]For example, the Jefferson City, MO PHA states in its PHA Annual Plan for FY 2000 that none of the over 200 Section 8 families are interested in the program despite several direct mailings to all families. It has requested that HUD provide a waiver of the requirement that it maintain a Section 8 FSS program of 40 participants. The authority does not offer an FSS program for any of its approximately 326 public housing residents. The PHA for the city of Binghamton, NY (NY437), also reported in its FY 2000 PHA Annual Plan that it requested and received a HUD waiver so that it does not have to maintain a mandatory Section 8 program of 22 FSS participants. The Binghamton PHA has 437 voucher slots and no public housing units. However, the Binghamton Housing Authority (NY116), a separate entity, has 641 public housing units and 50 vouchers. In its PHA Annual Plan, it states that it wants to work with the Binghamton City PHA and seek funding for an FSS coordinator. The contradictions between the Binghamton, NY Annual Plans may be clarified in the attachments to the plans which are not available at the HUD Web site.

[8]24 C.F.R. § 984.105(e)(2000).

[9]*Id.*

[10]*Id*. § 984.105(c).

[11]*Id.* § 984.103 (definition of the term "certification").

[12]*See e.g.*, *HUD San Francisco Office of Public Housing, Family Self-Sufficiency Program, Question and Answers*, Answer 9 (Nov. 16, 1999). www.hud.gov:80/local/sfc/pubhsg/sfcphfssp.html. Note that this document has not been revised since the regulations for the FSS program were amended. Thus, for example, the information regarding the definition of welfare assistance is not correct.

[13]*Voucher Program Guidebook Housing Choic*e, HUD Guidebook, 7420.10G, chpt. 23, Family Self-Sufficiency, ¶ 23.2.

[14]See footnote 34 and text, *infra,* describing which PHAs are required to provide information regarding FSS in the PHA Annual Plan Template.

- most PHAs with both a Section 8 and public housing program are administering a public housing FSS program that is proportionately, substantially smaller than the Section 8 FSS program,[15] and
- a vast number of PHAs who are running a Section 8 FSS program are not making it available to public housing residents.[16]

On a brighter note, the chart shows that a few of the selected PHAs report that they are running programs that are larger than what is mandated of them,[17] that some are administering programs in which the number of participants exceed the national average (about 5 percent of the family units)[18] and that others are offering an FSS program to participants in both the Section 8 and public housing programs.

Despite the failure of most PHAs to realize the potential of the program, there are steps that advocates may take to encourage or require local implementation or expansion of the FSS program. A good beginning place is the PHA plan and the PHA plan process.[19] The CBPP report lays out several arguments about the benefits of the program for PHAs as well as tenants that advocates should use in their advocacy. It suggests that PHAs benefit from the FSS program because it enhances relations with the public, provides improved services to residents and applicants and improves the PHAs' standing with HUD.[20]

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[15]Notwithstanding, there are PHAs that administer FSS programs for a greater percentage of their public housing residents than their Section 8 participants. For example, the chart on page 199 shows that the San Diego, CA, PHA FSS program is serving 12 percent of the public housing participants and 4 percent of the Section 8 participants. Additional examples are: Clearwater, FL (public housing 14 percent, Section 8 voucher 3 percent); West Palm Beach, FL (public housing 6 percent, Section 8 voucher program 1 percent); Kansas City, MO (public housing 6 percent, Section 8 voucher 3 percent).

[16]The following are a sampling of PHAs with a Section 8 FSS program but no public housing FSS program: Washington, DC; Newark, NJ; Savannah, GA; Americus, GA, Kansas City (Cnty), MO; St. Louis, MO and Great Falls, MT. Because of the size of their public housing programs, it is particularly significant that neither Washington, DC or Newark, NJ report that they are administering an FSS program for public housing tenants.

[17]*See* for example, Gloucester, NJ; Clearwater, FL; Woonsockett, RI; Austin, TX; Jefferson, OH; Erie, OH; St. Louis County, MO; and Perth Amboy, NJ.

[18]San Diego, CA, and Clearwater, FL, have public housing FSS programs that are serving, respectively, 12 and 14 percent of the available units. The following PHAs have Section 8 FSS programs that are serving the indicated percentage of Section 8 units: Perth Amboy, NJ (22 percent); Erie, OH (13 percent); Gainsville, FL (75 percent); and Americus, GA (11 percent). Note that these percentages are of all units, not just the family units. The percentages would be higher if they only took family units into account.

[19]Litigation may be another way to force a PHA to administer an FSS program of the mandatory size. However, before pursuing litigation, advocates should check whether HUD granted the PHA an exception to run a smaller program or no program at all. *See* discussion, *supra*.

[20]CBPP report at 7-18.

The FSS Program

Key features of an FSS program include:[21]

- an action plan, developed by the PHA and approved by HUD, describing the PHA's policies and procedures for operation of the FSS program;[22]
- a contract of participation for each participating family that lists the terms and conditions of participation, including the rights and responsibilities of the participant, the services to be provided by the PHA, and the activities to be completed by the head of household and each adult member of the household who elects to participate in the program;[23]
- a list of case management services, many of which are incorporated in the contract of participation, and other services that may be provided by a case manager; and
- an escrow account which, in the case of a very low-income household, is credited each month with an amount that is equal to the difference between the income the participant earned before entering the program and the amount that she is currently earning.[24] At the end of the contract term, which is generally five years, the head of household is entitled to receive the escrow funds if she is employed and no member of the household has received welfare assistance in the prior 12 months.[25]

A family may "still receive rental assistance at the time of and after the family's successful completion of the FSS program."[26] If there is good cause, the PHA must extend the contract term at the request of the participant.[27] Moreover, in accordance with the participant's contract, the PHA may decide to disburse a portion of the escrow funds prior to completion of the program for work-related reasons.[28] If the family does not successfully complete the contract, the escrow fund is forfeited.[29]

The family's escrow account is credited each month with an amount that is equal to the difference between the income the participant earned before entering the program and the amount that she is currently earning.

Most participants do not experience economic loss from participation in the FSS program. Their rent payment is the same, regardless of their participation, because their rent is based upon family income and as income rises so does the family's share of rent for the unit. If a participant fails to complete the FSS program, she gives up the escrow account and is left in the same economic condition as she would have been if she did not participate. Of course, this does not account for the harm that may accrue from the failure to fulfill the expectation of a successful program completion and the time and effort expended for self-sufficiency activities that are ultimately unsuccessful.

Some PHAs have adopted a policy that allows them to terminate the participant's Section 8 benefits if the participant does not complete the FSS program.[30] Obviously, this can, potentially, be very harmful. However, most PHAs have not adopted such a policy and, for the Section 8 voucher program, HUD has urged PHAs to eliminate the provision requiring a termination of benefits because it "is likely to have a negative impact on the PHA's ability to enroll additional families in the FSS program. . . ."[31] Nonetheless, local

[21] 42 U.S.C.A. § 1437u (West 1994 and Supp. 2001); 24 C.F.R. §§ 984.101-306 (2000); *See also* CBPP report, at 3-5, for a description of the main feature of the FSS program.

[22] 24 C.F.R. § 984.201 (2000)(requirements for action plan).

[23] *Id.* § 984.303 (contract of participation); FSS Advocates Guide, ¶ 2.4.

[24] 24 C.F.R. § 984.305 (2000)(FSS escrow account). Public housing tenants and Section 8 voucher participants with a disability who are receiving the full benefits of the earned income disregard (EID) will not have their FSS escrow accounts credited as long as the full disregard is in effect. When only part of their income is disregarded, the participant's escrow account should be credited on the basis of increased income that is not disregarded. *See* 24 C.F.R. § 960.255 (public housing) and 66 Fed. Reg. 6,218 (Jan. 19, 2001), *The Final Rule on Determining Adjusted Income in HUD Programs Serving Persons With Disabilities*, (requiring mandatory deductions for certain expenses and earned income disregards)(effective Apr. 20, 2001); *See also* FSS Advocates Guide, ¶¶ 2.2.3 (exclusion of certain types of earned income) and 2.3 (escrow account).

[25] *Id.* § 984.303(g)(2) and 984.305(c)(1)(2000); 42 U.S.C. § 1437u(d)(2)(the PHA may request from HUD a waiver of the 12-month requirement because it is not statutorily required); 24 C.F.R. § 984.103 (definition of welfare assistance for purposes of FSS program).

[26] HUD Guidebook, 7420.10G, *Voucher Program Guidebook Housing Choice*, Chpt. 23, Family Self-Sufficiency, ¶ 23.4. The Guidebook is only applicable to the Section 8 voucher program. However, there is no rational distinction between the Section 8 and public housing FSS programs. Thus, the policy should be the same. This is an issue that advocates should clarify in the FSS action plan for both the Section 8 and public housing FSS programs.

[27] 24 C.F.R. § 984.303(d)(2000); FSS Advocates Guide, ¶ 2.4 (discussing issues related to extensions).

[28] 24 C.F.R. § 984.305(c)(2)(ii)(2000). This is a significant benefit. Advocates could work with the PHA to develop guidelines for the interim release of such funds.

[29] *Id.* § 984.305(f).

[30] *Id.* §§ 984.201(d)(9) and 984.303(b)(5).

[31] *Voucher Program Guidebook Housing Choice*, HUD Guidebook, 7420.10G, Chpt. 23, Family Self-Sufficiency, ¶ 23.4; CBPP Report at 5. This rationale is also applicable to public housing FSS program participation; FSS Advocates Guide, ¶ 3.4.1 (discussing the fact that the threat of termination from the housing assistance program is a substantial barrier to participation).

advocacy may be necessary to influence PHAs to adopt a policy that does not allow for the termination of Section 8 assistance for failure to complete the FSS program.[32]

For some tenants, participation in FSS may give rise to the issue of whether the escrow account constitutes an asset to be considered when determining eligibility or the level of assistance for other benefit programs and, if so, what is the value of the assets that a tenant may accumulate before these other benefits are terminated.[33] These issues should be reviewed and addressed when developing a PHA's Annual Plans as well as an FSS plan.

Collecting Information Regarding Local FSS Programs

The PHA Plan and the required attachments provide basic information regarding the FSS program for each PHA. The Fiscal Year (FY) 2000 PHA Plan for many PHAs and the FY 2001 PHA Plan for some PHAs can be accessed from the HUD Web site.[34] Section 12 of the PHA Plan Template requests information on the number of participants that the PHA serves and the number that should be enrolled in the PHA's mandatory program, if applicable. A PHA that is serving fewer tenants than required by the mandatory program must explain in the FSS action plan or in the PHA's Annual Plan what steps it will take to increase program participation. Unfortunately, only some PHAs must provide information regarding the FSS program in their PHA Annual Plan. PHAs that are ranked by HUD as high performers or PHAs with less than 250 public housing units are not required to report this information.[35] Notwithstanding, every advocate should be able to obtain basic information regarding the FSS program, because every PHA with an FSS program must make available the FSS action plan for review by the tenants and the public.[36]

[32]*See also Id*. ("The contract language may be modified by the PHA to delete reference to termination of the housing choice voucher assistance for a family's failure to comply with the FSS contract."); FSS Advocates Guide, ¶ 2.5 (discussing the definition of good cause for the termination of rental assistance by PHAs that choose to adopt such a penalty).

[33]Q&A, pg. 4; CBPP report, pgs. 23-24; FSS Advocates Guide, ¶ 2.3.5 (effect of escrow on other need based programs).

[34]The PHA Plans are posted by HUD at www.hud.gov/pih/pha/plans/phaps_approvedplans.html.

[35]24 C.F.R. § 903.11 (2000)(High-performing and small PHAs are eligible to submit a streamlined Annual Plan that does not include information on the community service and self-sufficiency programs, including FSS; PHAs that administer only a Section 8 program may also submit a streamlined plan, but it must include information on the FSS program, if applicable.)

Advocates may determine the type of plan that the PHA has submitted from its response to the first question in the PHA Plan which asks the PHA to identify whether it is submitting a streamlined or standard plan. If the PHA is submitting a standard plan, it is required to submit information about the FSS program, if it is administering one.

[36]PHA Plan Template, *List of Supporting Documents Available for Review*; 24 C.F.R. §§ 903.17(b)(2) and 903.23(d)(2000)(Plan and required and supporting attachments must be available to the public for review). *See also PHA Certifications of Compliance with the PHA Plans and Related Regulations Board Resolution to Accompany the PHA Plan*, ¶ 22 (certification that all attachments to the plan are available for review).

FSS Action Plan

At a minimum, the PHA's FSS action plan must contain the following information:[37]

- the demographics of the families, including information on the supportive services that the families expected to participate might need;
- an estimate of the number of families who may reasonably be expected to receive supportive services;
- an estimate of the number of families who are participating in other local self-sufficiency programs who are expected to participate in the FSS program;
- the PHA's selection policies for participation in the program;
- a description of the incentives to encourage participation in the program, including the FSS escrow account;

[37]24 C.F.R. § 984.201 (2000).

Supreme Court to Review *Rucker* Decision

The United States Supreme Court has announced that it will review the *en banc* decision of the Court of Appeals for the Ninth Circuit in *Rucker v. Davis*, 237 F.3rd 1113 (9th Cir. 2001). In that case, the appeals court upheld the district court's decision to preliminarily enjoin the Oakland Housing Authority (OHA) from evicting four public housing residents on the grounds that they violated OHA's and the Department of Housing and Urban development's (HUD) "one-strike"policy.[1] OHA and HUD petitioned the Supreme Court for a review of that decision and, on September 25, the Court announced that it granted the defendants' petition.[2] Justice Breyer did not participate in the decision to grant the petition and is not expected to participate in the Court's consideration of the case. While no reason was given for his recusal, in all likelihood, it was based on the fact that the district court's decision in the case was issued by Judge Charles R. Breyer, the Justice's brother. Oral arguments are expected to take place in January and a decision is not expected before March 2002.

[1]For a detailed report on the decision, *See En Banc 9th Circuit Rules that "One-Strike" Law Does Not Permit Eviction of "Innocent Tenants,"* 31 HOUS. L. BULL. 29 (Feb. 2001).

[2]*Department of Housing and Urban Development v. Rucker*, ___ S.Ct. ___, 2001 WL 576,227, 70 USLW 3,036 (U.S. Sept. 25, 2001)(No. 00_1770).

- a description of the PHA's outreach efforts to solicit FSS participants;
- a description of the FSS activities and supportive services to be provided to FSS families;
- a description of how family needs will be identified;
- a description of the PHA's policies with respect to termination, withholding of supportive services or Section 8 assistance and the grievance and hearing process;[38]
- an assurance of non-interference with the rights of families who elect not to participate in the FSS program;
- a timetable for program implementation; and
- a certification of coordination with any relevant employment, child care, transportation, training and education programs, such as JOBS[39] and JTPA.[40]

Barriers to Implementation

The majority of PHAs could and should implement an FSS program. It is consistent with the goal of most PHAs (contained in their mission statement) which is part of the PHA's Five-Year Plan, of promoting economic opportunity for public housing residents and Section 8 voucher participants.[41] It is also in keeping with their five-year strategy to promote self-sufficiency and asset development.

The CBPP report identifies four perceived barriers to implementation of an FSS program, including: lack of funds, lack of staff expertise, insufficient tenant interest, and lack of employment opportunities and support services in the community.[42] The report responds to each of these problems. First, and most significantly, it makes clear that there are funds available to pay for case managers for both the Section 8 and public housing FSS programs. For FY 2001, there is $45 million available nationally for Section 8 FSS coordinators[43] and PHAs that receive HUD approval of FSS plans that will serve 25 or more participants may qualify for up to $60,000 for a service coordinator.[44] Moreover, depending on the demand for funding, PHAs may receive up to $60,000 in additional service coordinator-funding for every 50 HUD-approved FSS slots. Indeed, agencies may qualify for funds even if they have not enrolled the required or approved number of families due to lack of staff.[45] Historically, PHAs apply for these funds by responding to a notice of funding availability (NOFA) which is typically issued in February in conjunction with, or as a part of, what is known as the Super NOFA.[46]

PHAs that enroll public housing tenants in HUD-approved FSS programs may also receive funding for a case manager if they are serving at least 25 families.

PHAs that enroll public housing tenants in HUD-approved FSS programs may also receive funding for a case manager if they are serving at least 25 families.[47] This funding is an add-on to the PHAs' operating subsidies and is available to PHAs administering either the mandatory program, the voluntary program, or both.[48] The only prerequisite for funding is a HUD-approved FSS action plan. Thus, a PHA running an FSS program of 25 Section 8 residents and 25 public housing residents can receive funding for two FSS service coordinators.

For FY 2002, HUD requested $46.4 million for Section 8 FSS coordinators and asserted that it will work to expand the FSS program.[49] For public housing, the HUD budget does not have a separate line item for FSS because it is included in the overall funding request for public housing operating subsidies. Included in HUD's operating subsidy request for FY 2001 was approximately $14 million[50] for the public housing FSS program and for FY 2002, it is approximately $17.9 million.[51] These funds cover the costs of FSS coordinators as well as the cost of maintaining units within public housing complexes to provide supportive services.[52]

[38]FSS Advocates Guide, ¶ 2.5.2 (discusses the hearing process requirements).

[39]JOBS is the acronym for the Job Opportunity and Basic Skills Training Program, 42 U.S.C.A. § 402(a)(19)(West 2000).

[40]JTPA is the acronym for the *Job Training Partnership Act*, 29 U.S.C.A. § 1579(a) (West 2000).

[41]PHA Plans Template, *Five-Year Plan, A Mission*, at 1. *See e.g.* The FY 2000 Annual Plans for DeKalb County, IL; St. Louis, MO; Camden, NJ; Woonsocket, RI; Morristown, TN; Parma, OH; and Crawford, OH.

[42]CBPP report at 25-30.

[43]66 Fed. Reg. 12,401, 12,403 (Feb. 26, 2001)(Notice, Funding Availability for Rental Certificate/Housing Choice Voucher Family Self-Sufficiency (FSS) Program Coordinators).

[44]CBPP report at 25.

[45]*Id.* at 26.

[46]*See* for example, *Id.*

[47]*Id.* at 25.

[48]*Id.*; the revised form HUD-52723 (Jan. 2001) *Operating Fund Calculation of Operating Subsidy,* Part D, line 03 (Add-ons for changes in Federal law or regulation and other eligibility, family self-sufficiency) which supercedes the prior form HUD-52723 (May 1996) *Calculation of Performance Funding System Operating Subsidy*, line 28a (Add-on for Family Self Sufficiency Program); HUD Notice, PIH 2001_32 (HA) (Aug. 24, 2001) *Submission of Operating Subsidy Eligibility Requests for FY 2001, Proration Factor, and Other Special Notes* (hereinafter HUD Notice PIH 2001-32).

[49]*Executive Summary of the HUD Budget for FY 2002* at 14.

[50]*See Congressional Justifications for 2001 Estimates* at www.hud.gov/budget01/justif/pih/phof.cfm.

[51]*See Congressional Justifications for 2002 Estimates* at www.hud.gov/about/budget/fy02/cjs/toc1.cfm, click on *public housing operating subsidy fund*.

[52]If the funding requests for public housing FSS coordinators exceed the HUD allocation, presumably HUD will either deny the request or reduce proportionately the amount of operating subsidy available to each PHA.

Family Self-Sufficiency Information from PHA Plans[1]

Name of Housing Authority and State	HA Number	Fiscal Year[2]	PH—Total Number of Units[3]	PH-FSS Req./Vol.[4] No.	PH-FSS Actual No.	§8—Total Number of Units[3]	§8-FSS Req/Vol.[4] No.	§8-FSS Actual No.
Burbank, CA	CA105	01	0	N/A	N/A	1,049	46	R46
Orange Cnty, CA	CA951	01	0	N/A	N/A	8,989	470R	467
Sacramento Cnty, CA	CA007	01	1,135	22V	14	4,733	75R	60
San Diego, CA	CA063	00	1,483	100R	186	11,612	574R	522
Santa Ana, CA	CA093	01	0	N/A	N/A	2,533	185R	69
Santa Paula, CA	CA075	01	0	N/A	N/A	577	35R	14
Ventura Cnty, CA	CA092	01	355	0	0	2,608	155R	117
Norwalk, CT	CT002	00	823	0	0	801	24R	21
Washington, DC	DC001	00	10,561	0	0	8,316	55R	61
Clearwater Beach, FL	FL075	00	580	100V	85	1,056	100V	65
Fort Lauderdale, FL	FL010	01	888	24R	19	1,936	42R	30
Gainesville, FL	FL063	00	635	30 [5]	8	32	0	24
Hialeah, FL	FL066	01	1,117	100R	4	3,963	186R	132
Orlando, FL	FL004	01	1,607	0	0	2,409	200R	76
West Palm Beach, FL	FL009	01	734	20R	45	1,808	25R	25
Americus, GA	GA062	00	642	0	0	554	74R	64
Savannah, GA	GA002	00	2,701	0	0	1,815	240R	77
Peoria, IL	IL003	00	1,443	10R	25	1,710	73R	73
Jefferson City, MO	MO009	00	357	0	0	231	40R	0
Kansas City, MO	MO002	00	1,899	255R	199	7,751	300R	268
St. Louis, MO	MO001	00	4,913	0	0	5,428	152R	36
St. Louis Cnty, MO	MO004	00	560	0	0	6,367	0	124
Butte, MT	MT003	01	356	12R	12	11	0	0
Great Falls, MT	MT002	01	490	0	0	200	15R	12
Douglas Cnty, NE	NE153	01	87	0	2	838	24R	15
Lincoln, NE	NE002	00	320	32R	35	2,874	26R	64
Gloucester Cnty, NJ	NJ204	01	262	0	3	1,782	77R	85
Newark, NJ	NJ002	01	10,491	0	0	5,102	100R	105
Pert Amboy, NJ	NJ039-p006	01	614	0	20	596	111R	133
Union City, NJ	NJ026	01	455	0	0	666	50R	0
Bingham (City), NY	NY437	00	0	N/A	N/A	437	22R	0
Bingham (HA), NY	NY016	00	641	0	0	50	22R	0
Rochester, NY	NY041	00	2,573	50R	20	5,892	350R	150
Erie, OH	OH028	00	276	10R	10	1,070	50R	137
Jefferson, OH	OH014	00	805	10R	14	818	50R	85
Youngstown, OH	OH002	00	2,003	18R	18	2,113	200R	64
Woonsocket, RI	RI003	00	1,291	0	21	538	0	29
Austin, TX	TX001	00	1,931	0	52	4,645	28R	50

Footnotes

[1]The information summarized in this table is derived exclusively from PHA plans that are posted on the HUD Web site (www.hud.gov/pih/pha/plans/phaps_approvedplans.html). The listed PHAs are not necessarily a representative sample of either PHAs with posted plans or of the universe of PHAs. Indeed, the list of PHAs is likely not to be representative because PHAs that HUD categorizes as "high performers" as well as PHAs with less than 250 public housing units are authorized to submit streamlined PHA plans that do not require reporting on either the required number of FSS units or the actual number of participants. Moreover, it is likely that the PHA plans that are posted on the HUD Web site are disproportionately higher from PHAs that are categorized as "high performers" (which are not required to report on their FSS programs) and disproportionately lower from PHAs that are rated as "standard" (which are required to report on their FSS programs).

[2]The information shown is either from the PHA's 2000 or 2001 Annual Plan, as indicated.

[3]Information is from PHA profiles. http://pic.hud.gov/pic/haprofiles/haprofilelist.asp (accessed August 20-24, 2001).

[4]The indicated program size is either required/mandatory (R) or voluntary (V), as indicated.

[5]Combination of Public Housing and Section 8.

One possible explanation for the failure of PHAs to seek funding for FSS coordinators, or to even know about its funding availability, is that in prior years the funding for the Section 8 program was substantially less than for the last two years and inadequate to meet the specific need. Therefore, prior to 1999, applications were limited to PHAs with voucher programs of 1,000 participants or less. For public housing, the reason for lack of participation is not as clear. The HUD forms that PHAs use to request operating subsidy funds, which have been in use since at least May 1996, have a line for FSS funding. Moreover, since at least September 1995, the annual HUD notices regarding the Performance Funding System (PFS) Inflation Factor and Equation have included instructions on how to request the reasonable cost of salary and fringe benefits for an FSS service coordinator as an add-on to the PHAs operating subsidy.[53] Advocates who need support for creating or increasing the size of an FSS program should point to the availability of the funds for an FSS coordinator in support of their position, particularly when a PHA has not applied for funding or only sought a limited amount.

The elements of an FSS action plan are not complex and it should not be difficult for a PHA to develop one.

The CBPP report suggests that the lack of staff expertise may be overcome by contracting with outside agencies or individuals who are more familiar with case management, job placement, and asset accumulation and by the sharing of information with agencies that have established programs.[54]

In instances where lack of tenant interest is cited as the reason not to establish or increase the size of the FSS program, the CBPP report suggests several responses.[55] First, the source of the information should be evaluated. In light of welfare reform and time limits, tenants' interest in a program may be greater now than in the past. Second, a PHA's communication with the residents may not be optimal and tenants may be unaware of the program or confused about its terms, especially about whether housing benefits will be lost if a tenant fails to comply with the FSS contract. The CBPP report cites examples of PHA efforts to increase tenant interest. In addition, some PHAs have revived interest in the program simply by providing all current public housing residents and Section 8 voucher participants with a plain-language flyer and a brochure explaining the program, by providing training to staff, and by providing incentives—such as a quarterly drawing for modest gift certificates—to intake workers for referring families to the FSS program. Finally, with respect to the lack of jobs and services, the report cites examples of successful, rural programs that focus on long-term employment and the use of satellite offices or home visits.[56]

When advocating for the implementation or expansion of the FSS program, other reasons may surface as to why the PHA has not done more. For example, PHAs may:

- consider the FSS program as a "new" non-housing program that is burdensome for the staff to learn and understand even for the limited purpose of applying for funds;
- fear that funding for the program will not continue;
- experience competition between the Section 8 and public housing staff that interferes with efforts to adopt the program for both programs;
- lack of interest or commitment to support resident self-sufficiency efforts; and/or
- view the program as having been "imposed" from above and not generated at the local level.

These excuses may not always be articulated openly. Regardless, there are responses to each one. PHAs that claim that the program is burdensome or that they do not possess the expertise to apply for FSS funds should be encouraged to follow the paths of other PHAs that have successfully implemented the program. They can obtain copies of HUD-approved FSS action plans and use them as models for developing their own program. As noted above, the elements of an FSS action plan are not complex and it should not be difficult for a PHA to develop one. Housing advocates can assist in this process. Once funding is in place, the PHA can hire or contract for a case manager to assist with full implementation of the program.

Contrary to some PHA's perceptions, FSS program funding is relatively secure. The FSS program was enacted in 1990 and has been funded continuously since. Eleven years of funding should assure most PHAs that the program has gained a degree of permanence. This is particularly true in light of the fact that the program is consistent with the welfare changes implemented in 1996 and is, therefore, likely to receive continued support from Congress and the Administration. As noted earlier, the HUD budget requests for FY 2002 developed by the Bush Administration for both the Section 8 and public housing FSS program are somewhat higher than the current year's funding level and should assuage fears that the new administration plans to drop support for the program.

[53]HUD Notice PIH 2001-32; *see also* HUD Notices PIH 2000-04 (Feb. 3, 2000), PIH 98_57 (HA) (Dec. 1, 1998, PIH 97_55 (HA)(Oct. 30, l997), PIH 96_87 (HA)(Nov. 20, 1996) and PIH 95_57 (PHA/IHA)(Sept. 20, 1995). *See also* 58 Fed. Reg. 30,870 (May 27, 1993).

[54]CBPP report at 27. PHAs may also overcome such problems by operating a joint FSS program with other PHAs. 24 C.F.R. § 984.201(e)(2000).

[55]CBPP report at 27-28.

[56]*Id.* at 28-29.

The availability of funding for case managers under both the public housing and Section 8 FSS programs should alleviate splits between local administrators of the Section 8 and public housing programs. Moreover, the extent to which a PHA has developed a successful program for Section 8 should make it easier to expand the program to cover public housing residents. In fact, there is really no excuse for the many PHAs that operate only a Section 8 FSS program (see chart on page 199) not to also make it available to their public housing residents.[57]

> *PHAs that receive HOPE VI grants are required to provide a range of services to help HOPE VI residents move toward self-sufficiency.*

For those PHAs that do not appear to be committed to an FSS program, it may be helpful to refer them to their mission statement and strategies. Many such statements and strategies encourage self sufficiency and/or economic opportunity. In addition, in light of the changes to the welfare program, they may be persuaded to change their attitude toward self-sufficiency programs. The final argument, that the program does not arise from the local level, may be rebutted by housing advocates working with tenants and local entities to support the program.

Seeking Allies

To encourage a PHA to create or increase the size of an FSS program, a housing advocate may need allies. These may be found among:

- current public housing residents and participants in the Section 8 program;
- Resident Advisory Board (RAB) members;[58]
- tenant Commissioners;
- Project Coordinating Committee (PCC) members;[59]
- local agencies responsible for implementing JOBS training programs or programs through JTPA or other employment agencies;
- public and private education or training institutions;
- child care providers; and
- local and state welfare agencies.

HOPE VI

PHAs that receive HOPE VI grants are required to provide a range of services to help HOPE VI residents move toward self-sufficiency. Within the HOPE VI program "[s]ervices that help residents secure and sustain employment are a very high priority . . . ."[60] Community and support service funds are available for these efforts.[61] These funds may be used to fund a case management coordinator and to provide other services and incentives to implement an FSS program for current HOPE VI residents. There is no apparent reason why PHAs should not have implemented an FSS program for the original HOPE VI residents. Yet we are not aware of many HOPE VI grantees that have implemented such a program.

HUD has recognized that the community and supportive services plans for many HOPE VI plans "need strengthening and, on some sites, capacities need to be developed virtually from scratch."[62] Advocates are therefore encouraged to review community and supportive services plans of new HOPE VI applicants as well as those of recent and existing grantees to determine if these plans are adequate.

There may be several opportunities for advocates to influence the shape of a community service plan. Because the approved HOPE VI applications or approved or submitted HOPE VI Revitalization Plans are supporting documents to the PHA Annual Plan,[63] recommendations for change can be made in the HOPE VI grant application process or during any subsequent PHA Annual Plan process. Clearly, when a plan does not include an FSS program, or if a PHA has not implemented a previously proposed plan, implementation of such a plan should be recommended.

The regulations are clear. Participation in an FSS program must be voluntary for the residents. Notwithstanding, advocates

[57]*See also Id.*, footnote 3 ("In November 2000, MTCS data indicated that 54,108 families were enrolled in FSS, about 7,000 of whom were public housing tenants; the remainder received Section 8 assistance").

[58]Each PHA must establish a RAB to advise it in the PHA Plan process. The names of the RAB members must be attached to the Annual Plan and made available to the public at least 45 days before the public hearing on the PHA Plan.

[59]24 C.F.R. § 984.202 (2000). Each PHA with an established FSS program must create a PCC to advise it on the FSS program. In the case of a public housing FSS program, a tenant or tenants from the jurisdiction-wide or development resident council must be a member(s). If there is no resident council, the PHA may select an interested tenant(s). In the case of a Section 8 FSS program, the PHA must select Section 8 participants.

[60]*Community and Supportive Services for Original Residents, General Guidance for the HOPE VI Program* (Feb. 18, 2000) available www.housingresearch.org (click *reference library* and then click *residents*).

[61]The funds allocated to community and supportive services vary by grant year. Up to 20 percent could be allocated for projects funded in FYs 1993-1996. For FY 1997 and 1998, the amount was set at $5,000 times the number of households in occupancy at the time of grant application plus new tenants moving into the replacement housing. 63 Fed. Reg. 15,579 (Mar. 31, 1998). For FY 1999, 2000 and 2001, up to 15 percent of each grant may be spent on supportive services. HUD Notice PIH 99-17 (Mar. 15, 1999), 65 Fed. Reg. 9,605 (Feb. 24, 2000) and FY 2001 HOPE VI, Application kit as published in 66 Fed. Reg. 12,401 (Feb. 26, 2001).

[62]*Id.*

[63]PHA Plans, Template, HUD 50075 (Mar. 31, 2002).

have reported that some PHAs that have received HOPE VI funding have attempted to require participation in the FSS program. Such a requirement is forbidden by FSS regulations. Indeed, each FSS action plan must contain an assurance that a family's election not to participate in the FSS program will not affect its admission to public housing, participation in the Section 8 program, or occupancy rights under an existing lease.[64]

Conclusion

Most working tenants who are properly informed about and understand the benefits of an FSS program become very interested in participating in the program. A wisely implemented program can provide substantial benefit for participants who complete it. Approximately 45 percent of the families that successfully completed the FSS program between the fall of 1999 and November 2000 received escrow funds averaging nearly $5,000 per family.[65] There is also data that supports findings that FSS participants improve their employment status and increase their working hours from part-time to full-time and, in some cases, secure large increases in income during their period of participation. Because of its benefits, advocates, tenants and PHAs may find common ground for supporting the program and, by working together to implement or increase the size of an FSS program, may increase or improve trust and respect among them. For these reasons, implementation of an FSS program is certainly a subject that should be raised and advocated for in the PHA planning process and in the context of every HOPE VI application and award. ■

[64]24 C.F.R. § 984.201(c)(10); 42 U.S.C.A. § 1437u(b)(5)(West Supp. 2001).

[65]CBPP report at 6.

> *"Paying for housing is clearly the biggest financial burden faced by families leaving welfare and their budgets are stretched to the point that they are extremely vulnerable to crisis. These crises can disrupt employment and destabilize families. Low earnings and high housing prices result in a large discrepancy between income and the ability to pay for decent housing."*
>
> —*Center on Urban Poverty and Social Change, Issues of Housing Affordability and Hardship among Cuyahoga County Families Leaving Welfare, 2000*

HUD Proposes Another Initiative to Improve the Income Verification and Rent Determination Process

Introduction

The Department of Housing and Urban Development (HUD) is preparing to undertake another major effort to reduce the discrepancies that purportedly exist in the public and subsidized housing income determination and rent setting processes. The new initiative, titled the Rental Housing Income Integrity Project (RHIIP), comes in response to reports by the U.S. General Accounting Office (GAO), HUD's Office of the Inspector General (OIG), and HUD's Office of Policy Development and Research (PD&R) criticizing HUD's internal quality control with respect to subsidy payment errors in assisted housing programs.[1] It also comes on the heels of an earlier, highly criticized effort by HUD's office of Real Estate Assessment Center (REAC) to recover what it claimed were substantial subsidy overpayments to tenants who underreported their income. In order to avoid the mistakes associated with that effort, HUD has shared information about RHIIP with stakeholders and has begun a discussion and comment process to secure their reactions to the proposed program.[2] This article reviews the income determination process, the PD&R study and the proposed RHIIP program, and comments on some of the shortcomings of the proposed RHIIP program.

OIG first identified the problem of inaccurate income and rent determinations in 1991 and has reported on the issue in every audit report since then.[3] It attributes the problem to incomplete reporting of tenant income, improper calculation of tenant rent contributions, and failure to fully collect outstanding rent.[4] The seriousness of the problem is highlighted by the amount of money involved: in fiscal year (FY) 2000, HUD spent $19 billion to provide rent and operating subsidies to benefit about 4 million households.[5] The OIG cites estimates that as much as $1.9 billion, or 10 percent, of that amount constitutes subsidy overpayments, while subsidy underpayments constitute $.7 billion.[6]

[1]Letter from Gloria J. Cousar, Acting General Deputy Asst. Sec. For Public and Indian Housing and Frederick Tombar III, Acting Deputy Asst. Sec. For Multifamily Housing Programs to Dushaw Hockett, Director, Center for Community Change (May 17, 2001)(on file with NHLP).

[2]So far, HUD has held two stakeholder meetings about the program. The first was held in June 2001 and the second, a more targeted follow-up meeting, was held on August 22, 2001.

[3]Office of the Inspector Gen., HUD, *Semiannual Report to the Congress* (Mar. 31, 2001), *available at* www.hud.gov/oig/sar45.pdf.

[4]*See OIG Semiannual Report*, *supra* at note 3.

[5]*Id.*

[6]*Id.*

In response to these reports, HUD has made improving rent calculation a priority in the FY 2002 budget, when it hopes to commence reforms to assure that the right person receives the right benefit.[7] HUD believes that perhaps the biggest component of the rent calculation problem is that tenant income is underreported and as a result, rents are not properly calculated. Proposed reforms include ensuring that landlords and local agencies correctly calculate the rent based on the data they receive, implementing HUD's authority to match tenant-reported income with IRS records, and calling for more accurate and full reporting by housing agencies of tenant characteristics.[8] The goals of RHIIP are to reduce errors in the administration of subsidy payments, to ensure that as many low-income households are served as possible, and to ascertain that benefits are correctly assessed for each tenant household receiving assistance.

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Rent Determination

Tenants assisted by the public housing and Section 8 voucher programs typically pay 30 percent of the household's monthly adjusted income for rent.[9] Adjusted income consists of the household's gross annual income less certain mandatory exclusions[10] and deductions.[11] For families who pay income-based rent, PHAs are required to conduct an annual reexamination of household income, by interviewing the family and verifying the information, and to adjust the rent payment accordingly.[12] A family can request an interim reexamination of its income due to changes since the last determination. For instance, since its annual certification, a family may have incurred child care expenses or unreimbursed medical expenses which were not anticipated and which it is entitled to deduct from its annual income.[13] Conversely, a household may be required to report an increase in income or household composition that affects the household rent payment. Each PHA is authorized to establish its own policy as to when and under what circumstance the family must report a change in income.[14]

PHAs are required to obtain third party verification of each family's reported income, assets, and expenses relating to exclusions and deductions from annual income that affect the determination of adjusted income and income-based rent.[15] The documentation must go directly from the provider to the PHA. A tenant's Social Security number may be used to verify SSI or TANF income.

Report on Quality Control for Rent Subsidy Determination

HUD's Office of Policy Development and Research (PD&R) issued a report on June 20, 2001 about quality control for rent subsidy determinations.[16] The report, based on a study conducted by an independent contractor, examined sources of rent errors for the Public Housing and Section 8 programs, including tenant-based voucher assistance and project-based assistance. Using a sample of 2,403 households from 524 projects throughout the country, the study analyzed tenant files, tenant interview and income verification data to gain accurate information about the tenants' income and to recalculate the household's rent. It found the following major errors in rent and income determinations:

- 56 percent of the households paid an incorrect amount of rent with a $5 threshold;[17]
- 34 percent of the households paid at least $5 less than they should;[18] and
- 22 percent of the households paid at least $5 more then they should.[19]

[7]HUD, *Budget for Fiscal Year 2002* at 481, 483 (2001)(hereinafter HUD FY 2002 Budget).

[8]*Id. supra* at note 7.

[9]24 C.F.R. § 5.628 (a)(1)(2001).

[10]*Id.* § 5.609.

[11]Deductions include $480 per dependent, $400 for elderly or disabled family members and the sum of unreimbursed medical expenses for any elderly or disabled family and unreimbursed attendant care and auxiliary apparatus expenses to the extent that the sum exceeds 3 percent of annual income. Childcare expenses and additional deductions also apply. 24 C.F.R. § 5.611 (2001).

[12]The rent calculation issues are not nearly as severe for families that pay flat rents because the rent paid is not calculated on household income. Households paying flat rents have their income reexamined at least once every three years. 24 C.F.R. § 960.257 (a)(1) –(2) (2001).

[13]*Id.* § 5.611 (a).

[14]*Id.* § 5.657 (c).

[15]*Id.* § 960.259(c).

[16]ORC/Macro, Office of Policy Dev. and Research, HUD, *Quality Control for Rental Assistance Subsidies Determinations: final report* (June 20, 2001)(hereinafter OPD&R Final Report). The report addresses issues other than rent determinations that are not discussed in this article. For example, it includes a finding that 11 percent of all households occupied units that were larger than what is permitted under normal occupancy standards. *final report* (June 20, 2001), at ES-iv. The report also reviews rent reasonableness determinations that PHAs make for dwellings leased in the Section 8 tenant-based program. *Id.* at 49-76.

[17]*Id.* at 21.

[18]*Id.* at 22.

[19]*Id.* at 23.

The highest rate of underpayments were found to occur in the PHA-administered Section 8 programs (42 percent), while overpayments were found at the greatest rate in the owner-administered Section 8 programs (25 percent).

Of the 34 percent of tenants who paid less than they should, the average monthly underpayment was $95.[20] To calculate an overall annual underpayment dollar error, the study spread the total underpayments across all households in the sample. This led to an average monthly underpayment of $32, and an estimate of a national annual underpayment error of about $1.7 billion.[21] Of the 22 percent of tenants paying more than they should, the average monthly overpayment was $56.[22] Spread across all households in the study, the average monthly overpayment was $12,[23] and the national annual overpayment dollar error was estimated at $634 million per year, or $0.6 billion.[24] The study concluded that the net error of subsidy over and underpayments—or the total amount of money allegedly uncollected due to improperly calculated rent levels—is approximately $1.04 billion annually ($1.669 billion in underpayments minus $.634 billion in overpayments).

The study concluded that the net error of subsidy over and underpayments—or the total amount of money allegedly uncollected due to improperly calculated rent levels—is approximately $1.04 billion annually.

The PD&R study found multiple sources of rent errors. One source of errors is defined by the study as being "administrative." These consist of calculation errors, transcription errors, failures to recertify on time, and failures to verify information. Among these, calculation errors and the failure to verify and to make use of verified income and expense information were the two most common errors. The study found, for example, that earned income was verified 82 percent of the time, but that 45 percent of the verified amounts were not used to calculate rent and thus did not match the earned income reported on forms 50058 or 50059.[25] Thus, the data shows that many of the rent calculation errors are caused by PHAs' failure to use the accurately reported data that they receive. Additionally, a full 50 percent of the administrative errors were caused by transcription problems,[26] another area completely out of the tenants' hands. To date, HUD's primary response to these administrative errors seems to be to encourage the use of the Tenant Rental Assistance Certification Program (TRACS) and the Multifamily Tenant Characteristics System (MTCS) to check rent calculations on forms 50058[27] and 50059.[28]

Another and more prevalent source of errors identified by the PD&R study is "component" error. These are errors that are made in assessing income and expense items used to calculate rent. Incorrect income and deduction amounts were the most significant sources of rent determination errors. Ninety-two percent of the errors found were due to such income or expense component errors.[29] The study found that complete and detailed interviews disclosed additional sources of income beyond those that were reported by tenants initially.[30] Language barriers, forgetfulness, and misunderstanding were identified as reasons for underreporting income. The report, however, chooses to accentuate the accusation that much of this non-disclosure was intentional on the part of tenants.[31] Although the study clearly demonstrates that a better explanation of the verification process and more thorough interviews with tenants would greatly reduce inaccurately calculated rents, HUD's primary response has been to encourage income matching with state and federal data systems to identify unreported sources of income and assets.

PD&R also conducted an analysis of newly certified households[32] to determine if they were eligible for housing assistance. Of the sample used, only 53 percent met all of the eligibility criteria.[33] Sixteen percent did not document Social Security numbers or certify that Social Security numbers had not been assigned to one or more family members.[34] Furthermore, 22 percent did not sign consent forms necessary to authorize verification of income and assets for family members over the age of 18.[35] Of the sampled households, 21 percent did not have a signed proof of citizenship declaration form.[36]

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[20]*Id.* at 22.

[21]*Id.* at 35. (It is not clear why the OIG reported this total as $1.9 billion.)

[22]*Id.* at 23.

[23]*Id.*

[24]*Id.* at 35.

[25]*OPD&R Final Report* at 38. Note that the executive summary of the report states that 33 percent, rather than 45 percent, of the verified amounts did not match the amount of earned income used on the 50058/50059 form to calculate rents. *Id.* at ES-vi. Regardless of which figure is correct, either number is unacceptably high.

[26]*Id.* at 41.

[27]Form 50058 must be completed by PHAs for residents in Public Housing, Indian Housing, and Section 8 programs.

[28]Form 50059 is the Owner's Certification of Compliance with HUD's Tenant Eligibility and Rent Procedure.

[29]*OPD&R Final Report* at ES-vi.

[30]*Id.* at 79.

[31]*OPD&R Final Report* at ES-viii.

[32]This analysis was conducted on about 9 percent of the sample population.

[33]*OPD&R Final Report* at 27.

[34]*Id.*

[35]*Id.*

[36]*Id.*

Examining Component Error

Prior to the publication of the PD&R Final Report, HUD issued Notice PIH 2001-15, identifying and addressing component errors by PHAs[37] in determining and verifying rent.[38] The notice attributes these errors largely to the under-reporting of income by tenants and PHAs, and to PHAs not granting exclusions and deductions to which resident families are entitled.[39] A common mistake is made in the determination of anticipated total annual income, a figure that is vital for determining a household's eligibility for assistance and rent payment. The rent calculation, which often is figured manually, requires the PHA to determine the household's annual income and the household's adjusted income.[40] In addition, because of the numerous occupancy and admission rules and regulations, PHAs often make errors in reporting, tracking and verifying a family's income.

PIH 2001-15 specifically acknowledges and addresses some of the issues surrounding the correct determination and calculation of tenants' earned income—although not in significant depth.[41] The notice reviews earned income disallowances and other exclusions, and gives examples of the best practices, many of which involve direct electronic hookups to state welfare or unemployment agencies.[42]

The notice reinforces the requirement, affecting a large number of elderly persons and persons with disabilities, that PHAs must obtain the resident's medical expenses and, where applicable, provide either an exclusion or deduction.[43] Correctly determining whether the resident is entitled to an exclusion or deduction requires familiarity—by both PHA staff and tenants alike—with the rules and regulations regarding medical expenses. For instance, PHA officials need to know that reimbursements of medical expenses for any family member are excluded from income while tenants must know to keep records of medical expenses, including bills for prescription drugs and doctor visits. If a tenant has not maintained these records carefully as they accumulate, it can be extremely difficult, or time consuming, to reassemble them at a later time. On the other hand, the sum of unreimbursed medical expenses for any elderly or disabled household in excess of 3 percent of its annual income,[44] as well as unreimbursed attendant care and auxiliary apparatus expenses necessary for the member of the family to be employed,[45] are all deducted from income. An understanding of exclusions and deductions is also necessary to implement rules regarding childcare expenses,[46] net business income,[47] employment training programs,[48] and earned income disallowance.[49] Again, accurately calculating gross and adjusted income and rent requires considerable record keeping by tenants and a thorough knowledge of the rules by the PHA workers and tenants.

Significantly, errors in earned income calculations are the largest source of errors in determining annual income, accounting for 27 percent of the mistakes.

Significantly, errors in earned income calculations are the largest source of errors in determining annual income, accounting for 27 percent of the mistakes.[50] The average dollar error in income calculation, calculated at $6,641 annually, is also considerably higher than that for any other type of error.[51] Understandably, this also leads to the largest rent level miscalculations.

Although the PD&R study does not specifically analyze errors with respect to the earned income disregard, undoubtedly the errors stemming from the complicated earned income disregard rules make up a significant portion of the earned income calculation errors.[52] A major source of errors stems from PHAs' failure to identify the fact that certain earned income should be excluded from household rent and then in calculating the proper tenant rent. In many instances,

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[37]Although the notice specifically addresses only PHAs, there is little reason to believe that the findings would not hold equally for private owners.

[38]HUD Notice PIH 2001-15, (May 2, 2001)(hereinafter PIH 2001-15).

[39]*See Id.* at 1-4.

[40]Annual income is determined by calculating a family's anticipated total income minus allowable exclusions. Adjusted income is the annual income minus deductions. Other frequent errors occur around unreported employment and regularly occurring overtime pay, sporadic income, change in household size, and changes in other government assistance programs (*i.e.* TANF).

[41]*See infra* for additional discussion of the Earned Income Disregard in public housing.

[42]*See* PIH 2001-15 at 1-4.

[43]24 C.F.R. §§ 5.609 (c)(4) and 5.611 (a)(3)(2001).

[44]*Id.* § 5.611 (a)(3)(i).

[45]The expenses for attendant care and the auxiliary apparatus that enable a family member to be employed may not exceed the earned income received by the person whose employment is enabled by the apparatus. 24 C.F.R. § 5.611 (a)(3)(ii)(2001).

[46]*Id.* §§ 5.609 (c)(8)(iii), 5.611 (a)(4) and 5.603(d).

[47]*Id.* § 5.609(b)(2).

[48]*Id.* §§ 5.609 (c)(8)(i), 5.609 (c)(8)(iii), and5.609 (c)(8)(v).

[49]*Id.* §§ 960.255 (b) and 5.617.

[50]*OPD&R Final Report* at ES-vi – ES-vii.

[51]*Id.* at ES-vii.

[52]Earned Income Disregards require PHAs to exclude certain new income earned by public housing residents (these disregards do not apply to project-based or tenant-based Section 8 tenants) from household income for the purpose of determining rent. *See* 24 C.F.R. § 5.609 (2001).

tenants are not getting the benefits of these statutorily mandated exclusions from income[53] because PHAs have simply not implemented them, claiming that they do not have information about the program.[54] In fact, HUD has published regulations and notices about the disregards numerous times. In other cases, errors occur because the rules vary under differing circumstances and are complicated. Undoubtedly, this leads to a greater frequency of error in PHA rent determinations, and often to tenants' overpayment of rent.[55]

As more tenants are working and fewer are relying solely upon Temporary Assistance for Needy Families (TANF), the incidence of errors in rent calculations is rising. The PD&R Study found that two out of three key indicators for the frequency of errors in rent calculations included households with two or more sources of earned income[56] and households with one source of earned income and no public assistance.[57] Problems with earned income are exacerbated by frequent changes in the source and amount of income and by the complicated rules applicable to rent calculations that are based on earned income.

While HUD seems to focus on inaccuracies resulting in tenant underpayment of rent, tenants are more concerned with errors resulting in tenant overpayment. If the earned income disregard—or any of the other deductions or exclusions—is not properly implemented, tenants may be overpaying their rent and be subject to eviction for monies they did not actually owe. Moreover, it is extremely difficult to identify and locate tenants who have already been evicted under such circumstances. However, if they are located, PHAs must be able to give some redress, perhaps in the form of a credit to the tenant or by providing assistance in placing the tenant in a new residence. The same holds true for Section 8 tenants who have overpaid their rents because of Public Housing Authorities', Owners' and Agents' (POA) failure to properly exclude or deduct items from the tenants' income.

Tenants who have underpaid their rent may also be subject to eviction. Short of that, they may become obligated to pay large lump sum back payments if a POA, at some future date, claims that the tenant has underpaid rent for a significant period of time. These delayed discoveries are difficult to contest because circumstances may have changed, paperwork lost, or memories faded. If the claim is upheld, the tenant's inability to pay such a lump sum could lead to a prolonged and unanticipated period of hardship, or as already noted, to an eviction.

[53]For a detailed discussion of the Earned Income Disregard as it existed prior to 1998, *see Earned Income Disregards for Public Housing Tenants,* 28 HOUS. L. BULL. 1 (Jan. 1998).

[54]*See OPD&R Final Report*.

[55]*See generally, Earned Income Disregards for Public Housing Tenants*, *supra* at note 42. Note that the error rate for comparatively simple calculations is relatively low. For example, for the dependent allowance deduction of $480 per dependent, the error rate was only 4.7 percent.

[56]88 percent exhibited some dollar error, while the mean dollar error was $134.11. *OPD&R Final Report* at Appendix H, pgs, 3-4.

[57]85 percent exhibited some dollar error, while the mean dollar error was $105.30. *Id.*

Miscalculations and the later demands for payments that the tenant never knew they owed creates an atmosphere of distrust between tenants and landlords, whether they are PHAs or private owners. This atmosphere of mistrust may lead tenants who are given notice of alleged back rents to abandon their property instead of challenging the amount of rent assessed. Regardless of its validity, the mere perception that POAs often improperly calculate rents even when they receive correct information, or their failure to use verified information, leaves tenants with a sense of futility about income-reporting in the first place. Obviously, this compounds the problem for all parties involved.

If the earned income disregard is not properly implemented, tenants may be overpaying their rent and be subject to eviction for monies they did not actually owe. Moreover, it is extremely difficult to identify and locate tenants who have already been evicted under such circumstances.

Rental Housing Integrity Improvement Project

What RHIIP proposes to do is to develop and implement plans to correct management control deficiencies, reduce program error, and better assure the correct subsidy levels for rental housing subsidy programs. The first part of the project would develop initiatives related to program requirements. Such initiatives would include program simplification, documentation of current requirements, occupancy guidebooks, incentives and sanctions, and training and technical assistance.[58] It is expected that the initiatives will lead to improved documentation of program requirements for POAs and tenants, the development of rent calculation software, and implementation of an enforcement program that would assure compliance with rent and income determination requirements.

HUD has published a notice that makes suggestions for PHAs to improve income integrity within their organization.[59] One recommendation contained in the notice is to update any PHA-generated income calculation worksheets so that

[58]RHIIP Stakeholders Consultation Meeting, HUD Departmental Conference Room, Room #10233, Washington, D.C. (June 12, 2001).

[59]*See* Notice PIH 2001-15.

they are in compliance with the current *Public Housing Reform Act* provisions and requirements.[60] The notice also suggests that PHAs review income verification consent and waiver forms that are signed by residents.[61] These forms should inform residents of all available and anticipated methods for verifying income. It also recommends that the knowledge of occupancy specialists be reviewed with respect to income and rent determination, and that intake specialists be trained on the changes in the law, Forms 50058 and 0059, and MTCS 2000.[62] Finally, the notice recommends that PHAs develop an internal quality control system and read HUD's *Improving Income Integrity Guidance Booklet*.[63]

The HUD notice further recommends that PHAs use up-front income verification techniques instead of third-party verification.[64] This involves the use of automated government and agency data retrieval systems to access income information using tenants' Social Security numbers. PHAs will be given access to these resources once the tenant signs a consent form. HUD believes that up-front techniques will reduce errors in income reporting, verification and rent calculation. It would also reduce tenant fraud since PHAs would notify the applicant that up-front techniques would be used to verify the reported information. The resources available to conduct these types of verifications are the Tenant Assessment Sub-System, State Wage Information Collection Agencies, Credit Bureau Association Credit Reports, The Work Number, and Internal Revenue Service Letter 1722.

One point emphasized at the June 12 stakeholder meeting was the need to develop automated systems for calculating rent and subsidies. Automated tools would strengthen internal controls over program administration and HUD program oversight. HUD officials at the meeting stated that anything requiring a mathematical calculation should be automated.[65] HUD would like to develop an automated payment validation system to reduce errors that are due to POA rent calculations, billing errors and tenant underreporting of income.[66]

HUD also would like to implement a rent calculation tool that could be accessible via the Internet, is user-friendly, and would lead the person doing the rent calculation (a public or private owner) through a step-by-step calculation of the rent and subsidies. Such a tool could prompt the interviewer to inquire about certain sources of income or potential deductions or disregards. Such a prompt may lead the interviewer to ask, for example, if the tenant is involved in an applicable training program[67] and then proceed to lead the interviewer through the calculations necessary to credit the tenant with the proper disallowance. While HUD intends to make the program accessible only to POAs, if it were available and accessible also to tenants and their advocates, they would be able to use it to estimate tenant rent, spot potential income and rent errors and request appropriate deductions and exclusions.

HUD also would like to implement a rent calculation tool that could be accessible via the Internet, is user-friendly, and would lead the person doing the rent calculation (a public or private owner) through a step-by-step calculation of the rent and subsidies.

A third objective of RHIIP is to correct for poor quality control and error measurement. By using a comprehensive error measurement process, HUD would like to develop a rental subsidy program error methodology with a baseline and periodic measures of progress towards reducing error rates. An ongoing quality control program would review all major categories of POA and tenant errors and target high-risk POAs and tenants. Lastly, HUD believes that federal and state data sharing efforts will alleviate some of the current problems with income verification.[68]

Policy and Advocacy Implications of the RHIIP Program

Program Simplification

The PD&R Report recommends that the federal laws, regulations and HUD requirements should be simplified.[69] The claim is that the numerous federal laws and regulations for determining rent and income create an obstacle to accurate calculations. Because of the complex rules surrounding exclusions, deductions and verification, POAs have a difficult time properly determining what income level should be used in calculating rents. Moreover, the failure to verify accurately tenant income can lead to both underpayment and overpayment of rent.[70]

Further complicating the picture, but not highlighted in the PD&R Report, is the fact that HUD encourages tenants to seek gainful employment through a variety of programs

[60] *Id.*

[61] *Id.*

[62] MTCS 2000 is the computer program that PHAs use to enter the data from Form 50058.

[63] *See* Notice PIH 2001-15.

[64] *See Id.*

[65] RHIIP Stakeholders Consultation Meeting, HUD Departmental Conference Room, Room #10233, Washington, D.C. (June 12, 2001).

[66] *Id.*

[67] *See* 24 C.F.R. § 5.609(c)(8)(2001).

[68] *Id.*

[69] *OPD&R Final Report* at Ex–ix.

[70] 34 percent of the tenants in the study were underpaying their rent, while 22 percent were overpaying. This is a difference of less than 10 percent. *See OPD&R Final Report* at 22-23.

such as Welfare-to-Work,[71] Family Self-Sufficiency (FSS), Section 3, Community Service, etc. Inevitably, frustrating tenants' efforts to work is the PD&R report finding that PHAs fail to use available, verified information and make substantial mistakes regarding earned income. Further disincentives arise from PHAs failure to apply the earned income disregard accurately.

The earned income disregard currently provides a work incentive for families seeking to move from welfare to work. Although the PD&R report does not include a numerical analysis of the earned income disregard, it does not speak well of the program as currently structured, stating:

> As with many provisions associated with rent and income determinations, there apparently was little thought given to striking a balance between a policy objective and administrative feasibility. A flat dollar or percentage income deduction for any training or earned income, for instance, would have provided a more direct and understandable incentive, and would have been easier for program sponsors to implement and for HUD to monitor.[72]

Other simplifying approaches should also be considered, such as foregoing rent increases for a specified period of time after a resident's earned income increase.

Another way rent calculation might be simplified would be for POAs to exercise their option to conduct only annual recertifications instead of requiring interim recertifications when a tenant's income increases beyond a certain threshold. Income fluctuations occur more frequently now that more tenants are working and are no longer receiving a constant amount of income from welfare. An annual recertification would simplify the program by allowing all exclusions, deductions and disallowances to be calculated only once a year instead of several times. This would reduce the likelihood of error in the rent calculation. Improved accuracy and saved administrative time and costs are likely to offset any rent loss caused by such a system.

Until an improved program is put in place, tenant advocates should monitor tenant evictions for nonpayment of rent to ensure that the rent that they have been assessed is determined properly and calculated carefully to account for all income and any applicable disregards, exclusions and deductions.

HUD Information Outreach to POAs and Tenants

The PD&R study[73] recommends that HUD expand support of the occupancy activities of POAs and conduct an outreach campaign to PHAs and owners informing them of resources available from HUD. It suggests that HUD implement a nationwide and consistent approach to providing support and direction to POAs. For example, HUD could have a monthly, interactive telecast program focusing on a particular topic, and allowing participants to call in their questions. The study also recommends that HUD headquarters and resources should become more accessible to POAs and that headquarters' staff should provide consistent answers to POA inquiries. According to the study, HUD needs also to provide POAs with the forms, training and tools necessary for proper rent determination.[74] It can be argued that the same holds true for the HUD field staff, which need more information and training in order to ensure proper implementation of rent calculation regulations. HUD should also make greater use of Frequently Asked Questions (FAQ), which relay information in an understandable and relatively concise manner.

Until an improved program is put in place, tenant advocates should monitor tenant evictions for nonpayment of rent to ensure that the rent that they have been assessed is determined properly and calculated carefully to account for all income and any applicable disregards, exclusions and deductions.

The PD&R study fails to address outreach to tenants. It is likely that tenants are not aware when they qualify for exclusions, deductions, or income disallowances. Many are also uninformed about the consequences of an increase in their income and do not fully understand how their rent is being calculated. The implementation of a computer program or outreach campaign that informs tenants of their rights and responsibilities might alleviate much of this problem. If a rent calculation tool is developed, it should also be available to tenants so that they may estimate their rent. Training for tenants, POAs and HUD field offices is also necessary to apply the list of exclusions and deductions pertinent to income determination.

Accountability

Another recommendation made in the PD&R report is to make POAs accountable for adhering to HUD regulations and calculating rent properly.[75] Currently, the Section 8 Management Assessment Program (SEMAP) monitors the administration of Section 8 programs.[76] The program is designed, in part, to assess whether Section 8 tenant-based

[71]*Federal Funds Available to Assist Former Welfare Recipients' Shift into the Workforce*, 27 HOUS. L. BULL. 1 (Oct. 1997).

[72]*OPD&R Final Report* at ES-ix – ES-x.

[73]*See Id.* at 77-84.

[74]*Id.*

[75]*Id*. at ES-xi.

[76]24 C.F.R. § 985.1 (2001).

assistance programs provide eligible households with affordable housing at the correct subsidy amount. HUD uses SEMAP to measure PHA performance in key areas and assigns performance ratings. According to the PD&R study, it appears that PHAs are more responsive towards implementing HUD programs when they know they are being scored and penalized for failure to do so.[77] Therefore, the Public Housing Assessment System (PHAS) should be revised to also include an assessment of the proper rent, income and subsidy determination.[78]

The PD&R study also recommends that POAs with excessive errors should be required to submit and implement a corrective action plan and show improvement after a set period of time.[79] Quality control reviews at the POA level should be mandated for a percentage of income and rent determinations. These should be reviewed again by the HUD Field Offices to ensure that the calculations are being made properly. By making POAs more accountable, officials will be more thorough in collecting and processing data.

HUD's current policy goals only address holding the tenants accountable for paying the correct amount of rent. HUD plans to impose financial penalties on tenants who, as a result of incorrect reporting of income, underpay their rent by large amounts. Tenants assessed with back rent will be asked to repay the amount in a lump-sum and/or have their future rent payment adjusted so that the underpayment is recouped over the following year.[80] However, if tenants who have misreported income or underpaid rent are to be sanctioned, equally tough sanctions should be imposed on POAs for serious inaccuracies in their calculations. Additionally, those tenants who have overpaid must also receive redress, perhaps in the form of lump sum refunds, credits to their account, or rent adjustments.

Privacy Act Violations

HUD encourages POAs to have tenants sign a consent form, whereby they authorize HUD to use Social Security numbers to obtain information from the Internal Revenue Service to verify income information.[81] This practice raises serious concerns about possible violations of tenants' right to privacy. Because the *Privacy Act* applies to the collection of this delicate information,[82] advocates should ensure that POAs are informed only that the income reported to the POA does not match that reported to the IRS and that they do not gain any information about the actual income of the resident. These consent forms permit only HUD, not the POAs, to gain direct access to the IRS data for the named tenant.[83]

HUD's current policy goals only address holding the tenants accountable for paying the correct amount of rent. HUD has not addressed the issue of how to repay tenants who have overpaid their rent.

Tenant Overpayment

In HUD's proposed budget for FY 2002, HUD emphasizes that it would like to collect back rent from tenants who have allegedly underpaid their rent.[84] This creates the possibility that HUD, under budgetary pressure to "recapture" these funds, again will make overzealous attempts to pursue tenants who it believes to have underpaid rent in prior years. A HUD declaration that hundreds of millions of dollars were going uncollected spurred the Real Estate Assessment Center (REAC) to conduct an income match with respect to 1998 rents. As a result, over 216,000 letters were sent to tenants whose incomes, as reported to the IRS, allegedly did not match those reported to their POAs. In the end, only 11 percent of those tenants had actual discrepancies, with no indication as to the reasons behind those discrepancies. Ultimately, REAC reported the recovery of only $3,014,223 in excess rental assistance as a result of the 1998 match.[85] At the same time, those 216,000 letters may well have resulted in thousands of tenants vacating their units prematurely when confronted with the possibility that they underpaid their rents.

Conversely, but just as important, HUD has not addressed the issue of how to repay tenants who have overpaid their rent. Another unanswered question is how HUD will identify tenants who have under or overpaid their rent and by what method will it attempt to collect from tenants who have underpaid. At a minimum, tenant advocates propose that instead of evicting a tenant who has underpaid rent, a reasonable repayment plan (*i.e.*, a small percentage of the tenant's current income, spread out over a reasonable period of time) should be implemented to allow the tenant household to remain in residence. It has also been proposed that tenants be granted amnesty for any alleged back rent owed for at least the time that HUD takes to correct its flawed rent calculation system.

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[77]*OPD&R Final Report* at ES-v.

[78]24 C.F.R. § 902 (2001). The PD&R Report's data may not support this conclusion. The Public Housing Assessment System (PHAS), which is used to monitor only public housing, does not contain provisions similar to those in SEMAP. Yet, for example, 20 percent of households in both PHA-Administered Section 8 and public housing were determined to have overpaid their rent.

[79]*Id.*

[80]*See HUD FY 2002 Budget* at 483.

[81]*See, e.g.,* 24 C.F.R. §§ 5.210, 5.214, and 5.230 (2001).

[82]*Id.* § 5.212.

[83]*Id.* § 5.230; *see also Id.* § 5.234(b).

[84]*HUD FY 2002 Budget, Executive Summary* at v.

[85]Results of 1998 Income Verification Match, on file at NHLP.

Advocate Participation

On August 31, 2001, the Housing Justice Network, the National Alliance of HUD Tenants, and the Public Housing Residents National Organizing Campaign[86] submitted joint comments to HUD on its proposed Fact Sheet, a four-page explanation of income and rent calculations in HUD programs that is to be distributed to POAs and tenants throughout the country.[87] Currently, NHLP continues to seek tenants' and housing advocates' comments about the RHIIP program. Advocates plan to review HUD's proposals regarding the program as they are released. Advance comments with respect to particular topics are welcome. The issues covered include:

A. Program Requirements
   1. Documentation and Existing Requirements
   2. Program Simplification
   3. Occupancy Handbooks
   4. Incentives and Sanctions
   5. Training and Technical Assistance
B. Systems
   1. Rent Calculation Tool
   2. Automated Payment Validation
C. Quality Control & Error Measurement
   1. Comprehensive error measurement process
   2. Ongoing quality control program
   3. Federal and state data-sharing efforts

Interested persons should contact Vytas V. Vergeer at vvergeer@nhlp.org or (202) 347-8775. ■

[86]The Campaign is now known as *Everywhere and Now Public Housing Residents Organizing Nationally Together* (ENPHRONT).

[87]On file at NHLP.

In 1968, a minimum wage worker earned 120 percent of the federal poverty level.

In 1980, a minimum wage worker earned 98 percent of the federal poverty level.

In 1997, a minimum wage worker earned 84 percent of the federal poverty level.

Support Builds For New Production Bills

Introduction

The 107th Congress is considering twin, multifamily rental housing production bills that would construct at least 1.5 million in low-income housing units in the next 10 years without supplanting existing housing appropriations. The first, H.R. 2349, introduced in the House of Representatives on June 27, 2001 by representatives Bernard Sanders (I-VT), John McHugh (R-NY), and Barbara Lee (D-CA), together with 73 cosponsors, proposes to establish a National Affordable Housing Trust Fund from excess Federal Housing Administration (FHA) revenues. The second, S. 1248, was introduced in the Senate on July 25, 2001 by Senator John Kerry (D-MA) with 16 co-sponsors, including James Jeffords (I-VT) and Lincoln Chafee (R-RI). The bills, which are similar to each other, would help fill the growing gap in the availability of decent, safe, and affordable housing for low-income families in the United States.

These bills follow unsuccessful efforts by Senators Bond (R-MO) and Kerry (D-Mass), who each introduced housing production legislation last year. Senator Bond's bill, S. 3033, advanced to the point of being included in the Senate's Department of Housing and Urban Development (HUD) appropriations bill, but was subsequently deleted after it passed the Senate Appropriations Committee due to opposition by last year's Senate leadership. S. 3033 was more limited than the current bills in that it proposed an authorization of only one billion dollars to be drawn from excess Section 8 reserves. Thus, it simply shifted funding for low-income housing from one source to another, without adding new funding for the production of housing affordable to low-income residents. At the same time, however, the Senator Bond's bill was targeted to households with lower incomes than either of the current bills, which are discussed below. Housing advocates believe that Senator Bond plans to introduce another housing production bill, similar to S. 3033, in September. Senator Kerry's bill from last year, S. 2733, is substantially similar to the current Senate Bill, S. 1248. What follows in this article is a summary of the significant provisions of the two new bills.

Source of Funds

The House bill establishes a Trust Fund using funds from two sources. First, it proposes to use funds from the FHA's Mutual Mortgage Insurance Fund (MMIF) by tapping funds in excess of the amount necessary to maintain a capital ratio of 2 percent. Second, it proposes to use revenues generated by the Government National Mortgage Association (GNMA) in excess of administrative costs and expenses necessary to ensure its safety and soundness.[1] The Senate bill has a similar

[1]Section 3(b).

provision, except that it provides for a minimum 3 percent capital ratio for the MMIF.[2]

Distribution

The House bill would distribute funding to the states through a formula that considers:

- the percentage of families living in substandard housing;
- the percentage of families paying more than 50 percent of their annual income for housing;
- the percentage of persons having an income at or below the poverty level;
- the cost of developing or carrying out substantial rehabilitation of housing;
- the percentage of the population living in counties that have extremely low vacancy rates; and
- the percentage of housing that is extremely old (45 years old or older).[3]

Under the House bill, at least 1 percent of the total funds would be made available for each state. The Senate bill does not have a minimum percentage for each state. It also provides that only 75 percent of the funding would be distributed by formula, and reserves 25 percent of assistance for a national competition of nonprofit intermediaries.[4]

Matching

The Senate bill[5] and the House bill[6] provide $1 of federal funds for every $0.25 of non-federal funds the state provides. Nonfederal funds include 50 percent of funds allocable to tax credits, 50 percent of revenues from mortgage revenue bonds, 50 percent of proceeds from the sale of tax-exempt bonds, and any other state revenue not derived from federal sources. The Senate bill adds Temporary Assistance to Needy Families (TANF) block grants as a nonfederal source, but requires the Secretary of HUD to approve nondelineated sources as nonfederal.

Eligible Uses

Section 4(f)(2) of the House bill allows funds to be used for development of affordable housing of projects in which at least 50 percent of units qualify as affordable housing. Possible uses include:

- construction of new housing;
- acquisition of real property;
- site preparation and improvement, including demolition;
- substantial rehabilitation of existing housing;
- the provision of rental assistance under a continued assistance rental subsidy program; and
- providing incentives to maintain existing housing as affordable housing and to establish or extend any low-income affordability restrictions for such housing, including covering capital expenditures and operating costs.

The Senate bill contains most of the above provisions, with two exceptions. First, and most significant is that S. 1248 currently does not include the preservation of existing housing as an eligible use. Second, as discussed below, the Senate bill does not use the term "continued assistance rental subsidy program," but permits Section 8-type rental subsidies to be an eligible use.[7]

The House bill requires 75 percent of the grant amounts to be used for eligible activities relating to affordable housing for families whose income does not exceed 30 percent of area median income.

Targeting

The House bill[8] requires 75 percent of the grant amounts to be used for eligible activities relating to affordable housing for extremely low-income families in the state. "Extremely low-income" is defined as families whose income does not exceed 30 percent of area median income (AMI).[9] The bill also provides that the states' allocation plans must include a list of factors and preferences for distributing funds to subrecipients (localities and other agencies awarding funds for specific developments). It also requires that these allocation plans include a preference for applicants that will use:

- at least 45 percent of the funding for housing families with incomes less than 30 percent of AMI or state median income, whichever is higher;
- at least 30 percent of the funds for housing families with incomes equivalent to federal full-time minimum wage or state full-time minimum wage, whichever is higher (but for households larger than three persons, the housing must be affordable at 1.5 times the applicable minimum wage).

[2]*Id.* at 4(b).

[3]*Id.*

[4]S. 1248 at Section 5(a).

[5]*Id.* at Section 5(b)(2).

[6]Section 4(e and f) of H.R. 2349.

[7]S. 1248, Section 3(4).

[8]H.R. 2349, Section 5(a).

[9]*Id.* at Section 6(6).

- not more than 25 percent of the funds for the development, preservation or rehabilitation of existing affordable housing or rental or homeownership assistance for low-income families in the state (up to 80 percent of AMI).[10]

The Senate bill requires that each state distribute at least 75 percent of its funds for rental housing to families with income less than 30 percent of AMI (exceptions are available for areas with unusually high or low AMIs). Any remaining amount (up to 25 percent) is available to families between 50 and 80 percent of AMI for affordable rental housing or homeownership.[11]

Affordable Housing

The House bill[12] and the Senate bill[13] both define affordable housing as rental housing with restricted rents that do not exceed the lesser of HUD-established Fair Market Rents (FMRs) used by public housing agencies (PHAs) to operate the voucher program, or 30 percent of the adjusted income of a family at 65 percent of the AMI, with the usual authority for HUD to establish exceptions in certain areas.

Additionally, the House bill limits the tenant contribution for any given unit to 30 percent of the tenant family's adjusted income.[14] It also requires the housing provider to set aside units for tenant or project-based vouchers proportionate to the level of trust fund assistance used in the project and prohibits discrimination against voucher holders. The Senate bill also requires intermediaries receiving funds to certify, in their Plans of Use, that tenant contributions will not exceed 30 percent of income, and that trust funds will supplement other assistance, including Section 8 assistance.[15] A percentage of the units, proportionate to the level of trust fund assistance used, but not to exceed 25 percent, must be made available for Section 8 voucher recipients or project-based vouchers.

Tenant Rent Contributions and Operating Subsidy

The targeting requirements discussed above mandate that most trust fund units be reserved for individuals with very low incomes. Since the definition of affordable housing also limits the tenants' portion of the rent to 30 percent of income, most units will require an additional operating subsidy. Tenant rent contributions alone, even with substantial capital subsidies provided by the trust fund, usually will be insufficient to support operating costs and any remaining debt. Neither bill definitively resolves how these necessary operating subsidies will be provided. However, in addition to the above-described provisions concerning the use of Section 8 vouchers in the definition of "affordable housing," both bills address the issue to some extent.

The House bill includes a "continued assistance rental subsidy program" as an eligible use of trust funds,[16] defining that term as one that provides project-based rental assistance for a maximum of three years and, after three years, requiring families to receive Section 8 project-based voucher rental assistance.[17] Thus, the bill assumes that HUD will have additional Section 8 resources to fund these project-based vouchers, or that local jurisdictions will have and use sufficient Section 8 funds or other housing resources of their own.

The Senate bill defines "continued assistance rental subsidy program," in a similar way to the House bill, as one that provides project-based assistance for not more than three years. It also requires that such a program give tenants the opportunity to move with tenant-based assistance after one year of occupancy. However, in an apparent oversight, the term "continued assistance rental subsidy program" appears nowhere else in the Senate bill. Instead, "rental subsidy, in the same manner as [Section 8] voucher assistance" is listed as an eligible use for trust fund dollars.[18]

Neither bill focuses attention on requiring that individual projects house tenants with varying income levels. However, both offer some incentives to assure that the neighborhoods in which these properties are built have reasonable opportunities for employment and economic growth.

Income Mixing

Neither bill focuses attention on requiring that individual projects house tenants with varying income levels. However, both offer some incentives to assure that the neighborhoods in which these projects are built have reasonable opportunities for employment and economic growth. The House bill provides that a state must submit an allocation plan that includes preferences to promote income mixing.[19] The only provision that addresses this issue within an individual development states that one funding preference is the extent to which the project will have residents of various

[10] *Id.* at Section 5(e)(3)(B).

[11] S. 1248, Section 5(b)(4).

[12] H.R. 2349, Section 6(1).

[13] S. 1248, Section 3(2).

[14] H.R. 2349, Section 6(1).

[15] S. 1248, Section 5(c)(3)(C).

[16] H.R. 2349, Section 6(3).

[17] *Id.* at Section 6(2).

[18] S. 1248, Section 3(a)(4)(E). In S. 2997, which was introduced in the 106th Congress, the section defining eligible activities used the term "continued assistance rental subsidy program," rather than the language used in S. 1248.

[19] H.R. 2349, Section 5(e)(3)(B).

incomes. The remaining preferences address the neighborhood income mixing, in that they consider:

- the extent of employment and other economic opportunities in the area;
- the extent to which the county is experiencing an extremely low vacancy rate (2 percent or less);
- the extent to which the percentage of extremely old housing exceeds 35 percent;
- whether 75 percent of the funds will be used in census tracts where the number of families with income below the poverty line is less than 20 percent, or in communities undergoing revitalization; and
- whether the remaining 25 percent of the funds will be used in census tracts where the number of families with income below the poverty line is greater than 20 percent and are not located in a community undergoing revitalization.

The Senate bill requires that the recipients' Plans of Use include a certification that the housing will be located in a mixed-income development,[20] and includes the preferences for neighborhood diversification included in the House bill and listed above.[21]

Use Restriction

Section 5(b)(4)(B)(i)(I) of the Senate bill and Section 6(1)(E)of the House bill both require that the housing remain affordable for 40 years. Currently, neither of these bills has been brought to the housing committees and no hearings have been scheduled. The staff of the bill's sponsors are working to gain additional bipartisan support and hope to hold hearings in the fall.

National Housing Trust Campaign

These bills are, in part, an answer to the plea by housing advocacy groups, including social services providers, tenants' groups, and others for more low-income housing. One such advocacy group is the National Housing Trust Fund Campaign,[22] a coalition of more than 1,100 organizations that is advocating for new low-income housing production legislation this year. Although the Trust Fund Campaign has its own production proposal, which differs slightly from the House and Senate bills, it is currently supporting both the House and Senate Bills. Highlights of the Campaign's proposal include:

Distribution

The Campaign proposes that 90 percent of the funds would be distributed to states by the formula with the remaining 10 percent to be distributed through national competition.

Matching

The Campaign's proposal sets the matching ratio at $2 of federal funds for every $1 a state or locality provides. If a state uses locally controlled federal resources (*e.g.*, HOME and CDBG funds), rather than purely state funds, it would receive $1 of federal funds for every $1 it provides.

> *The need for more and improved housing for low-income families is finally becoming more of a priority in Congress.*

Targeting

The Campaign's proposal provides that 75 percent of the funds would be used for extremely low-income housing. Thirty percent of that 75 percent should be used for housing that is affordable to families with income at or below the equivalent of full-time minimum wage. The remaining 25 percent of the total funds can be used for families earning up to 80 percent of AMI, provided the funds are restricted to production, preservation, and rehabilitation in low-income neighborhoods. Additionally, the Campaign proposes that no tenant would pay more than 30 percent of their income for rent.

Use Restriction

The Campaign's proposal would extend the use restriction requirement so that the housing remains affordable for the life of the project. Regardless of the differences, the Campaign is likely to support any substantial production or preservation bill that emerges from either chamber of Congress.

Conclusion

These proposals, along with Congress' creation of the Millennial Housing Commission, indicate that the need for more and improved housing units for low-income families is finally becoming more of a priority in Congress. In light of the dwindling budget surplus, however, the passage of a major housing production bill faces a difficult battle. Progress will require sustained efforts by housing advocates, both on Capitol Hill and within the communities that so urgently need additional low-income housing resources. ■

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[20]S. 2349, Section 5(c)(3)(C)(iv).

[21]*Id.* at Section 5(b)(4)(B)(ii).

[22]*See* www.nhtf.org for a detailed outline of the Campaign's proposal, a complete list of endorsers, meeting minutes and other activities of the Campaign.

Preservation Bills Resurrected

Introduction

The 107th Congress, like the 106th, now has before it two bills aimed at preserving low-income housing through preservation matching grants. The grants would provide incentives to state and local governments that use some of their own locally generated or locally controlled funds for preserving federally assisted affordable housing. The first bill, H.R. 425, *the Housing Preservation Matching Grant Act of 2001*, was introduced by Jerrold Nadler (D-NY) on February 6, 2001, with 41 original cosponsors. The second, S.1365, *The Affordable Housing for Seniors and Families Act of 2001*, was introduced by Senator James Jeffords (I-VT) with five original cosponsors on August 3, 2001. Both are slightly revised versions of bills that were introduced in the 106th Congress and discussed in detail in prior issues of the *Bulletin.*[1] The bills seek to restore a federal role in the preservation of existing federally subsidized or assisted properties that face conversion to market-rate use. Such a federal funding role is essential to preserving the at-risk stock, because state and local resources are rarely sufficient to fund the purchase of the owner's equity and all the rehabilitation costs.

Highlights of the Bills

Eligible Uses

The two bills have identical provisions regarding eligible uses. Owners of projects receiving grants from their state would be permitted to spend the money for acquisition, project rehabilitation, operating costs, or other capital expenditures. (S. 1365, Sec. 2(e)(1); H.R. 425, Sec. 4(a)).

Eligible Properties

Both bills define eligible projects quite broadly. Grants could be made to properties subsidized by the Department of Housing and Urban Development (HUD) under the Section 221(d)(3) BMIR[2] and 236 programs, and to any properties receiving project-based Section 8 assistance. Certain resident-owned and Rural Housing Service (RHS) Section 515 Rural Rental Housing would also be permitted to receive grants.

Continued Use Restrictions

Section 2(e) of S.1365 would require owners of eligible projects to agree to some continued use restriction in order to receive additional funds. For Section 221(d)(3) BMIR, Section 236, and Rent Supplement properties, the owner must agree to an unconditional waiver of prepayment rights, along with low-income affordability restrictions that will last for at least 15 years after the time the project receives its grant. For eligible projects with Section 8 assistance, the owners must agree to accept Section 8 contract renewals until either 15 years after the grant or for the remaining term of the mortgage, whichever is longer. Projects owned by tenants or resident-approved nonprofit organizations must agree to 15-year low-income affordability restrictions.

H.R. 425 has many of the same provisions. Section 4 of the bill also requires the unconditional waiver of prepayment rights. For Section 221(d)(3) BMIR, Section 236, and Rent Supplement properties, the owner must also agree to extend the low-income affordability restrictions, presumably through the remaining term of the mortgage, although the legislation does not specifically state the applicable limitation. Eligible projects with Section 8 assistance must agree to extend the Section 8 assistance for "the maximum period allowable under law." These use restrictions will probably be debated further as the legislation moves forward.

The grants would provide incentives to state and local governments that use some of their own locally generated or locally controlled funds for preserving federally assisted affordable housing.

Total Resources

The impact of either bill will be dependent on the amount of money actually appropriated to fund it. Neither bill specifies an authorized amount. Rather, S.1365 authorizes appropriation of "such sums as may be necessary," for fiscal years (FY) 2002 through 2005. Likewise, H.R. 425 authorizes appropriations of "necessary" sums for FYs 2002 through 2006. The amounts potentially appropriated cover only the federal contribution, not the total amount of state matching funds advanced. Because the funding for each bill is deferred to the annual appropriations process, advocates must remain active in appropriations discussions to assure that the enacted grant program receives enough resources to preserve a significant segment of the at-risk housing stock.

The Matching Formula

Although the bills are commonly described as "matching grant" programs, states may not receive a full match. S.1365, like its predecessor S.1318, instructs HUD to distribute available funds based upon the proportion of the applying state's need to the total need of the grant recipients for that year (Section 2(f)). This amount is then capped at the amount

[1]*See Senate Considers New Preservation Legislation*, 30 HOUS. L. BULL. 103 (July 2000); *Preservation Issue Heats Up In Congress*, 29 HOUS. L. BULL. 133 (July/Aug. 1999); *New Preservation Proposal Introduced In Congress*, 29 HOUS. L. BULL. 52 (Mar. 1999). In the 106th Congress, the House bill providing for matching grants was folded into the Fiscal Year (FY) 2000 HUD/VA Appropriations bill (H.R.202, at the time) that passed the House floor, 405 to 5, but these grant provisions were deleted in conference negotiations.

[2]Below Market Interest Rate.

of the calculated match-up to two federal dollars for every one state dollar spent for purposes that would be permitted by the bill itself (Section 2(g)). State allocations of federal tax credits or mortgage revenue bond funds to preservation would also count, but only 50 percent of such funds would be credited as non-federal funds for the purposes of the match (Section 2(g)(3)).

Many states still view low-income housing preservation as a federal problem and have very few available state or local resources to direct to this purpose.

H.R. 425 contains identical provisions regarding the match and distribution (Section 6(a)). However, it does not permit counting federal tax credits or mortgage revenue bond funds as non-federal sources for purposes of the match (Section 6(c)).

The matching requirement—both how much and what counts as a state and local contribution—could produce some controversy. States might seek a more flexible approach, with more resources countable than the current bills allow. Many still view low-income housing preservation as a federal problem and have very few available state or local resources to direct to this purpose.

Allocation of Funds

Overall, states and localities are likely to request much more money than will be available in any given year. Under the Senate bill, initial allocations would be made directly to states and localities, under an application procedure to be designed by HUD. The states and localities would then decide how to distribute it among eligible projects, guided by a set of statutory criteria. Section 2(f)(2) of S.1365 establishes two factors for HUD to consider in distributing the grant monies to states and localities:

- the number of units in the state or locality that are at risk of prepayment, opt-out, or otherwise at risk of being lost as low-income housing; and
- the difficulty residents would have in finding adequate affordable housing if displaced.

One of the concerns here is how HUD would actually implement these criteria for determining relative needs. For example, HUD might seek to oversimplify the process by looking merely to rent to published Fair Market Rent (FMR) ratios, rather than considering all factors, such as equity in the units and low Real Estate Assessment Center (REAC) scores.

H.R. 425 fails to provide even this rudimentary guidance on allocating funds, saying merely that states may submit applications which should "contain any information and certification necessary for the Secretary to determine whether the State is eligible to receive such a grant." (Section 8). Local governments would apparently have to seek funds through the states, rather than receiving funds directly, as under the Senate bill.

S. 1365 also provides some guidance to the states and localities in distributing the funds, once received, requiring consideration of the following factors:

- whether the assistance will be used to transfer the project to a nonprofit;
- owner use restrictions beyond the required minimum;
- providing access to jobs, transportation, etc.;
- meeting specific unmet needs, *i.e.*, disabled housing, or housing for families with children;
- the local government resources provided; and
- other factors established by HUD or the locality. (Section 2(e)(1)(b)).

Again, H.R. 425 provides no such guidance whatsoever to the states on which projects to assist.

Both of these bills would also require significant advocacy work at the state level. Since they would award money to states, rather than directly to projects, some states will have to be pushed to apply. Also, because states may consider factors that they establish to distribute funds, state housing finance agencies (HFAs), which will probably make the distribution decisions, may prefer to preserve federally subsidized units already in their own portfolios—perhaps units less at risk than those that are not state-financed. Advocacy will have to ensure the fair targeting of state and federal resources to those projects most in need.

Conclusion

To date, neither of these bills has progressed far in the 107th Congress. H.R. 425 was referred to the Subcommittee on Housing and Community Opportunity on March 2, 2001 and S. 1365 was referred to the Committee on Banking, Housing, and Urban Affairs on August 3, 2001. One possible scenario is that preservation could become an eligible use of any new production funds Congress provides,[3] and matching grant legislation could be incorporated into any such program. Advocates should contact their representatives in Congress to express their support for these bills and for any measures that Congress could take to increase the low-income housing stock. ■

[3] *See Support Builds for Production Legislation*, on page 210 of this issue.

Ninth Circuit Authorizes Circumvention of RHS Section 515 Preservation Statute Through a Quiet Title Action

Introduction

In what appears to be a very questionable decision, the United States Court of Appeals for the Ninth Circuit recently held that a partnership that owns a Rural Housing Service (RHS) Section 515 Rural Rental Project can compel the RHS, by way of a quiet title action, to accept a prepayment of its loan in contravention of the prepayment restrictions placed on all Section 515 loans by the *Emergency Low-Income Housing Preservation Act of 1987*[1] (ELIHPA) and subsequent amending legislation. *Kimberly Associates v. United States*, 2001 WL 930,454, ___F.3d___, (9th Cir., August 17, 2001).

Kimberly Associates, an Idaho partnership, secured a long-term[2] Section 515 loan from the Farmers Home Administration (FmHA) (now RHS) in 1981 and used the proceeds to construct a rural rental housing project. In its loan documents with FmHA, Kimberly Associates agreed to construct and maintain the housing as affordable to low-income households for a term of 20 years and to abide by various FmHA regulations, which placed a number of restrictions on the owners, including profit caps. The use restrictions notwithstanding, the promissory note executed by Kimberly Associates contained a provision permitting it to prepay the Section 515 loan at any time.

Six years later, in 1987, Congress enacted ELIHPA, which placed certain prepayment restrictions on all Section 515 projects that were financed under contracts entered into prior to December 21, 1979. In 1992, Congress made those restrictions applicable to the Kimberly Associates property by adopting legislation that extended the prepayment restrictions to all projects financed between December 21, 1979 and December 15, 1989.[3] In essence, the 1987 and 1992 restrictions preclude any owner of Section 515 housing from prepaying a loan, if the housing is serving the needs of low-income or minority households, without first offering the project for sale, at fair market value, for a period of six months to a nonprofit or public entity that would maintain the housing as affordable to low-income households.[4]

Kimberly Associates sought to prepay the $5,979 balance on its RHS loan[5] in 1987, four years before even the original use restriction on the development had expired. RHS refused to accept the prepayment and sought to force Kimberly Associates to comply with the prepayment restrictions, which it refused. Instead, Kimberly brought an action to quiet title and force the United States to accept the prepayment in accordance with the promissory note.

The Decision

In the district court proceedings, which were conducted before a magistrate judge, RHS sought summary judgment on two grounds. First, it argued that the action was barred by the government's not having waived sovereign immunity in quiet title actions. Second, it contended that the relief sought was precluded by the unmistakability doctrine, a special and limited rule of contract construction that does not allow for the enforcement of contract provisions that were abrogated by subsequent acts of the government acting in its sovereign capacity unless the sovereign, in unmistakable terms, has waived its right to modify those contract provisions. In an unpublished opinion, the district court held that the sovereign immunity defense did not apply to the case but that the unmistakability doctrine did. The magistrate thus dismissed the complaint and Kimberly Associates appealed the decision.[6]

The Court of Appeals for the Ninth Circuit upheld the sovereign immunity ruling on the grounds that 28 U.S.C. § 2410 unambiguously waives sovereign immunity in any civil action where an individual seeks to quiet title to real property on which the United States has a lien. It rejected the RHS's contention that Kimberly Associates' claim was contractual and injunctive in nature and thus not within the ambit of a quiet title action. According to the court, nothing in Section 2410 prescribes the remedial details of a quiet title action and for these, the court found, the courts have turned to state law for guidance. Turning to Idaho law, it found that it is quite expansive and had specifically allowed for a plaintiff to proceed in a quiet title action on the basis that the defendant had refused tender of payment. It therefore concluded that sovereign immunity had been waived.[7]

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[1]Pub. L. 100-242.

[2]The loan to Kimberly Associates was, in all likelihood, a 50-year loan.

[3]*See Housing and Community Development Act of 1992*, Pub. L. 102-550, 106 Stat. 3672 (1992).

[4]*See* 42 U.S.C.A. § 1472 (c)(West 1994 and Supp. 2001).

[5]Since inception, the Kimberly Associates project was receiving project-based Section 8 assistance from the Department of Housing and Urban Development (HUD). Under that contract, the rent payments to Kimberly Associates from HUD increased annually in accordance with an annual adjustment factor prescribed in the contract and tied to an inflation index. These adjustments typically exceeded the increased cost of operating the project and generated excess income for the project. Because the Section 515 contract with RHS restricted the profits that the owner could derive from the operation of the project, the owner was required to either place the excess cash in the project's reserve account or to use the funds to prepay the RHS loan. It appears that Kimberly Associates chose the latter and, as a consequence, the 50-year loan was paid nearly in full after a mere 16 years.

[6]*Kimberly* at 11,161-2.

[7]*Id.* at 11,162-3.

Contrary to the district court, the appeals court found that the unmistakability doctrine did not apply to the case and that Kimberly Associates could pursue the quiet title action. The court's analysis of the unmistakability defense begins with a recitation of the applicable rules for which the starting point is the general proposition that the rights and duties of the United States as a contracting party are no different than those of a private party. The court next acknowledges that the rule is limited by the existence of sovereign power to legislate and that the sovereign power "governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms."[8] The court ends its analysis by quoting the Supreme Court's recent decision in *United States v. Winstar,*[9] for the proposition that "when the government is acting as a private contracting party, then the [unmistakability] doctrine does not apply, and the government's rights and duties are governed by law applicable to private parties unaltered by the government's sovereign status."[10] In summary, it concludes that "an unmistakability doctrine analysis requires examination of two questions: (1) in what capacity was the United States acting when it breached its contractual obligations? and (2) if the United States acted in its sovereign capacity, did the contract waive sovereign rights in unmistakable terms?"[11] Turning to the case before it, the court quickly concludes that:

> [i]t is unquestionable that, when it altered the terms of its contract with Kimberly, the government was not acting in a "public and general capacity." The provisions of the 1992 amendments to ELIHPA applicable to Kimberly's situation constituted a narrow, targeted piece of legislation aimed at relieving the government from onerous provisions contained in a finite number of specific contracts it had already entered....In the context of federal programs, it appears relatively few loans were affected, perhaps numbering less than 5,000. To prevent enforcement of these private contracts between [the government] and the borrowers would be to "give the Government-as-contractor powers that private contracting parties lack." Such a result cannot be countenanced because the government in its private contracting capacity cannot exercise sovereign power "for the purpose of altering, modifying, obstructing or violating the particular contracts into which it had entered with private parties."[12]

Having concluded that the unmistakability doctrine does not apply to the case, the court found it unnecessary to answer the second question and proceeded to hold that it was an error by the district court to grant RHS' motion to dismiss. Accordingly, it reversed and remanded the case for further proceedings consistent with the decision.[13]

The Kimberly decision is inconsistent with a long line of Supreme Court cases that define the unmistakability doctrine and repeatedly refuse to allow private parties to enforce contractual provisions that have the effect of blocking the exercise of a sovereign power of the Government.

Analysis

The *Kimberly* decision is inconsistent with a long line of Supreme Court cases that define the unmistakability doctrine and repeatedly refuse to allow private parties to enforce contractual provisions that have the effect of blocking the exercise of a sovereign power of the Government.[14] As the Supreme Court recently stated:

> a contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an Act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power. The cases extending back into the 19th century thus stand for a rule that applies when the Government is subject either to a claim that its contract has surrendered a sovereign power (*e.g.*, to tax or control navigation), or to a claim that cannot be recognized without creating an exemption from the exercise of such a power (*e.g.*, the equivalent of exemption from Social Security obligations). The application of the doctrine thus turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the Government.[15]

Moreover, as the Court continued, "the particular remedy sought is not dispositive and the doctrine is not rendered inapplicable by a request for damages, as distinct from specific performance."[16]

The error in the *Kimberly* decision stems from the court's apparent misunderstanding of the general applicability of the unmistakability doctrine and the consequences of its

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[8]*Id.* at 11,164.

[9]518 U.S. 839, 895 (1996).

[10]*Kimberly* at 11,164 (clarifying language added).

[11]*Id.*

[12]*Id.* at 11,165-6 (internal citations and footnotes omitted).

[13]*Id.* at 11,167.

[14]*See e.g. Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) and *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987).

[15]*United States v. Winstar,* at 878-9 (1996) (footnotes omitted).

[16]*Id*.

inapplicability.[17] After quoting the Supreme Court's clear statement as to the applicability of the unmistakability doctrine, the court totally ignores its substance and proceeds to conclude, based on another quote from *Winstar,* that "when the government is acting as a private contracting party, then the doctrine does not apply, and the government's rights and duties are governed by law applicable to private parties unaltered by the government's sovereign status."[18] What the *Kimberly* court does not explain is that this last statement, upon which both its analysis and conclusion hinge, comes from a part of *Winstar* that does not discuss, and is not related to, the unmistakability doctrine. It comes from a totally separate part of the *Winstar* decision wherein the Court discusses the "sovereign acts" doctrine, a related but totally independent doctrine that has been used by the Government to avoid damage liability in cases where it has abrogated its contracts with private parties.[19] Indeed, the quote upon which the *Kimberly* court relies has its origins in *Lynch v. United States*,[20] and is a general statement describing the starting point for analyzing the rights and obligations of the government as a contractor. It has no applicability whatsoever to the unmistakability doctrine, or, for that matter, to the sovereign acts doctrine.[21]

The Kimberly decision stands the unmistakability doctrine on its head.

The *Kimberly* decision stands the unmistakability doctrine on its head. By granting the remedy of quiet title on the basis of a promissory note provision authorizing prepayment of the loan at any time, the court is blocking the government's exercise of a sovereign power—the enactment of legislation (*i.e.* ELIHPA)—to the plaintiff and all similarly situated owners of Section 515 housing in the court of appeals' jurisdiction, which extends over nine western states and several territories.[22] Importantly, regardless of how one views *Winstar*, that decision does not control the outcome in *Kimberly*. The *Winstar* analysis is only applicable to cases where the plaintiff seeks to recover damages arising from the breach of a government contract and is not at all applicable where the plaintiff seeks to specifically enforce a contract provision against a statute that abrogates it or, as in *Kimberly*, to avoid a statutory provision that limits the rights of the plaintiff's preexisting contract rights. In these cases, the unmistakability doctrine is clearly applicable and the plaintiff's claims must be dismissed. Thus, contrary to the court's conclusion, the unmistakability doctrine is applicable to the case and the only means by which the prepayment provision could have been enforced is through a finding, not made, that the government, in unmistakable terms, had waived its right to alter that provision through subsequent legislation.[23]

Conclusion

It is expected that RHS will seek reconsideration, or reconsideration *en banc*, of *Kimberly.* When it does, future developments in the case will be reported in the *Bulletin*. ■

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[17]Moreover, it appears that the court may have misunderstood the difference between the sovereign acts doctrine and the unmistakability doctrine because, as noted later, in several instances it relies on several courts' discussion of the sovereign acts doctrine and applies that language to its analysis of the unmistakability doctrine. *See* footnote 19, *infra.*

[18]*Kimberly* at 11,164.

[19]*See* 518 U.S. 891-910. Surprisingly, the *Kimberly* court repeats its reliance on other courts' discussion of the sovereign acts doctrine to enlighten and support its analysis of the unmistakability doctrine. *See Kimberly* at 11,116 (discussing *Gen. Dynamics v. United States*, 47 Fed. Cl. 514, 542 (2000) and *Yankee Atomic Electric. v. United States*, 112 F.3d 1569, 1575 (Fed. Cir. 1977)).

[20]292 U.S. 571, 579 (1934).

[21]*See Winstar* at 860. As stated by the Court, "[w]e took this case to consider the extent to which *special rules, not generally applicable to private contracts*, govern enforcement of the governmental contracts at issue here." *Id.* (emphasis added).

[22]The *Kimberly* court's confusion as to the applicability of the unmistakability doctrine undoubtedly arises from the Supreme Court's fractured decision in *Winstar*, a case that had its roots in the savings and loan crisis of the 1980s. In that case, a four-justice plurality found that the thrifts' contracts with the government, which granted the thrift institutions the right to use certain favorable accounting principles that were later prohibited by an act of Congress, had been construed by the lower courts as not blocking the government from exercising its authority to subsequently modify banking regulations or any other sovereign power. 518 U.S. at 881. It did so on the basis of the lower courts' conclusion that the contracts contained a risk-shifting agreement that made the government liable for *damages* arising from the breach brought about by passage of the subsequent legislation. The plurality found that the award of *damages* did not amount to an exemption from the new law and, therefore, found no reason to apply the unmistakability doctrine. *Id.* at 881.

Three justices who concurred in the Court's judgment, arrived at the same result another way. They believed the unmistakability doctrine applied to the contracts in question but that the government made an unmistakable promise to regulate the thrifts into the future in accordance with the favorable accounting rules. Hence, the concurring justices concluded that the doctrine, while applicable, did not shield the government from damages. The two remaining and dissenting justices also agreed that the unmistakability doctrine applied to the contracts but did not find the requisite, unmistakable promise not to alter the thrifts' regulatory scheme. Thus, they concluded that the government should have been shielded from liability.

Courts and commentators have been confused by *Winstar* because the Court's plurality, but not its majority, appears to have carved an exception into the unmistakability doctrine whenever the underlying contract can be construed to contain a risk allocation mechanism by which the government can be held liable for the damages occasioned by a breach. At the same time, the Court's majority, consisting of the three justices concurring in the judgment and the two dissenting justices, rejected the plurality's analysis although the majority split as to the appropriate result in that case.

[23]*See Parkridge Investors v. Farmers Home Administration*, 13 F.3d 1192, 1198 (8th Cir. 1994).

Recent Housing Cases

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

Paraquad, Inc. v. St. Louis Housing Authority, 259 F.3d. 956, 2001 WL 884,103 (8th Cir., August 8, 2001). A split U.S. Court of Appeals for the Eighth Circuit affirmed the district court's decision to grant summary judgement in favor of the St. Louis Housing Authority (SLHA) and against the plaintiff for lack of ripeness. The plaintiffs, disabled public housing tenants, challenged the SLHA's HOPE VI plan that proposed, among other things, demolition of 1,200 public housing units, half of which were vacant, and the construction of 650 new, mixed-income units. The plan included the reservation of certain units for elderly tenants, but no reservation for disabled non-elderly tenants. The plaintiffs, two non-elderly disabled individuals and three organizations that provide social services to the disabled, sought injunctive and declaratory relief under the *Fair Housing Act*, the *Rehabilitation Act*, the *Americans with Disabilities Act*, the *Equal Protection Clause*, and the *United States Housing Act*, alleging that disabled individuals were not afforded equal housing and service opportunities under the HOPE VI plan. The court held that the case was not ripe for adjudication because none of the plaintiffs could show that any disabled individual had been or would be denied accessible housing in the implementation of the HOPE VI plan. It reasoned that because the plan was still in its early stages—demolition had not yet started, drawings were still in the preliminary stage, and no construction had begun—and SLHA had promised to provide tenants with temporary or permanent housing at comparable cost, it was too early to adjudicate the plaintiffs' claims. The dissenting judge argued strongly that the case was ripe for adjudication because the HOPE VI plan excluded non-elderly disabled persons from parts of the development.

City of Pittsburgh Commission on Human Relations v. DeFelice, ___A.2d___, 2001 WL 909,126 (Pa. Commw. Ct., August 14, 2001). The court affirmed a lower court's decision, which itself upheld a decision by the City of Pittsburgh Commission of Human Relations (CHR), that the defendant landlords had violated a Pittsburgh ordinance when it intentionally and unlawfully discriminated against an African-American couple seeking to rent an apartment. The plaintiffs were quoted a price of $850 per month for an apartment and given a rental application. Feeling discriminated against, they filed a complaint with CHR, which sent testers to the apartment. The first set of testers, a Caucasian couple, was quoted a rent of $700, while a second set of testers, an African-American couple, was quoted a rent of $950. The defendants argued that because the plaintiffs never applied for the apartment, and thus were not denied an opportunity to rent the unit, they had not established a necessary element of a Fair Housing claim under the ordinance. The court, relying on an interpretation of Section 3604(b) of the federal Fair Housing Act for guidance, held that the defendants' offering the apartment to the plaintiffs and the African-American testers at higher rents than to the Caucasian test couple discriminated in the terms and conditions of rental and that the plaintiffs had presented a *prima facie* case of discrimination. Thus, it reasoned that the burden of providing a nondiscriminatory reason for their actions was appropriately shifted to the defendants. The court of appeals upheld the lower court's decision that there was substantial evidence that the defendants did not meet this burden. It also upheld the lower court's affirmance of an award of attorneys' fees. ■

[1]www.westlaw.com

[2]www.lexis.com

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

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD), and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued through August 15, 2001. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

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

HUD Regulations

Housing Vouchers CFR Correction
66 Fed. Reg. 42,731 (August 15, 2001)

Summary: In 24 C.F.R. Part 887 is removed and reserved.

[1]*At* www.access.gpo.gov/su_docs.

[2]*At* www.hudclips.org/cgi/index.cgi.

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

[4]*At* www.rdinit.usda.gov/regs.

HUD Proposed Rules

Public Housing Agency Plans: Deconcentration—Amendments to Established Income Range Definition; Proposed Rule; 66 Fed. Reg. 42,925 (August 15, 2001)

Summary: This proposed rule would amend the deconcentration component of HUD's Public Housing Agency (PHA) Plans regulations to revise the definition of Established Income Range (EIR) to include within the EIR those developments in which the average income level is at or below 30 percent of the area median income (AMI), and therefore ensure that such developments cannot be categorized as having average income "above" the EIR. An income level that is at or below 30 percent of the AMI is defined as "extremely low income" in HUD's regulations. HUD believes that developments with an average family income at or below 30 percent of the AMI should not be categorized as higher income developments for purposes of income-mixing because efforts to place lower-income families into these developments would not result in income deconcentration as contemplated by the statute.

Comment Due Date: October 15, 2001.

HUD Federal Register Notices

Notice Inviting Applications: Designation of Forty Renewal Communities; 66 Fed. Reg. 41,431 (August 7, 2001)

Summary: *The Community Renewal Tax Relief Act of 2000* (CRTR Act) authorizes HUD to designate up to 40 Renewal Communities within which special tax incentives would be available. This notice invites applications for designation of nominated areas as Renewal Communities (RCs) in accordance with the designation process described in this notice.

Application Due Date: October 12, 2001.

HUD Notices

Guidelines for Calculating and Retaining Section 236 Excess Income Notice H 01-07 (HUD) (July 27, 2001)

Summary: This notice supersedes Notice H 00-17 and provides guidelines for implementation of Section 216 of HUD's *Fiscal Year (FY) 2001 Appropriations Act*, P.L. 106377 and Section 861 of the *American Homeownership and Economic Opportunity Act of 2000*, P.L.106-569. Section 861 of the *American Homeownership and Economic Opportunity Act of 2000* amends Section 236(g) of the *National Housing Act*, and provides an extension of the authority to retain Excess Income. It also provides, in relevant part, that any Excess Income that a project owner has collected and not remitted to the Secretary of HUD may be retained by such owner unless the Secretary provides otherwise. Instructions are provided for an owner's participating in retention of Excess Income for projects with assistance through the Section 236 Interest Reduction Payments Program.

Expires: July 31, 2002.

PHA Plan Guidance; Further Streamlining of Small PHA Plans; Early Availability of Capital Formula Funding for Obligation; Extension of Notices PIH-33 (HA), PIH 99-51 (HA), PIH 2000-22 (HA), PIH 2000-36 (HA), PIH 2000-43 (HA) and PIH 2001-4 (HA); Notice PIH 2001-26 (HA) (August 2, 2001)

Summary: This notice transmits PHA Plan guidance to PHAs with FYs beginning January 1, 2002, on submission of third-year PHA Plans as provided in the PHA Plans Final rule (issued December 22, 2000 Federal Register (65 Fed. Reg. 81,214), found at 24 C.F.R. Part 903, Subpart B. Until notification of new instructions, PHAs must use the currently available templates and instructions in completing their Plans with updates provided in the Notice. The currently available instructions, previously issued in Notices PIH 99-33 (HA), 99-51 (HA), 2000-22 (HA), 2000-36 (HA), 2000-43 (HA) and 2001-4 (HA) are hereby extended.

Expires: August 31, 2002.

Implementation of Public Law 106-504 Regarding the Eligibility of the Citizens of the Freely Associated States for Federally Assisted Housing; Notice PIH 2001-27 (HA) (August 3, 2001)

Summary: The purpose of this notice is to provide implementation guidance on Public Law 106-504, enacted November 13, 2000, regarding the eligibility of the citizens of the Republic of the Marshall Islands, Republic of Palau, and the Federated States of Micronesia (collectively referred to as the "Freely Associated States" or "FAS") for federally assisted housing.

Expires: August 31, 2002.

FY 2001 Operating Fund Local Inflation Factors, Formula Expense Level Equation Multipliers, and Related Tables; Notice PIH 2001-28 (HA) (August 7, 2001)

Summary: This notice provides information needed by PHAs in their determination of operating subsidy eligibility for their respective fiscal years beginning January 1, April 1, July 1, or October 1, 2001. Appendix 1 of this notice contains Local Inflation Factors. If a PHA is unsure whether it should apply the metro or non-metro inflation factor, it should consult the listing of metropolitan areas contained in Appendix 2.

Expires: August 31, 2002.

Fiscal Year 2001 Financial Management Requirements for Section 8 Moderate Rehabilitation Program (Mod Rehab) Housing Assistance Payments (HAP) Contract Expirations; Notice PIH 2001-29 (HA) (August 8, 2001)

Summary: This notice provides instructions on financial procedures for implementing Notice PIH 2001-13, FY 2001 and 2002 Renewal of Expiring Section 8 Moderate Rehabilitation (Mod Rehab) Housing Assistance Payments Contracts (HAP), dated April 6, 2001. This notice updates PIH Notice 2000-17 (April 18, 2000), PIH Notice 99-46 (November 5, 1999), and PIH Notice 99-14 (February 24, 1999), Financial Management Program Requirements for the Moderate Rehabilitation Program.

Expires: December 31, 2002. ■

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