

who experienced a reduced payment standard under the old policy and thus pay substantially higher rents.

The PHA must establish a process for choosing which families will be required to move if there are more over-housed enhanced voucher families than available appropriately sized units. Suggested criteria include a lottery process, length of time the family has been living in the oversized unit, and age or frailty of the family.¹⁴

Notice PIH 2008-12 is a welcome new policy to protect over-housed tenants' right to remain. However, unless HUD acts to implement similar protections for tenants being denied continued assistance because of PHA re-screening or because owners fail to honor the enhanced voucher's good cause eviction feature, Congress must act soon to further clarify that tenants must receive continued assistance to remain in their homes when they have done nothing wrong.¹⁵ ■

Congress Considers Overdue Preservation Agenda

In order to address the increasing shortage of affordable housing, Congress must enact stronger legislative policies to preserve hundreds of thousands of units of existing privately owned federally assisted affordable housing. Because the current policy framework allows many owners to convert to market-rate and the costs of acquisition and rehabilitation are substantial, major changes to existing budget and policy decisions are needed. The National Preservation Working Group (NPWG), a network of national, state and local public and nonprofit organizations working on the housing preservation problem over the past two decades, has developed a package of legislative proposals that would address many of the obstacles to preserving affordable housing. These proposals are being considered by both the House and the Senate as their housing leadership drafts a comprehensive preservation bill to be introduced in Congress later this year. This article briefly reviews the major components of the NPWG preservation proposals.

Maintain Housing at Risk of Market-Rate Conversion

A number of different strategies can help prevent affordable housing from being converted to market rents. While Congress should affirm that HUD has a duty to maximize preservation when making discretionary decisions, there are many specific steps that can be taken to maintain the current housing stock. First, Congress should appropriate the amount of funds necessary each year to renew existing Section 8 contracts, rather than cutting them below needed levels as the current Administration proposes. This will enable retention of many units covered by current contracts, as well as retention of those expiring contracts with below-market rents that require higher rents in order to encourage owners to remain in the program.

Another vital change is reforming the mark-to-market program by making a broader range of properties eligible for mark-to-market debt restructuring, increasing the cap on HUD's authority to approve rents in excess of 120% of Fair Market Rent (FMR), and expanding the base of previously restructured properties that could benefit from not-for-profit purchase incentives. Specifically, both Section 8 properties in presidentially declared disaster areas and otherwise-eligible properties with rents at or below market eligible (not just those with rents exceeding market) should be eligible for debt restructuring. Marking up to market should also be allowed to enable preservation of Section 8 Moderate Rehabilitation properties, which are currently prohibited from doing so. Regarding approving rents above 120%, HUD's current authority is exhausted because it is capped at 5% of the restructured portfolio. The cap should be increased to 9%.

¹⁴*Id.* at pp. 3-4. Tenants and advocates could decide to negotiate this process with the PHA in the Annual Plan.

¹⁵The lack of clear policies has required tenants to litigate some of these issues. See, e.g., *Jeanty v. Shore Terrace Realty*, No. 03-Cv. 8669 (BSJ), 2004 WL 1794496 (S.D.N.Y. Aug. 10, 2004) (enjoining owner from refusing to accept enhanced voucher); *Estevez v. Cosmopolitan Assocs. LLC*, 2005 WL 3164146 (E.D.N.Y. Nov. 28, 2005) (enjoining evictions for nonpayment of rent based on owner's refusal to renew voucher assistance); *Feemster v. BSA Ltd. P'ship*, 471 F.Supp.2d 87 (D.D.C. 2007) (requiring acceptance of enhanced vouchers); *Barrientos v. 1801-1825 Morton, LLC*, No. CV 06-6437-ABC (FMOx) (C.D.Cal., orders Sept. 10 and Oct. 24, 2007) (enjoining owner's attempt to terminate all enhanced voucher tenancies at the property).

A looming threat to the current affordable housing stock is the maturing of HUD-subsidized mortgages. Between 2003 and 2013, the HUD-subsidized mortgages and rent restrictions on about 200,000 units will expire. At expiration, neither the units nor the tenants have any protection against market-rate rents. House Financial Services Committee Chairman Frank's 2004 bill, H.R. 4679, proposed rehabilitation, acquisition, or rent subsidy assistance to owners (nonprofit and for-profit) and purchasers in exchange for extending affordability restrictions. In addition, NPWG recommends that any new legislation should: (1) cover all properties owned by both for-profit and nonprofit owners, with HUD-insured or HUD-held mortgages that contain budget-based rent restrictions; (2) provide rehabilitation funds as either loans or grants; (3) ensure adequate acquisition, rehabilitation and rental assistance resources for nonprofit purchasers and owners; and (4) allow deferment of prior Flexible Subsidy loans. At the same time, tenants should be involved in preservation planning and endorsement, and Congress should require protections such as extended and specific affordability restrictions and timely provision of enhanced vouchers where the housing is not preserved.

Because incentives are often insufficient to guarantee preservation, Congress should also establish a federal first right of purchase to provide opportunities for tenants and communities to preserve properties facing market-rate conversion. To take full advantage of the federal investment in these properties, Congress should establish a federal first right of purchase, as it has for Rural Development (RD) properties facing prepayment. This first right of purchase would allow a preservation purchaser to buy the property at fair market value within a specified period after the owner gives a notice of proposed conversion or expiration of rent restrictions, similar to that established for RD properties and several state and local laws.

Although many state and local laws aim to preserve affordable housing by establishing notice or purchase requirements,¹ advocates often have to fight to protect these local laws from preemption challenges on a state-by-state basis. Parties challenging these preservation laws often point to an express preemption provision contained in the Low-Income Housing Preservation and Resident Homeownership Act (LIHPRHA) that has been dormant for years.² In order to avoid excessive litigation and uncertainty on this issue, Congress should clarify that LIHPRHA preemption only applies to properties with an executed LIHPRHA plan of action and that state and local preservation laws are not otherwise preempted by general conflict preemption principles.

¹See, e.g., *A Brief Review of State and Local Preservation Purchase Laws*, 36 HOUS. L. BULL. 217 (Nov./Dec. 2006).

²Pub. L. No. 101-625, tit. VI, 104 Stat. 4249, 4273 (1990) (establishing § 232 of LIHPRHA), codified at 12 U.S.C. § 4122 (1990).

In addition to these major changes to preserve housing at risk of conversion, Congress should enact other modest revisions to various programs. For example, it should authorize conversion of Rent Supplement and Rental Assistance Payment contracts to project-based Section 8, thereby permitting subsidy renewal, including mark-ups, and rehabilitation.

Finally, Congress should address a number of issues regarding the use of project-based vouchers for preservation purposes. Congress should allow owners and public housing agencies (PHAs) to utilize project-based vouchers, instead of enhanced vouchers, after conversions, while exempting these units from the ordinary project-based voucher cap, which limits the number of project-based vouchers to 25% of total number of units in a development, and the PHA's overall inventory limits for voucher based units. It is also important that Congress clarify that expiring project-based certificates can be converted to project-based vouchers, the successor program. Congress should also specifically allow project-based voucher rents to be established at market rents that are higher than the Low Income Housing Tax Credit (LIHTC) limits in order to support additional financing and, thereby, prevent HUD from imposing a lower cap in regulations.³

Restoring Deteriorating Properties

Many affordable housing properties are at risk of loss not because of market-rate conversion, but rather because of the lack of capital available for rehabilitation, together with subsidies to maintain affordable rents. Section 8 properties in poor condition are at risk of subsidy abatement and termination, and default on any underlying HUD-insured mortgage. After default and assignment of the mortgage to HUD, current law provides HUD with "flexible authority"⁴ on what to do with the property, whether selling the property to a third party at foreclosure, bidding its debt and purchasing the property, or accepting a deed-in-lieu of foreclosure. However, in order to preserve the affordability of HUD multifamily properties facing foreclosure or other disposition sale, Congress recently has required HUD to generally maintain in place the project-based Section 8 contracts.⁵ Because HUD has avoided this requirement by terminating contracts prior to foreclosing, Congress needs to tighten this mandate. Congress should also enact specific portions of H.R. 44, introduced in the 110th Congress, which would repeal HUD's "flexible authority," require HUD to maintain rental assistance to buildings undergoing rehabilitation

³Initially, HUD's rule (70 Fed. Reg. 59,892 (Oct. 13, 2005)) imposed a cap at the LIHTC rent level, but HUD recently reversed its position so that higher rents are permissible in these circumstances. 72 Fed. Reg. 65,206 (Nov. 19, 2007).

⁴12 U.S.C.A. § 1715z-11(a) (West 2001).

⁵Pub. L. No. 109-115, Tit. III, § 311, 119 Stat. 2462 (2005); Pub. L. No. 110-161, Div. K, Tit. II, § 220 (Dec. 27, 2007).

as part of a preservation transfer, and extend HUD's non-judicial foreclosure authority to local government units acquiring HUD-held mortgages.

When HUD disposes of distressed HUD-owned properties or the HUD-held mortgages themselves, additional reforms are needed to ensure that local governments can purchase these properties and loans at prices that permit preservation of affordable housing. Ostensibly because of the Deficit Reduction Act of 2005, HUD adopted a policy that excludes repair or rehabilitation costs in determining an appropriate sales price for HUD-owned buildings and HUD-held loans. This policy makes it unreasonable for a local government to purchase the buildings or the loans, since it also has to fund the repair costs. H.R. 44 would revise the law to require HUD to use industry standard appraisal practices (which include the costs of repairs) when determining the market value of all multifamily real property and HUD-held loans.

A related issue, also arising from the Deficit Reduction Act of 2005, concerns restrictions on HUD's authority to provide grants and loans from the insurance fund for the necessary cost of rehabilitation of these properties, without further appropriations. H.R. 44 includes a provision that would reauthorize up-front grants, thus permitting these properties to be improved as affordable housing.

When HUD-supported properties are being sold, buyers should be required to demonstrate capacity by showing a track record of compliance with state and local housing and health codes. While Section 219 of the 2004 HUD/VA appropriations act⁶ required HUD to promulgate regulations to this effect, at least for foreclosure and disposition sales, HUD has never finalized such rules. Congress should therefore enact those provisions of H.R. 44 to ensure that buyers of both troubled and non-troubled properties are in compliance with housing and health codes.

In those situations where a project is not restorable, HUD should have authority to transfer project-based assistance to a new development, with appropriate protections to prevent abuse. Two statutes address this: 42 U.S.C. § 1437f(bb) and provisions in the FY 06 and FY 08 HUD Appropriations Acts.⁷ Section 215, the most recent provision, severely restricts the ability of assisted property owners and preservation purchasers to complete transactions. Congress should increase the authority to transfer the project-based Section 8 by broadening the definition of eligible properties, allowing partial transfers, strengthening tenant endorsement provisions, and affirming applicability of existing fair housing laws, among other things.

Finally, HUD has access to already appropriated but unused funds resulting from prepaid or terminated

Section 236 interest reduction subsidies. Section 531 of the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRAA)⁸ directed these funds to be used for rehabilitation of multifamily properties, but accumulated funds have often been rescinded. Congress should make an appropriation redirecting these funds and mandating that HUD implement a rehabilitation program.

Tenant Protections

As buildings lose their use restrictions or subsidies, or need to be rehabilitated, tenants facing displacement must be protected. Congress began addressing this issue in the mid-1990s, culminating in 1999, when it passed authority requiring HUD to provide enhanced vouchers for tenants facing certain conversion actions, such as opt-outs and prepayments.⁹ However, HUD has failed to implement this effectively; some owners refuse to accept the voucher, or if they do, often fail to set forth the good cause for eviction requirement. At other times, HUD policies permit PHAs administering the vouchers to deny assistance to previously assisted tenants or to force displacement of tenants whose family size has shrunk or grown and thus are mismatched to their current unit. In order to address these problems, Congress should clarify the owners' obligation to accept the enhanced voucher and ensure that new leases contain a good cause eviction provision. Legislation should also prohibit PHA re-screening of tenants and allow tenants to remain in their homes with enhanced vouchers regardless of unit size until the family can be transferred to a proper size unit.

In many situations where federally supported housing is lost (e.g., conversions of privately owned properties or public housing demolitions), Congress has provided tenant protection vouchers in order to maintain the community's overall affordable housing supply. However, in 2006, HUD issued Notice PIH 2006-5, providing that tenant protection vouchers would only be issued for the number of units that are occupied at the time the PHA applies for the replacement vouchers. This can lead to a significant loss in overall units, as some PHAs and owners encourage residents to move before they are even allowed to apply for replacement vouchers. Congress should override this policy and clarify that one-for-one replacement of the lost units is required.

Tenant Empowerment

Tenant involvement in the operation and major life cycle events of federally assisted housing leads to more responsive operations and smoother transitions. Recognizing this, Congress has sought to increase tenant capacity by permitting tenant participation in specific

⁶Pub. L. No. 108-199, § 219, 118 Stat. 397 (2004).

⁷Pub. L. No. 109-115, § 318, 119 Stat. 2463 (2005); Pub. L. No. 110-161, Div. K, Tit. II, § 215 (Dec. 27, 2007).

⁸Pub. L. No. 105-65, § 531 (1997).

⁹42 U.S.C. § 1437f(t) (West Supp. 2007).

decisions and providing funding for outreach and technical assistance activities. HUD, however, has not provided this funding to tenants since 2001, and has given funds to unqualified groups to work with tenants. Thus, it is important for Congress to clarify that HUD must spend the authorized funds each year and ensure that recipient organizations working with tenants are both qualified and independent from the ownership or management of the threatened property.

In order to improve project operations, tenants must also receive certain information about the property in a timely fashion. For example, HUD recently agreed to begin posting Real Estate Assessment Center (REAC) scores on the Internet, which will give residents and affected communities early notice of any problems with assisted properties. However, much more is needed to advance preservation goals. Tenants and community preservation allies should be able to easily obtain information on Section 8 opt-out or renewal notices, prepayment notices, and other relevant information filed by owners with HUD concerning their plans. This can be done through specific statutory authority, as well as stronger language recognizing tenants' rights to access information from HUD and owners. HUD data could serve as an "Early Warning System" for tenants and nonprofit owners who may be interested in preserving a property, permitting time to develop community preservation plans for threatened properties and to identify the necessary resources.

Often HUD and local governments do not have the resources to enforce regulations against owners of federally assisted properties. Because enforcement makes an impact on the daily life of tenants, tenants should be enlisted as partners in enforcement. Tenants should be identified as third-party beneficiaries to HUD contracts, such as Section 8 Housing Assistance Payment contracts, rehab escrow deposit agreements, and mark-to-market restructuring commitments, permitting tenants to enforce violations where HUD is slow to do so. In addition, Congress should further specify flexible enforcement tools, such as allowing tenants to pay rent into an escrow fund controlled by HUD, to make repairs using rent money, and to allow special inspections and reviews where necessary. Beyond enabling greater enforcement, these improvements would increase owners' incentives to comply with housing quality standards.

Tax Legislation

Tax incentives were a major component of creating and preserving affordable housing, but the current tax structure of property ownership often makes it economically infeasible for owners to transfer property. Sellers are often subject to capital gains taxes on the whole sales price, which often exceeds the cash sales proceeds when mortgage debt is assumed. Many owners are thus encouraged to hold on to properties until death delivers a step-up in tax basis. Congress should create tax incen-

tives that exempt certain owners from capital gains taxes if they transfer properties to qualified purchasers for continued use as affordable housing. Additionally, Congress should end the current policy prohibiting Section 8 Moderate Rehabilitation properties from also obtaining tax credit funding that is often needed for necessary improvements.

Conclusion

After the better part of a decade of neglect, Congress is now poised to take up an ambitious agenda to reform federal preservation policy. The National Preservation Working Group's comprehensive recommendations should receive serious consideration by the House and Senate Committees as they assemble their bills this year. The *Bulletin* will report on key developments in this effort to preserve the affordable housing stock. ■

Recent Cases

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

Public Housing: Eviction, Local Right to Cure Law not Preempted by HUD One-strike Rule

Pratt v. District of Columbia Housing Authority, 2008 WL 449705 (D.C., Feb. 21, 2008). The District of Columbia Court of Appeals reversed a lower court's jury decision granting the housing authority the right to evict a public housing resident for the criminal activity of her son. The court held that the plaintiff was entitled to cure the lease violation under District of Columbia law and that federal one-strike rules did not preempt the District of Columbia statute because the lease between the parties did not specifically incorporate, as required by federal law, the right to evict pursuant to the federal one-strike law. Accordingly, the court concluded that the resident had a right to cure the lease violation and that the housing authority's effort to evict without first granting the right to cure violated the tenant's statutory rights.

¹ <http://www.westlaw.com>.

² <http://www.lexis.com>.

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