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614 Grand Avenue, Suite 320, Oakland CA 94610
Telephone (510) 251-9400 • Fax (510) 451-2300

727 Fifteenth Street, N.W., 6th Fl. • Washington, D.C. 20005

www.nhlp.org • nhlp@nhlp.org

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Cover: Cornelius Weekley, a resident of the Park Village Apartments, an 84-unit project-based Section 8 senior development in Oakland, California. Mr. Weekley, one of several plaintiffs in a suit against the private owner who failed to give the federal and state required notices prior to opting-out of the Section 8 program, signs a settlement agreement that provides for the sale of Park Village Apartments to a nonprofit organization that will maintain the housing as subsidized affordable housing.

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Inquiries or comments should be directed to Eva Guralnick, Editor, *Housing Law Bulletin*, at the National Housing Law Project, 614 Grand Avenue, Suite 320, Oakland, CA 94610, Tel: (510) 251-9400 or via e-mail to nhlp@nhlp.org

Congress Acts to Address Project-Based Section 8 Funding Crisis

Prior *Bulletins* have described the inability of the Department of Housing and Urban Development (HUD) to make timely payments to project-based Section 8 owners, and HUD's strategy to cope with Fiscal Year (FY) 2008's funding shortfall—providing only "funding increments," good for several months at a time.[1] The shortfall—the additional funds required to fully back one-year renewal contracts—has been acknowledged by HUD[2] and is now estimated to be at least $2.5 billion for FY 2009, a huge chunk of the program's $6.14 billion FY 2008 appropriation. The insufficiency results directly from the Administration's inadequate budget requests; never did the Administration clarify to Congress that it was changing its policy to request funding only to take all contracts through the end of the fiscal year, rather than the one-year contract term previously funded.

In addition to regular channels, advocates and owners had also sought the necessary funds to redress the shortfall through a supplemental appropriation for FY 2008, either in the emergency supplemental vehicle to fund the Iraq war, or through another supplemental spending bill. In April, twenty-two Senators, including five Republicans, sent a letter requesting such funding to the Appropriations Committee (following earlier successful efforts to provide increased funding in the Budget Resolution), and fifteen House members followed suit. Although the House Appropriations Subcommittee held a hearing exclusively focused on the project-based Section 8 funding shortfall on April 23, obtaining additional funding through the supplemental appropriations process proved unsuccessful. However, by demonstrating an increasing awareness of the problem, these efforts provided a solid foundation for other legislative treatment in additional funding vehicles, including any Continuing Resolution or subsequent FY 2009 appropriations bill.[3]

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[1]NHLP, *Congress Considers Solutions for the Project-Based Section 8 Funding Crisis*, 38 Hous. L. Bull. 87 (Apr.-May 2008); NHLP, *Growing Reports of a Project-Based Section 8 Funding Crisis as FY 2007 Closes*, 37 Hous. L. Bull. 149 (Sept. 2007).

[2]Letter from John W. Cox, HUD Chief Financial Officer, to Honorable Maxine Waters, Chairwoman, Subcommittee on Housing and Community, House Committee on Financial Services (Nov. 16, 2007) (estimating a shortfall of $1.5 billion in FY 2008 to provide one-year funding for all contracts).

[3]Part of the eventual solution for FY 2009 will likely include an "advance appropriation" of FY 2010 funds, which could provide future funding on October 1, 2010, to cover the shortfall represented by contracts with tails hanging over into subsequent fiscal years. This technique, approved by the Senate's version of the FY 2009 Budget Resolution and the Senate's FY 2009 appropriations bill, would effectively provide assured funding when it is needed, without requiring additional scarce budget authority during FY 2009. Used for many years to fund part of the voucher

Recognizing this desperate need for additional funds, the Senate FY 2009 appropriations bill[4] had sought to provide a total of $8.45 billion ($6.7 billion from FY 2009 funds and an advance appropriation of $1.75 billion from FY 2010)—more funds, to be sure, but still not enough to renew all expiring contracts and funding increments for full one-year periods. The Senate Committee Report also vociferously criticized HUD's actions over the past few years that have jeopardized the stability of the program.[5] However, because of substantial differences between Congress and the Administration on domestic spending priorities, an FY 2009 appropriations bill never reached the House or Senate floors.

The Continuing Resolution authorized HUD to expend funds at whatever rate is necessary to renew all contracts expiring during its term.

When it became clear that no separate appropriations legislation would be passed, Section 8 owners and tenants once again faced the prospect that, late this fall, HUD would be unable to make timely payments on all expiring contracts and funding increments, even just to renew contracts or increments temporarily. This risk reappeared because FY 2008 funds for most properties would run out around November 30,[6] and because ordinary stop-gap funding legislation would not address the special circumstances presented by HUD's recent fiscal management practices.

Under the ordinary stop-gap funding policy of a Continuing Resolution (CR), funding is based upon the prior year's level. In FY 2008, this level was already demonstrably insufficient for the project-based Section 8 program. Ordinary pro-rata funding would therefore be woefully inadequate to provide sufficient funding increments to all projects requiring new funds, for several reasons: an influx of new contracts expiring for the first time; a dramatic increase in the number of properties with simultaneously expiring funding increments during the period covered by the CR (as compared with the same period during FY 2008); as well as the time required to actually provide new paperwork and funds to virtually all properties (14,000 expiring contracts or funding increments) simultaneously. Moreover, if the funds provided under a CR were to run out this fall after adjournment for the election, Congress would not be in session to provide emergency funding and HUD would lack access to any other quick fixes. Mortgage defaults, service reductions, threatened evictions, litigation—all could appear suddenly, with little warning.

Tenants, owners and advocates, with tacit support of HUD staff, alerted Congress to the tremendous risk presented by the usual CR policy; late in September, Congress responded. At the end of September, in the Continuing Resolution, Congress inserted a provision authorizing the HUD Secretary to expend funds provided under the CR at whatever rate is necessary to renew all contracts expiring during the term of the CR, which runs for a little over five months, until March 6, 2009.[7]

Since there was enormous pressure to keep additional provisions out of the CR process, obtaining this flexibility language represents a significant victory, avoiding the most immediate aspect of the funding crisis. Without this language, the risk of late assistance payments would have been much greater, and the CR's longer term and special flexibility further reduces the risk presented by HUD's inability to quickly obligate payments from subsequent appropriations bills.

Even with this gratifying victory, immediate problems will resurface after the CR expires. Additional appropriations of approximately $2.5 billion are needed during FY 2009 to restore full one-year funding to all expiring or recently renewed contracts. Although Congress can always defer meeting this need to restore full-year funding, continuing the policy of funding only increments ending during the first quarter of each fiscal year promises further erosion of owner and lender confidence, and further chaos should appropriations not occur in a timely fashion or with sufficient flexibility. In addition, HUD has reportedly identified a shortfall of approximately $6 billion in funding accounts covering longer-term contracts that have not yet reached their initial expiration. Over the next decade, these funds will have to be replenished as those contracts age, in order to avoid nonpayments. In an environment of scarce resources, these are formidable challenges indeed.

Should the shortfall continue, owners' eroding confidence in the subsidy guarantee may foster more opt-outs at contract expiration. Similarly, lenders and investors asked to provide capital for refinancings or transfers necessary to preserve and improve properties that are aging or at risk of market-rate conversion may be increasingly

program, this technique requires annual repetition to avoid a huge disruption downstream.

[4]S. 3261, 110th Cong., 2d Sess. (as reported from the Committee on Appropriations, July 14, 2008), at p. 94 ("Project-Based Rental Assistance").

[5]S. Rep. 418, 110th Cong., 2d Sess. (July 14, 2008), at pp. 161-162.

[6]*See, e.g.*, Cox Letter, *supra* note 2.

[7]Section 168 of the CR reads: "Notwithstanding any other provision of this joint resolution, other than section 106, the Secretary of Housing and Urban Development shall obligate funds provided by section 101 at a rate the Secretary determines is necessary to renew, in a timely manner, all section 8 project-based rental assistance contracts. In renewing such contracts, the Secretary may provide for payments to be made beyond the period covered by this joint resolution." Pub. L. No. 110-329, ___ Stat. ___ (Sept. 30, 2008).

reluctant to participate. More than half of the properties with project-based Section 8 contracts have HUD mortgage insurance; any funding interruptions could result in mortgage defaults and more costly claims on the mortgage insurance fund. Tenants, who have no clear protection against the consequences of a HUD breach of contract, face growing uncertainty.

Inadequate HUD estimates about total subsidy costs[8] could also trigger nonpayment problems, similar to those in the summer of 2007, if the program lacks the financial cushion provided by one-year funding.

Advocates have been seeking various legislative reforms to require HUD to provide advance notice of imminent nonpayments to Congress, owners and tenants.

Advocates have also been seeking various legislative reforms to require HUD to provide advance notice of imminent nonpayments to Congress, owners and tenants. Advocates support requiring HUD to use available funds for tenant protections or even the mortgage insurance fund to provide stopgap funding to properties with expiring funding increments. Affected owners should be authorized to draw on reserves to make mortgage payments or pay operating expenses. Tenants should also receive temporary protection from any threatened rent increases. The House Mark to Market Reform bill, H.R. 3965, as reported by the House Financial Services Committee, contains a provision requiring notice to owners, authorization for use of reserves, and interest for late payments,[9] although this legislation requires reintroduction in the 111th Congress.

As Congress takes up appropriations issues after the election, likely in January, NHLP and its allies will continue to seek adequate funding to restore a solid foundation for these invaluable 1.4 million units. ■

[8]This could happen if HUD underestimates the number of units involved that require renewal funding, or underestimates per-unit subsidy renewal costs due to inflation in operating costs, to rising market rents for certain properties, or decreases in tenant incomes.

[9]H.R. 3965, § 13, as reported April 10, 2008, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h3965rh.txt.pdf.

HUD Issues Regulations Implementing the Neighborhood Stabilization Program

The Housing and Economic Recovery Act (HERA) was signed into law on July 30, 2008. The act is an effort to address the country's foreclosure crisis and thus contains numerous foreclosure assistance provisions, including the restructuring of Government Sponsored Enterprises such as Fannie Mae and Freddie Mac, providing refinancing schemes for homeowners, establishing a National Housing Trust Fund, and creating the Neighborhood Stabilization Program (NSP).[1] NHLP has previously published articles on other provisions of HERA.[2] This article focuses on Title III of the act, which creates the NSP and grants $3.92 billion for emergency assistance to states and localities to redevelop abandoned and foreclosed homes and residential properties.[3]

These NSP funds are not for foreclosure-prevention activities or for redevelopment of non-blighted areas.[4] Instead, they are meant to stabilize neighborhoods that have deteriorated as a result of high foreclosure rates. Congress identified five uses for which grantees may use NSP funds:

- establish financing mechanisms for purchase and redevelopment of foreclosed-upon homes and residential properties;
- purchase and rehabilitate homes and residential properties that have been abandoned or foreclosed upon, in order to sell, rent, or redevelop such homes and properties;
- establish land banks for homes that have been foreclosed upon;
- demolish blighted structures; and
- redevelop demolished or vacant properties.[5]

[1]Housing and Economic Recovery Act, Pub. L. No. 110-289, 122 Stat. 2654, 2850-4 (2008); HUD Notice Implementing Neighborhood Stabilization Program Under the Housing and Economic Recovery Act, 73 Fed. Reg. 58,330 (October 6, 2008)(hereinafter HUD NSP Notice).

[2]*See* Katherine Lehe, *Foreclosure Relief Legislation Includes GSE Regulation and National Housing Trust Fund*, 38 Hous. L. Bull 161, 161-7 (Aug. 2008).

[3]Housing and Economic Recovery Act (hereinafter HERA), Pub. L. No. 110-289, § 2301-5, 122 Stat. 2654, 2850-4 (2008).

[4]HUD NSP Notice at 58,338.

[5]HERA § 2301(c)(3); HUD NSP Notice at 58,337-8.