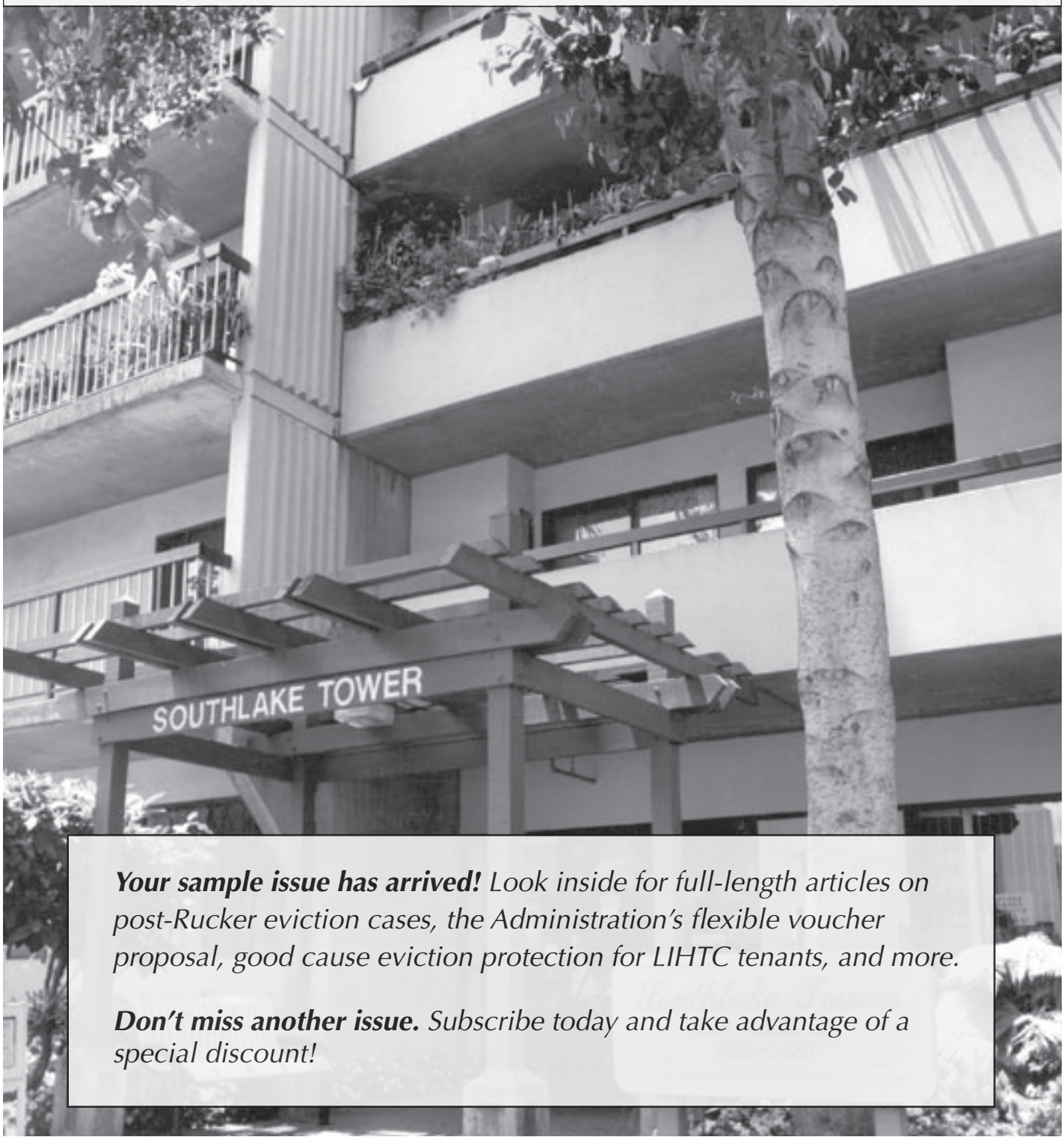
NATIONAL HOUSING LAW PROJECT

advancing housing justice

Housing Law Bulletin

Sample Issue

Published by the National Housing Law Project



Your sample issue has arrived! *Look inside for full-length articles on post-Rucker eviction cases, the Administration's flexible voucher proposal, good cause eviction protection for LIHTC tenants, and more.*

Don't miss another issue. *Subscribe today and take advantage of a special discount!*

COMPREHENSIVE CURRENT AUTHORITATIVE

UPDATED

3RD EDITION

NHLP's

HUD Housing Programs: Tenants' Rights

EXPANDED

Originally published in 1981, NHLP's Green Book has proven indispensible to housing law practitioners across the country.

Dubbed the Green Book by users across the country, *HUD Housing Programs: Tenants' Rights* is a comprehensive, issue-oriented guide to the federal housing programs. Last published in 1994, the 3rd Edition has been reworked, updated and expanded to cover recent sweeping changes from Congress, HUD and the courts.

It is the only book that explains and analyzes all applicable laws central to effectively representing tenants assisted under the HUD programs. In a single volume, it provides a practical road map through the complexity of the federal housing programs, including public housing, subsidized rental housing, vouchers, section 8 homeownership, and others. Evictions, resident participation, loss of units and other key issues are covered in depth as well.

Meticulously researched and clearly written by expert NHLP staff attorneys and outside contributors, the Green Book is a unique and and invaluable resource for anyone working within the scope of the federal housing programs:

- attorneys and paralegals
- fair housing and other public interest advocates
- HUD offices
- public housing authorities
- nonprofit housing and community organizations
- private owners and managers
- local and state housing agencies
- housing policy organizations and policymakers
- clinical law programs and law libraries

The 3rd Edition contains the most recent applicable authorities for virtually all common problems encountered in a federal housing landlord-tenant relationship, including state and federal cases, federal statutes and regulations, and HUD Handbooks, Notices and opinion letters.

***HUD Housing Programs: Tenants' Rights* is available now. See the Publication Order Form for prices.**

CD ROM

The 3rd Edition of the Green Book features a complimentary CD-ROM that contains a searchable table of more than 2,000 cases. It also contains full PDF texts of selected hard-to-find documents referenced in the manual, including HUD circulars, notices, forms, memoranda and unreported court opinions.

SPECIAL FEATURE

AN ESSENTIAL RESOURCE FROM THE NATIONAL HOUSING LAW PROJECT

Housing Law Bulletin

Sample Issue

Published by the National Housing Law Project
614 Grand Avenue, Suite 320, Oakland CA 94610
Telephone (510) 251-9400 • Fax (510) 451-2300
www.nhlp.org • nhlp@nhlp.org

Table of Contents

Cover: Southlake Tower, a 130-unit Section 8 housing development in Oakland, California. Originally developed by a for-profit developer under the HUD §221(d)(3) program, the development was purchased and is currently managed by Christian Church Homes, a nonprofit management and development organization, using funds from the California Housing Finance Agency and the City of Oakland.

The *Housing Law Bulletin* is published 10-12 times per year by the National Housing Law project, a California nonprofit corporation. Opinions expressed in the *Bulletin* are those of the authors and should not be construed as representing the opinions of policy of any funding source.

A one-year subscription to the *Bulletin* is $150.

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

One-Strike Eviction Decisions: Two Years After *Rucker*

This article first appeared in the July 2004 Bulletin

Two years ago, the United States Supreme Court's decision in *Department of Housing and Urban Development. v. Rucker* significantly undermined the right of public housing tenants to maintain possession of their homes.[1] Relying on 42 U.S.C § 1437d(1)(6), the court in *Rucker* ruled that the tenancy of a public housing tenant could be terminated if "any member of the tenant's household, or any guest" were engaged in drug-related or certain other criminal conduct on the premises.[2] Tenants may also be subject to termination for conduct occurring off premises at federally assisted low-income housing.[3] The decision was particularly troubling in that the tenant did not need even to know about the illegal activity and could even have taken affirmative steps to prevent the activity.

A number of early post-*Rucker* decisions yielded the heartbreaking result of innocent tenants unfairly losing their homes,[4] but more recently courts have focused on certain factual elements in assessing *Rucker* eviction actions. With some exceptions, many courts appear to prefer not to order the eviction of tenants per the *Rucker* one-strike rule. Although *Rucker* imposes what amounts to a strict liability standard, courts appear interested in whether the tenant knew about the illegal activity. They have been particularly concerned with the nature of the illegal activity and have drawn distinctions between recreational drug use and drug businesses, which they regard as more likely to place other tenants in danger. They have employed a somewhat restrictive definition of what constitutes "criminal or drug related" activity for one-strike purposes. Courts have also been attentive to instructions from HUD to public housing authorities to use "common sense" in one-strike termination decisions.[5]

Recent post-*Rucker* decisions from New York, South Dakota, Massachusetts, Ohio and Missouri are discussed below.

---

[1]Department of Housing & Urban Dev. v. Rucker, 535 U.S. 125 (2002).

[2]For more on the *Rucker* decision, *see* NHLP, *U.S. Supreme Court Finds No "Innocent Tenants" in Application of One-Strike Law*, 32 HOUS. L. BULL. 95, 95-98 (April 2002).

[3]42 U.S.C. § 1437d(1)(6) (West, WESTLAW current through P.L. 108-270 (excluding P.L. 108-263 to 108-265) (End) approved 7-7-04)).

[4]*See* NHLP, *One-Strike Evictions: Post-Rucker Decisions*, 32 HOUS. L. BULL. 201, 201-205 (Sept. 2002).

[5]Letter from Mel Martinez, Secretary of HUD, to Public Housing Directors, (April 16, 2002), *available at* http://www.nhlp.org.

New York: Courts Address Knowledge and Culpability

In two cases, the civil court in New York City was reluctant to apply the *Rucker* decision strictly and assessed various factual circumstances before ordering the eviction of tenants. *ARJS Realty Corp. v. Perez* involved a tenant whose son was alleged to have engaged in illegal drug sales. New York City police officers entered Luz Perez's apartment and found her son was "conducting the proscribed illegal business or trade of narcotics on the premises."[6] In defense to her eviction proceedings, Perez asserted that she did not have "knowledge" of her son's illegal activities.[7] Relying on the *Rucker* decision, the court ruled against Perez and determined this case called for a "strict liability" standard.[8]

In contrast to the relatively narrow approach by the New York Civic Court, the South Dakota Supreme Court's ruling applied Rucker in a more expansive fashion.

Presumably, once the court declared "strict liability" for these cases, nothing more would need to be said about Perez's situation. In dicta, however, the court went to great lengths to establish that Perez actually did "know" about her son's illegal activity.[9] The court cited New York City Real Property Law Section 231, requiring that the illegal activity was not merely an isolated incident but "customarily or habitually on the premises."[10] The court emphasized that, when "the search warrant was executed, Perez was ten to fifteen feet from her son's room, one of the scales for his drug dealing business was in plain view of anyone in the 400-square-foot apartment, and she knew of her son's prior arrests."[11] The court further stated that "there comes a time when one must look, and when one looks, he must see. Convenient indifference should not be confused with pardonable ignorance."[12] The court's lengthy discussion regarding "knowledge," indicates that it was basing its decision, at least in part, on Perez's culpability, as opposed to actually mandating "strict liability" for all tenants in similar situations.

In *NYC Housing & Development, LLC v. Arias*, the civic court refused to order eviction, in spite of illegal drug activity, due to the landlord's procedural error. New York City police officers entered Altagracia Arias's apartment pursuant to a search warrant on January 30, 2003.[13] The officers found a brick of cocaine and a pistol in Arias's bedroom. Detective Frank Rivera's testimony established that the premises were used for the purpose of a "drug business."[14] NYC Housing & Development, relying on the *Rucker* decision, brought a holdover proceeding to evict Arias.[15] Arias relied on the New York City Rent Stabilization Code and made an oral motion to dismiss because NYC Housing & Development did not provide the required seven-day termination notice.[16] The court agreed and dismissed the proceeding.

Prior to addressing the Rent Stabilization Code, the court entertained the merits of the case. While relying on *Perez* to re-affirm strict liability, the court did acknowledge different levels of severity regarding drug activity. In dicta, the court emphasized that this was a "drug business . . . rather than individual or isolated drug use in the premises."[17]

Perez and *Arias* are noteworthy in that the *Rucker* one-strike rule was not applied rigidly. In both cases, the court considered the severity of the criminal behavior as well as the tenant's connection with the illegal activity.

South Dakota: Court Defers to PHA

In contrast to the relatively narrow approach by the New York Civic Court, the South Dakota Supreme Court's ruling in *Lakota Community Homes, Inc. v. Randall* applied *Rucker* in a more expansive fashion. Agnes Randall leased a home with Lakota Community Homes (LCH), a federally subsidized public housing cooperative in Rapid City, South Dakota. Police arrested Agnes's son, Daryl Mesteth, for public intoxication.[18] The officer had stopped Mesteth, who was a member of Randall's household, because he was part of a group that had recently vandalized a car. In a conversation with police officers, Randall admitted that her son had a history of alcohol abuse.[19] After detaining

[6]ARJS Realty Corp. v. Perez, 2003 WL 22015784 (N.Y. Civ. Ct., Aug. 14 2003).

[7]*Id*.

[8]*Id*.; 42 U.S.C.A. § 1437d (*l*)(6) (West 2003).

[9]*Perez*, 2003 WL 7891011, at *2.

[10]*Id*.

[11]*Id*.

[12]*Id*.

[13]NYC Housing & Development, LLC v. Arias, 772 N.Y.S.2d 789, 790 (N.Y. Civ. Ct. 2003).

[14]*Id*. at 791.

[15]*Id*.

[16]*Id*. at 790.

[17]*Id*. at 791.

[18]Lakota Community Homes, Inc. v. Randall, 675 N.W.2d 437, 439 (S.D. Sup. Ct. 2004).

[19]*Id*.

Mesteth, the police found a pipe that "smelled of burnt marijuana," and charged him with possession of drug paraphernalia.[20] The ticket for possession of drug paraphernalia was dismissed and Mesteth was never convicted of vandalism or a drug-related crime.[21]

At trial, Randall argued that she could not be evicted because her son was not convicted of a crime. She also asserted that even if her son did possess drug paraphernalia, it was neither a repeated offense nor significantly serious enough to warrant eviction.[22] Randall insisted that the court apply 24 C.F.R. § 982.553(c), a Housing Choice Voucher regulation, in her case. Randall argued that possession of "drug paraphernalia" did not fit the definition of "drug-related criminal activity" per 24 C.F.R. § 982.553(c).[23] The court rejected Randall's argument and applied 24 C.F.R. § 966.4(*l*)(5)(iii)(A), a public housing regulation, and concluded that, under § 966.4, a conviction is not necessary if the PHA determined, based on the "preponderance of the evidence," that the criminal activity occurred.[24] The court reasoned that the PHA had determined that Mesteth committed a crime and affirmed the ruling of the magistrate court that evicted the tenant from federally subsidized housing.

Massachusetts: Court Narrowly Construes "Household Member"

In *Boston Hous. Auth. v. Bruno*, a Massachusetts appellate court narrowly construed *Rucker* and refused to permit the eviction of a resident from the Old Colony housing project based on the conduct of a non-resident family member. The Boston Housing Authority (BHA) brought an action to evict Arthur Bruno because his son, Adam, was arrested for possessing drugs on the grounds of the housing development in which Bruno lived.[25] The city housing authority brought summary proceeding to evict tenant. The Housing Court Department, Boston Division, Suffolk County, entered judgment for tenant. The housing authority appealed and the Appeals court affirmed that the tenant could not be evicted on the grounds that Adam was not a member of Bruno's "household."[26]

Bruno asserted that Adam lived with his mother in a nearby city.[27] Adam's name appeared on the lease, as well as the annual Tenant Status Review (TSR) documents.[28] Bruno testified that he "didn't think it was necessary" to erase Adam's name and "didn't want to take him off anyway because in case he ever did want to come home."[29] On the night Adam was arrested, "Adam, in a random manner, stopped by on his way home from work and then, as far as Bruno knew, left to return to the mother's home."[30] Bruno submitted Adam's W-2 wage form to verify that he lived with his mother.[31] Additionally, Adam, whom the trial court found to be a "credible witness," testified that he did live with his mother.[32]

A Massachusetts appellate court narrowly construed Rucker *and refused to permit the eviction of a resident based on the conduct of a non-resident family member.*

BHA argued that Adam's name on the lease and TSR documents should have led to, as a matter of sound social policy, an irrebuttable presumption that Adam was a member of Bruno's household.[33] Additionally, the BHA argued that if Adam was not a household member, he should have been considered a "guest," and therefore subjected Bruno to the *Rucker* one-strike rule. The court ruled against BHA's irrebuttable presumption theory and declined to address the "guest theory" since it had not been previously asserted by the BHA.[34]

Bruno is particularly promising for its narrow construction of one-strike terms, such as "household member." However, the court may have reached a different conclusion had the BHA not failed to raise its guest theory earlier in the litigation.

Ohio: Courts Address Marijuana Possession

Two Ohio courts took different approaches in evaluating marijuana possession under the *Rucker* doctrine. In *Cuyahoga Metropolitan Housing Authority v. Hairston*, a Cleveland municipal court held that the housing authority waived the tenant's breach of the lease by continuing

[20]*Id.* at 440.

[21]*Id.* at 440, 443.

[22]*Id*. at 437.

[23]*Id.* at 442.

[24]*Id*.; 24 C.F.R. § 966.4(*l*)(5)(iii)(A).

[25]Boston Hous. Auth. v. Bruno, 790 N.E.2d 1121, 1122 (Mass. App. Ct. 2003).

[26]*Id*. at 1122.

[27]*Id*. at 1123.

[28]*Id*.

[29]*Id*.

[30]*Id*. at 1125.

[31]*Id.*

[32]*Id*.

[33]*Id*. at 1124.

[34]*Id*. at 1124, 1125.

to accept rent after becoming aware of the breach. Hairston was a tenant in a public housing unit managed by the Cuyahoga Metropolitan Housing Authority (CMHA).[35] Police discovered marijuana in Hairston's unit.[36] CMHA continued to accept rent for at least seven months even though they were aware that police had discovered drugs in Hairston's unit.[37] Relying on *Brokamp v. Linneman* and *Quinn v. Cardinal Foods, Inc.*, the court ruled that a landlord waives the "right to terminate a tenancy due to breach of the lease if, after learning of the breach, he takes action inconsistent with the termination of the tenancy."[38] Citing *Rucker* and the one-strike regulations, the CMHA argued that the principles in *Brokamp* and *Quinn* were inapplicable because the tenant's behavior violated public policy.

The court would not accept the CMHA's argument that drug use on the premises must necessarily lead to eviction on public policy grounds. The court relied on a now well-known letter from the Secretary of Housing and Urban Development to public housing directors emphasizing "compassion and common sense in responding to cases involving the use of illegal drugs."[39] While urging PHAs to use discretion, the court also ruled that the one-strike policy "would not constitute a waiver" of the landlord's obligations under *Brokamp* and *Quinn*.[40] Thus, even if the tenant's behavior could be a basis for termination of tenancy under *Rucker* and one-strike regulations, a tenant may still invoke generally applicable defenses to eviction, such as those based on a landlord accepting rent after becoming aware of the tenant's breach of the lease agreement. The court affirmed that the *Rucker* decision does not act as a license for the landlord to "violate the clearly established eviction procedure" and that the CMHA's behavior was "equally contrary to public policy." Hence, they ruled that the tenant's process for eviction was unwarranted.

Hairston may be useful to advocates on two accounts. First, it makes good use of the HUD letters on *Rucker*. Second, it makes clear that *Rucker* and one-strike regulations do not bar assertion of common law defenses to eviction.

Another Ohio court demonstrated no compassion for a youthful indiscretion. In *Cincinnati Metropolitan Housing Authority v. Browning*, the Ohio Court of Appeals reversed a county municipal court's ruling regarding a PHA's decision to terminate the tenant's tenancy when police found the tenant's son in possession of marijuana.[41] The tenant, Deborah Browning, resided in a publicly subsidized apartment in Cincinnati. Her son, Roderico, was stopped by police officers on CMHA property for violating curfew.[42] When police searched the 15-year-old, they found less than one-eighth of an ounce of marijuana in his pocket.[43] The officer cited Roderico for "acts that, if committed by an adult, would have constituted the crime of possession of drugs" and the PHA subsequently filed a complaint for forcible entry and detainer. Browning argued that she should not be evicted since her son was a juvenile and punishment should be "rehabilitative not punitive." The municipal court awarded Browning summary judgment. The appellate court chose to address the issue under contract principles and ruled the "lease in question makes no distinction between adult and juvenile offenders."[44] The appellate court found that the trial court's holding was erroneous since the language of the lease made no distinction between criminal activity of juveniles and that of adults. Notably, this decision stands for the proposition that juvenile offenses can be considered criminal activity under *Rucker* and one-strike rules.

Missouri: Court Rules Criminal Behavior Must Be Contemporaneous with Tenancy

A Missouri appellate court decided that a crime must be contemporaneous with the tenancy for Rucker to apply. In *Wellston Housing Authority v. Murphy*, the Missouri Court of Appeals ruled that neither 42 U.S.C. § 1437d(1)(6) nor the *Rucker* decision applied to "past criminal activity."[45] Marilyn Murphy entered into a "subsidized federal housing lease" for the rental of an apartment in January 2002. Thereafter, Murphy asked the Wellston Housing Authority to have Morris Lockett added to her lease.[46] This inquiry led to the housing authority's discovery that Lockett had a criminal record for acts committed prior to 2002. Upon this discovery, Lockett was prohibited from being added to the lease and permanently forbid-

---

[35]Cuyahoga Metropolitan Housing Authority v. Hairston, 790 N.E.2d 828, 829 (Ohio Mun. Ct. 2003).

[36]*Id*.

[37]*Id*.

[38]Brokamp v. Linneman, 20 Ohio App. 199, 202 (Ohio App. 1923) (Holding that a landlord waives the right to terminate a tenancy due to a breach of the lease if, after learning of the breach, he takes action inconsistent with the termination of the tenancy); Quinn v. Cardinal Foods, Inc., 20 Ohio App.3d 194 (Ohio App. 3d 1984) (Holding that the *Brokamp* principle is not applicable only to situations involving nonpayment of rent; waiver may be deemed to have occurred in cases involving the breach of a nonmonetary obligation).

[39]Letter from Mel Martinez, Secretary of HUD, to Public Housing Directors, (April 16, 2002), *available at* http://www.nhlp.org.

[40]*Hairston*, 790 N.E.2d at 831.

[41]Cincinnati Hous. Auth. v. Browning, 2002 WL 63491 (Ohio Ct. App. Jan. 18, 2002).

[42]*Id*.

[43]*Id*.

[44]*Id*.

[45]Wellston Hous. Auth. v. Murphy, 131 S.W.3d 378, 381 (Mo. Ct. App. 2004).

[46]*Id*. at 379.

den from the grounds.[47] On July 28, 2002, Lockett visited Murphy.[48] The housing authority had Lockett arrested for trespassing and served Murphy a notice of termination of her lease.[49]

While declining to comment on a housing authority's right to bar a person from entering a leased dwelling based on past criminal activity, the court ruled that the one-strike rule only applied to guests' contemporaneous—as opposed to past—behavior.[50] The housing authority argued that "any criminal activity of a guest" applied to one's past record, but the court concluded that "it strains construction to construe 'any criminal activity . . . of a guest' to include criminal conduct that occurred prior to the tenant's lease term."[51] By narrowly construing the definition of the "criminal activity" sufficient to trigger application of one-strike rules, the court rejected the housing authority's bid to substantially expand its one-strike authority.

Conclusion

Two years after the issuance of the Supreme Court's decision, it is difficult to detect clear patterns in courts' interpretation of *Rucker*. The decision and 42 U.S.C. § 1437d(*1*)(6) still loom over HUD-assisted tenants and the leases they must sign. Courts, however, have seemed prepared to apply a certain degree of common sense and discretion in deciding eviction cases initiated under one-strike authority. In some cases, residents have unfairly lost their homes, but, in a number of others, courts have declined to adopt the broad interpretations of one-strike urged by public housing authorities. ■

[47]*Id*.

[48]*Id*.

[49]*Id*.

[50]*Id*. at 380.

[51]*Id*.

Bush Flexible Voucher Proposal Faces Nationwide Resistance

This article first appeared in the April 2004 Bulletin

The Bush Administration's Fiscal Year (FY) 2005 budget[1] once again proposes inadequate funding levels for most federal housing programs. Housing and other domestic spending programs face disproportionate cuts to levels below what is required to maintain current services in order to create budget room for spending on other more favored programs and entitlements. To make the numbers work, the budget takes aim at the largest single housing program operated by the Department of Housing and Urban Development (HUD), Housing Choice Vouchers, reducing funding and converting the assistance into a block grant to public housing authorities (PHAs).[2] Through this "block and cut" strategy, the Administration seeks to shed responsibility for any increases in local housing costs, and sets the stage for large-scale future reductions in federal contributions.

Background on the Flexible Voucher Proposal

Last year's FY 2004 proposal to block grant voucher funding to the states gained no traction on the Hill. The Administration's new "Flexible Voucher" proposal seeks greater support from PHAs in the political debate by promising near-total deregulation in exchange for providing less funding now and uncertain funding in the future. Its most essential feature is to forever shatter the link between federal funding levels and actual local housing costs, relieving all pressure to sustain federal voucher funding levels against the projected tidal wave of long-term budget pressures from declining revenues from tax cuts and increasing entitlement costs. These pressures will mount dramatically over the next two decades as demographics change, especially if recent tax cuts are extended.

On its own merits, the Flexible Voucher block grant proposal has so far received no better reception among legislators or communities throughout the land than the FY 2004 proposal did. The big question is whether that skepticism will hold as Congress crafts and implements its larger budget plans, and makes spending decisions.

[1]The complete budget submission with supporting documents is available from the Office of Management and Budget's Web site at www.whitehouse.gov/omb/budget/fy2005/index.html. *See generally* NHLP, *Administration's FY 2005 Budget Once Again Threatens Federal Housing Programs*, 34 HOUS. L. BULL. 33, 33 (Feb.-Mar. 2004).

[2]NHLP, *Administration's FY 2005 Budget Once Again Threatens Federal Housing Programs*, 34 HOUS. L. BULL. 33, 33 (Feb.-Mar. 2004).

As a dollar-based block grant program with funds distributed directly to PHAs, the radical Flexible Voucher proposal promises significant harm to very low-income families. Because federal funding would no longer be linked to the actual local costs of providing vouchers, the central affordability feature of the current program would disappear for many tenants. Instead, the Administration would encourage "graduation" from assistance, "greater PHA discretion in meeting local housing objectives, steady and predictable funding levels adjusted annually for inflation," and accountability through incentives.[3]

HUD's justification for the proposal has been built around alleged unsustainable spiraling cost increases in recent voucher budgets and greater flexibility for PHAs. Closer analysis by budget analysts and committee staff has demonstrated that recent cost increases are entirely explicable and will not persist,[4] at least in the short run, as local housing markets soften and rent increases abate. The Flexible Voucher proposal would shift this burden of cost increases from the federal government to the tenants. "Flexibility" is a valid justification only when policymakers reach agreement about broader policy objectives—i.e, what should voucher assistance accomplish? If the debate ever emerges from the level of budget constraints to reach this dimension, in the face of persistent and widespread housing unaffordability even for working families, HUD will have a lot of explaining to do.

Concerning the funding level for the program, the Administration's proposed FY 2005 funding level is approximately $1.5 billion below what is needed to fund all currently authorized vouchers. It would reduce the number of currently authorized vouchers by more than 10 percent, or about 250,000 units nationwide. Over time, the picture could worsen dramatically, as funding would be driven not by housing costs, but by the political vagaries of the federal appropriations process.

Impacts of the Proposal

If the proposed FY 2005 funding level were enacted and the shortfall were covered solely by raising rents, the rent burdens of the two million mostly extremely low-income voucher households would have to rise by an average of about $850 per year.[5] Over the longer term, the Flexible Voucher proposal will inexorably reduce the number of families served, raise tenant rent burdens and divert benefits to higher-income households.[6] With insufficient federal funding and increasing rents due to inflation or market forces, PHAs will simply have no choice.[7] The President's budget proposes cutting voucher funding by about 30 percent in 2009, one of the deepest cuts made in any major low-income assistance program in recent decades. If this long-run cut were implemented by reducing the number of families served, according to the Center on Budget and Policy Priorities, PHAs would have to eliminate about 600,000 vouchers, or if by raising rent contributions, the average voucher family would face a rent increase of about $2,000 per year in 2009.[8]

According to Congressman Barney Frank, "The proposal is a callous attempt to implicate desperate cash-starved public housing authorities in its war on the poor."

With no restrictions on payment standards, tenant rent contributions and targeting, voucher recipients would shoulder the entire burden of inadequate funding, or vouchers would be eliminated. The Flexible Voucher proposal will allow Congress to set voucher funding at whatever level the political process chooses, unrelated to actual local housing costs or affordability to tenants. PHAs will dole out the crumbs.

Yet another troubling dimension of Flexible Vouchers is the retreat from housing choice and fair housing objectives. As recently pointed out by the Poverty and Race Research Action Council, inadequate subsidies will effectively limit participants' choice of neighborhoods, likely producing further segregation and concentrations of poverty,[9] contrary to the housing choice policy that has

[3] Budget of the United States Government, Fiscal Year 2005, Appendix, Department of Housing and Urban Development, 515 (2004), *available at* http://www.gpoaccess.gov/usbudget/fy05/pdf/appendix/HUD.pdf.

[4] *See* Barbara Sard & Will Fischer, Nearly All Recent Section 8 Growth Results from Rising Housing Costs and Congressional Decisions to Serve More Needy Families (2004), *at* http://www.cbpp.org/2-2-04hous.htm (recent cost increases have resulted from unusually rapid growth in rents, depressed incomes of low-income families, improved PHA voucher utilization, and issuance of additional vouchers). *See also* Press Release, House Financial Services Committee Democratic Staff, Setting the Record Straight: Section 8 Voucher Costs Are Not Spiraling Out of Control (Feb. 2004).

[5] Barbara Sard & Will Fischer, Administration Seeks Deep Cuts in Housing Vouchers and Conversion of Program to a Block Grant (2004), *at* http://www.cbpp.org/2_12_04hous.pdf.

[6] *Id*.

[7] *Id*. Under the FY 2004 budget resolution, annual Section 8 spending levels would be very low, especially in later years. Critical information about the long-run projections was not disclosed in the budget documents themselves, but in a supplementary 1000-page computer run released by OMB. In FY 2009, Section 8 expenditures would be $6.1 billion below Congressional Budget Office estimates for current services, and more than $4 billion below OMB's Section 8 estimate for 2004.

[8] *Id*.

[9] *See* Press Release, Poverty and Race Research Action Council, Fair Housing Implications of the Administration's Flexible Voucher Proposal (Apr. 6, 2004).

provided a foundation for the voucher program since its inception in 1974.

To illustrate the impact of the cuts, the Center on Budget and Policy Priorities prepared summaries of the impact on each state and PHA in both 2005 and 2009,[10] showing the number of units that would have to be cut or the amount of rent increases tenants would have to pay if the cuts were to be covered in those ways. This information has fueled a strategy to inform legislators and the media of the concrete impacts of the proposed cuts. Many newspapers throughout the country have written articles detailing the impact of the cuts. Some added editorial pieces opposing the proposal. Those efforts have certainly helped raise the profile of the Bush voucher plan for the ensuing budget and political discourse.

The Political Response

The first response came from the Democrats on the House Financial Services Committee. Ranking Member Barney Frank (D-MA) issued a strongly worded statement:

> The proposal is a callous attempt to implicate desperate cash-starved public housing authorities in its war on the poor. They have been presented with the Sophie's choice of pitting poor people against one another by having to make do with the inadequate resources being provided to them by HUD . . . . Since this administration took office, it has recklessly bestowed billions of dollars in tax breaks to the wealthy and to its corporate cronies. It has relentlessly made war upon poor people, refusing to fund new affordable housing, failing to preserve existing housing, presiding over an increase in homelessness and slashing programs for low-income people, the elderly and the disabled.[11]

Putting legislative force behind these words, Congressman Frank followed by offering an amendment to the Committee's Statement of Views and Estimates on the FY 2005 Budget, which specifically details the impacts of the Flexible Voucher proposal on voucher funding, the families who would be served, and the rents they would pay.[12] The amendment passed on a roll call vote of 34-26, with prominent Republican Doug Bereuter (R-NE) joining the Democrats in substituting this language for that contained in the original Budget Views draft.

About the same time, the HUD-VA Subcommittee of the House Appropriations Committee next held a hearing on the voucher portion of the Administration's budget on March 3, where several Democratic members (Ranking Member Mollohan and Congressman Price) strongly criticized the Flexible Voucher plan. Subcommittee Chair Walsh (R-NY) has offered vague support for the plan, although without specifically endorsing all of the specifics.

On the Senate side, when VA-HUD Appropriations Subcommittee Chair Christopher Bond (R-MO) introduced then-nominee HUD Secretary Alphonso Jackson at his confirmation hearing in mid-March, he stated that Jackson had "inherited a budget request from OMB for '05 which undermines the financial viability and integrity of a number of important housing programs, including both Section 8 and FHA." Later, at the Senate HUD-VA Appropriations Subcommittee hearing on April 1, Senator Bond characterized the Bush proposal as "fatally flawed" and a "meat cleaver," due to its promise of insufficient funding and abandoning targeting vouchers to the most needy, forecasting that the Senate would not have enough time to consider the plan this year.[13]

In addition, the Senate opposition may be more broadly based. The Senate Budget Committee earlier had approved a budget proposal on a party-line vote that cuts discretionary spending (including housing programs) by $2 billion beyond the Bush request, and this plan later passed the full Senate.[14] While the Senate plan will make it very difficult for appropriators to fully fund both vouchers and other HUD housing programs, the Budget Committee's report did promisingly posit renewal of vouchers, while not endorsing block-granting.[15] The

---

[10]For estimates of the potential impact of the cuts in 2005 and 2009 on every state and individual PHAs, see Press Release, Center on Budget and Policy Priorities, Local Effects of Proposed Cuts in Federal Housing Assistance (Mar. 17, 2004), *available at* http://www.cbpp.org/3-17-04hous-states.htm.

[11]Statement of Congressman Barney Frank, Ranking Member, House Financial Services Committee, on the FY '05 Budget (Feb. 2, 2004).

[12]Amendment to Views and Estimates of the Committee on Financial Services on Matters to Be Set Forth in the Concurrent Resolution on the Budget for Fiscal Year 2005, Offered by Mr. Frank of Massachusetts (Feb. 25, 2004). See also Staff of the House of Representatives Comm. on Financial Services, 108th Cong., VIEWS AND ESTIMATES OF THE COMMITTEE ON FINANCIAL SERVICES ON MATTERS TO BE SET FORTH IN THE CONCURRENT RESOLUTION ON THE BUDGET FOR FISCAL YEAR 2005 19 (Comm. Print 2004) (includes amendment), available at http://financialservices.house.gov/media/pdf/FY2005%20Views_FINAL.pdf, at 19.

[13]*See* Statement of Senator Kit Bond at the Senate HUD-VA Appropriations Subcommittee Hearing (April 1, 2004), available at http://bond.senate.gov/atwork/record.cfm?id=219951.

[14]The Senate Budget Resolution passed March 12 also proposes deep cuts in core low-income programs, such as Medicaid, while imposing restraints on other critical programs, such as the TANF reauthorization. See Press Release, Center on Budget and Policy Priorities, Budget Priorities Under the Senate Budget Plan (rev. Apr. 2, 2004), *available at* http://www.cbpp.org/3-4-04bud.htm (analyzing the Budget resolution as passed by the full Senate, with the exception of the Feingold amendment restoring pay-go rules for tax cuts, which is strongly opposed by the Republican leadership in both chambers).

[15]"Under the Chairman's Mark, sufficient budget authority and outlays are provided to renew all utilized Section 8 housing contracts. The Mark does not reflect the Administration's block grant proposal (consistent

House Budget Resolution, however, was silent on the issue. However, House Appropriations Committee Chair Bill Young (R-FL) had mentioned the $1.7 billion shortfall in Section 8 funding proposed by the Administration's FY 2005 budget, while detailing many other significant problems for domestic discretionary programs posed by the budget, in a letter to fellow Republicans concerning the needs to be considered in developing the House version of the Budget resolution.[16]

These actions reflect the seeds of growing bipartisan opposition to the Administration's "block and cut" proposal for Section 8. Ultimately, its fate will be determined by the final shape of the Budget resolution (as of April 15 still in Conference to resolve differences between the House and Senate versions), as well as subsequent actions by the appropriations committees when they develop their bills. An important element of the budget resolution will be whether it will contain the Senate's version of the "pay-go" budget enforcement rule (adopted as an amendment on the Senate floor and so far acceded to by the Senate Republican leadership). This provision would require any additional spending or tax cuts to be offset by tax increases or spending reductions, unless sixty Senators vote to waive the rule, and is strongly resisted by both the Administration and the House leadership.

Advocates have also worked with Congressional supporters, such as Senator Paul Sarbanes (D-MD, Ranking Member of the Senate Banking Committee) and Rep. Nydia Velasquez (D-NY, member of the House Housing Subcommittee) to circulate sign-on letters to mark and strengthen the opposition. Advocacy groups and other program participants (such as PHAs, apartment owners and realtors) have also voiced opposition.

The fate of the Flexible Voucher plan will have a tremendous impact on many other federal housing programs, whose federal funding levels are now driven almost entirely by cost considerations. Look for further reports in the *Housing Law Bulletin* as the appropriations process unfolds later this year. ■

with Congressional action in 2004 appropriations on a similar proposal in 2004 budget request)." United States Senate Budget Committee, CHAIRMAN'S MARK 2005 BUDGET 600-44 (2003 [sic]), available at http://www.senate.gov/~budget/republican/pressarchive/ChairmansMark2005.pdf. While budget resolutions and reports are not technically binding on subsequent appropriations decisions, an enacted resolution makes subsequent spending decisions inconsistent with their terms subject to points of order in floor action, and thus they usually serve as a basic framework for appropriations. Therefore, such statements can only be helpful.

[16]Letter from C.W. Bill Young, House Appropriations Committee, to Republican Committee Members, att. 1 (Mar. 3, 2004).

Federal Court Rules that Enhanced Voucher Tenant Has Right to Remain

This article first appeared in the Nov.-Dec. 2004 Bulletin

In a case of first impression, a federal district court in New York has recently ruled that federal law requires owners leaving the project-based subsidy programs to accept the replacement subsidies provided by Congress. *Jeanty v. Shore Terrace Realty Ass'n*, No. 03 Civ. 8669 (BSJ), 2004 WL 1794496 (S.D.N.Y. Aug. 10, 2004). Last November, after a hearing but without an opinion, the court had issued a preliminary injunction that required the owner to accept a tenant's voucher. In this ruling, the court relied both on a federal statute establishing the enhanced voucher program[1] and other HUD policies to permanently enjoin the owner from refusing to accept the tenant's voucher and to renew her lease so long as she remained eligible for the voucher and complied with the terms of her lease. This ruling provides clear and direct support to the position that Congress itself has required owners to accept these subsidies, joining the position long espoused by tenant advocates and even by Department of Housing and Urban Development (HUD) since 2000.

Background

When private owners leave HUD's multifamily housing programs, either by opting out of their project-based Section 8 contracts or by prepaying their HUD-subsidized loans, many tenants are eligible to receive enhanced vouchers, pursuant to annual appropriations acts during the late 1990s and permanent legislation passed in 1999.[2] These new vouchers can usually cover the entire amount of any new higher market rent for the unit, if that amount is determined reasonable by the public housing authority (PHA).

For many years, some owners have disputed any duty to accept these vouchers to avoid tenant displacement, despite HUD's repeated policy statements. Owners, HUD and PHA staff, and tenants alike have also been uncertain about the duration of the duty to accept. For some of this time, Congress' lack of explicit direction was part

[1]42 U.S.C.A. § 1437f(t) (West 2003).

[2]Pub. L. No. 106-74, § 538, 113 Stat. 1047, 1122 (1999) (establishing Section 8(t) of the United States Housing Act and codified at 42 U.S.C. § 1437f(t)).

of the problem,[3] but Congress soon acted,[4] clarifying the enhanced voucher statute by restoring the inadvertently omitted language. The Conference Report explicitly stated that this revision was a clarification of law, not new law.[5] Subsequently, in its Section 8 renewal policy guide, HUD reiterated that tenants receiving enhanced vouchers have the right to remain in their units as long as the property remains available for rental use, meets housing quality standards, and rents for an amount approved as "reasonable" by the local PHA.[6] This protection is not time-limited, but extends beyond the first lease following conversion, lasting until the owner has good cause to terminate the tenancy for noncompliance with the lease.[7] HUD policy seeks to implement this requirement by requiring owners to certify on their "opt-out" or renewal form that they will comply with the tenants' right to remain, as well as through language containing this commitment in the one-year notice form.[8] Despite these policies, and despite issuing numerous letters informing specific owners of these duties, occasional owner resistance persists, giving rise to enforcement litigation like *Jeanty*.

The Case and Decision

After opting out of its project-based contract in 2003, project owner Shore Terrace offered all but four of its tenants leases and agreed to accept their enhanced vouchers. However, while it was willing to sign unassisted leases for the four, and did so, it refused to accept their vouchers, allegedly because they were chronically late in paying rent or had refused access for repairs. The PHA informed the tenant that the owner had refused to sign the assistance contract, and indicated that it was issuing her a voucher to move.

The tenant filed suit against the owner challenging its refusal to accept her enhanced voucher as a violation of the enhanced voucher statute. The PHA was sued as well. Although strongly supporting the tenant's legal position under federal law, the PHA believed it lacked the power to force the owner to accept the voucher assistance.

The court found that the statute was clear on its face, rejecting as "illogical" the owner's claim that while the tenant has the right to remain, the owner has no duty to accept the voucher.[9] In the court's words, "[i]f a landlord's obligation to accept enhanced vouchers upon opt-out was merely voluntary, then § 1437f's grant to the tenant of the right to remain would be illusory," noting that the right to elect to remain appears within the enhanced voucher subsection of the statute and hence cannot be divorced as the owner contended.[10] The court also found unpersuasive the owner's attempt to rely on the generally voluntary nature of an owner's participation in the voucher program, distinguishing the additional protections afforded by the entirely separate enhanced voucher statute.

Although because of the statute's clarity it was unnecessary to do so, the court also pointed to HUD's reasonable interpretation in the Section 8 renewal policy guide and in a separate notice that owners are obligated to accept the vouchers, to which it would defer. Additional support came from the court's view of the statute's legislative history.

An additional question raised by the litigation was the duration of the owner's duty to accept the enhanced voucher, specifically at the point of lease expiration. Employing a similar analysis as used for the duty to accept, the court found it illogical to provide a right to remain but not recognize a duty to offer a lease renewal, referring to the absence of any time-limit language in the statute as further support. Buttressing this conclusion, the court pointed to HUD's reasonable interpretation in the Section 8 renewal policy guide.[11]

After issuing the declaration that the refusal violated the statute and the permanent injunction requiring acceptance of the voucher, the court reserved plaintiff's claim for attorney's fees and costs. The owner has since filed an appeal of the judgment with the United States Court of Appeals for the Second Circuit, but no stay of the injunction has been issued. ■

---

[3] In Fiscal Year (FY) 1999, Congress inadvertently omitted the tenants' "election to remain" from the Appropriations Act. Pub. L. No. 105-276, 112 Stat. 2461 (1998). However, HUD set forth the policy in its implementing Notice H 99-36 (Dec. 29, 1999).

[4] *See* FY 2001 Military Construction and FY 2000 Emergency Supplemental Appropriations Act, Pub. L. No. 106-246, § 2801, 114 Stat. 511, 569 (2000) (was H.R. 4425). This provision amended Section 8(t) of the United States Housing Act, 42 U.S.C. §1437f(t), to state that "the assisted family may elect to remain in the same project in which the family was residing on the date of the eligibility event . . . ."

[5] "[The report] inserts language as proposed by the House and the Senate clarifying the intent of title V, subtitle C, section 538 of Public Law 106-74." H.R. Rep. No. 106-710 (2000).

[6] HUD, Office Of Multifamily Housing, Section 8 Renewal Policy: Guidance For The Renewal Of Project-Based Section 8 Contracts, ¶ 11-3B (2001) [hereinafter Section 8 Renewal Policy Guide], *available at* http://www.hudclips.org (click shortcut link on left to "Section 8 Renewal Policy Guide"). *See also* Section 8 Tenant-Based Assistance (Enhanced and Regular Housing Choice Vouchers), PIH 2001-41 (Nov. 14, 2001).

[7] Section 8 Renewal Policy Guide, *supra* note 6.

[8] *Id*. at ch. 8.

[9] *Jeanty*, 2004 WL 1794496, at *3 (citing 42 U.S.C. § 1437f(t)(1)(B): "the assisted family may elect to remain in the same project in which the family was residing on the date of the eligibility event for the project.").

[10] *Id.*

[11] *Id.* at *5 (citing Section 8 Renewal Policy Guide, *supra* note 6, at ¶ 11-3B).

IRS Finally Clarifies Good Cause Eviction Protection for Tax Credit Tenants

This article first appeared in the October 2004 Bulletin

More than a decade following Congress' passage of amendments to improve tenant protections, the Internal Revenue Service (IRS) has finally issued a formal Revenue Ruling requiring all owners of Low-Income Housing Tax Credit (LIHTC) properties to place good cause eviction requirements in the property's recorded restrictions. IRS Rev. Rul. 2004-82, Q&A 5 (2004). The IRS thus joins a handful of state appellate courts that have held that the tax credit statute[1] requires good cause for all terminations of tenancy.[2] As it does with almost all other federal housing programs with the exception of vouchers, the good cause eviction requirement applies to all terminations of tenancy in the LIHTC program, whether during the term of the lease or at the end of the term.[3] Because the ruling requires state agency tax credit allocators to review their LIHTC inventory to determine the extent of noncompliance and require certain curative actions in order for owners to continue to claim the credits, advocates should become informed about their state's activities and simultaneously take action to protect tenants' rights during this process.[4]

The revenue ruling adopts the position that numerous state agencies and several state appellate courts have already determined—that the LIHTC statute itself requires that every LIHTC property have a recorded "extended low-income housing commitment" (ELIHC), which, among other things, prohibits evictions or terminations of tenancy other than for good cause.[5] This obligation exists throughout and for three years beyond the "extended use period," which begins when the building first becomes part of a tax-credit-qualified property, and ends on the later of the date specified by the state agency in the ELIHC (which varies from state to state), or thirty years.[6] The statute has contained this clarifying language since 1990.[7]

This means that, aside from its impact on the owner's ability to legally claim the tax credit, advocates and tenants can use the statute and the IRS interpretation immediately to defend evictions without cause. In addition, advocates can use the statute to immediately seek negotiations or judicial relief requiring the good cause protection to be expressed in the tenant's lease. The LIHTC statute itself not only requires the language to be included in the project's ELIHC, but also provides the tenant an express right to enforce the prohibition on no-cause evictions.[8]

Under the ruling, by December 31, 2004, each state credit allocator must review all existing ELIHCs in its jurisdiction to determine whether they contain an explicit "no cause eviction protection."[9] If any ELIHC lacks such a provision, the state agency must make a determination that the ELIHC is invalid and the property is not in compliance, and presumably then notify the owner. Under the Ruling, absent a prompt cure to include such good cause language in the project's ELIHC, a noncompliance determination jeopardizes the owner's ability to claim the credit, which could affect prior, current and future tax years.[10] Hopefully this substantial financial risk will encourage faster compliance by those owners whose ELIHCs are currently lacking the required language.

Because the method used by various state agencies to implement the statute's ELIHC requirements may vary,

---

[1]26 U.S.C.A. § 42 (West 2002).

[2]Cimarron Village Townhomes, Ltd. v. Washington, No. C5-98-15671, 1999 Minn. App. LEXIS 890, 1999 WL 538110 (July 27, 1999) (LIHTC tenants may be evicted only for good cause), *on appeal after remand*, 659 N.W.2d 811 (Minn. App. 2003) (upholding finding that good cause existed); Bowling Green Manor Ltd. Partnership v. Kirk, No. 94CVG01059, 1995 Ohio App. LEXIS 2707, 1995 WL 386476 (Ohio App. June 30, 1995) (finding sufficient state action to require good cause for termination of LIHTC and Section 8 tenancy); Bowling Green Manor Ltd. Partnership v. LaChance, 1995 Ohio App. LEXIS 2767, 1995 WL 386496 (Ohio App., June 30, 1995) (same); Carter v. Maryland Mgmt. Co., 2003 WL 22533198, 2003 Md. LEXIS 740 (Md. Ct. App. Nov. 10, 2003) (good cause required for termination of LIHTC/Voucher tenancy, but good cause found). *See also* Marc Jolin, *Good Cause Eviction and the Low Income Housing Tax Credit*, 67 U. CHI. L. REV. 521 (2000). A number of state agencies have previously recognized the requirement.

[3]26 U.S.C.A. § 42 (h)(6)(E)(ii)(I) (West 2002) ("eviction or termination of tenancy (other than for good cause)").

[4]LIHTC projects local jurisdictions can be located through a HUD Web site at http://www.huduser.org/datasets/lihtc.html#data.

[5]26 U.S.C.A. § 42 (h)(6)(B)(i) (West 2002).

[6]Under the statute, the "extended use period" is fifteen years after the close of the compliance period, which is itself fifteen years, for a total of thirty years. 26 U.S.C.A. § 42 (h)(6)(D) (West 2002), which refers to the definition of "compliance period" in § 42(i)(1). The statute also requires the good cause protection to last for three years beyond the termination of the extended low-income housing commitment, which is usually the determinant of the extended use period, as it is often longer than thirty years. 26 U.S.C.A. § 42 (h)(6)(E)(ii) (West 2002).

[7]Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, § 11701(a)(7), 104 Stat. 1388-506 (1990).

[8]26 U.S.C.A. § 42 (h)(6)(B) (i) (establishing the rent limitations and good cause eviction protections) and (ii) (authorizing state court enforcement) (West 2002).

[9]Rev. Rul. 2004-82, at A-5.

[10]26 U.S.C.A. § 42 (h)(6)(J) (West 2002). The ruling allows owners one year from the date of any state agency determination of noncompliance to bring the property into compliance, and preserve the ability to claim the credit for tax year 2004, and all subsequent and prior years. Rev. Rul. 2004-82, at A-5, ¶ 2.

agencies are likely to proceed in different fashions to implement the Ruling for any noncomplying properties in their jurisdictions. Hopefully, the task of identifying noncomplying properties can be simplified by an agency's review of any form ELIHCs that it has used over the years for its LIHTC inventory. This would allow an agency to quickly determine any subsets of noncomplying properties.

Because the method used by various state agencies to implement the statute's ELIHC requirements may vary, agencies are likely to proceed in different fashions to implement the Ruling for any noncomplying properties in their jurisdictions.

Those agencies whose ELIHCs are a single bilateral agreement between the agency and the owner, recorded as a binding restriction on the property, may have to execute a revised ELIHC with the owner, whereas those whose existing agreements expressly require an owner to comply with the LIHTC statute may be able to simply require the owner to execute and record a form unilateral amendment to the ELIHC or other restrictive covenant.

In all cases, it will also be important to obtain amendments to the leases used by project owners, as this is the primary reference point for tenants, managers and local eviction court judges for determining the applicable rules, certainly not the recorded ELIHC. Also important will be more detailed definition of the good cause protection, and what procedural protections, such as the length and content of any prior notice, will be required.[11]

Working with other advocates, NHLP has prepared simple form amendments to project ELIHCs and leases which could be readily adapted to the specific circumstances of any particular jurisdiction or property. Contact Jim Grow at NHLP for more information. ■

[11] *See* NHLP, HUD Housing Programs: Tenants' Rights ch. 14 (3d ed. 2004) (statutes, regulations and cases exploring these issues in other federal housing programs).

HUD and DOJ Clarify Reasonable Accommodations

This article first appeared in the October 2004 Bulletin

In an effort to clarify the obligations of housing providers and rights of tenants, the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ) in May published a memorandum regarding "reasonable accommodations" for people with disabilities pursuant to requirements of the Fair Housing Act.[1] The Joint Statement provides a fairly complete and accurate picture of what courts and administrative judges have decided on specific issues in the area, while refraining from exploring uncharted territory, so it provides a useful resource for advocates and housing providers alike. The Statement may be especially important for advocates since requesting reasonable accommodations can be particularly helpful in both enabling people with disabilities to have full access to housing and preventing evictions.[2]

The Fair Housing Act requires housing providers to make reasonable accommodations necessary to "afford a person with a disability the equal opportunity to use and enjoy a dwelling."[3] Those housing providers that receive federal financial assistance are also subject to Section 504 of the Rehabilitation Act of 1973,[4] which imposes a similar reasonable accommodation duty, but also potentially greater obligations. The Statement is limited to reasonable accommodation duties affecting rules, policies, practices and services (which are virtually identical under the Fair Housing Act and Section 504), not those involving structural modifications to units, which might be required under Section 504.[5]

[1] Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Accommodations Under the Fair Housing Act* (May, 17, 2004) [hereinafter "Joint Statement"]. The Fair Housing Act is codified at 42 U.S.C.A. §§ 3601-3619 (West, WESTLAW through P.L. 108-303 (excluding P.L. 108-293) approved 09-08-04). The "reasonable accommodation" duty is set forth at 42 U.S.C.A. § 3604(f)(3)(B).

[2] For a more thorough discussion on using reasonable accommodations to prevent evictions, *see* Fair Housing Information Sheet #4, *at* http://www.bazelon.org/issues/housing/infosheets/fhinfosheet4.html (last visited June 9, 2004).

[3] 42 U.S.C.A. § 3604(f)(3)(B) (West, WESTLAW through P.L. 108-303 (excluding P.L. 108-293) approved 09-08-04); 24 C.F.R. § 100.204 (2003).

[4] 29 U.S.C.A. § 794 (West, WESTLAW through P.L. 108-303 (excluding P.L. 108-293) approved 09-08-04).

[5] For more on Section 504, *see* U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, Notice PIH 2003-31 (HA) (www.hud.gov/offices/fheo/disabilities/PIH03-21.pdf) and "Section 504: Frequently Asked Questions," (www.hud.gov/offices/fheo/disabilities/ sect504faq.cfm#anchor272118).

Who Must Provide Reasonable Accommodations?

The reasonable accommodation requirements apply to most entities engaged in providing housing and residential lending, including owners, managers, homeowner and condominium associations, lenders, real estate agents and brokers, as well as state and local governments. The Fair Housing Act contains a few specific exceptions for some private, individual owners selling their own homes or owner-occupants of buildings with less than four units.[6]

Who Is Entitled to a Reasonable Accommodation?

The Fair Housing Act defines persons with disabilities (actually "handicaps") to include individuals with a physical or mental impairment that substantially limits one or more major life activities, who are regarded as having or who have a record of such an impairment.[7] The Fair Housing Act covers numerous disabilities, including many diseases and conditions, but specifically does not protect juvenile offenders or sex offenders.[8] Persons currently engaging in the illegal use of controlled substances are not protected either, in contrast to those recovering from substance abuse, who can request reasonable accommodations.[9]

Those whose tenancy would constitute a "direct threat" to the health and safety of other individuals or result in substantial physical damage to the property of others are not entitled to a reasonable accommodation, unless a reasonable accommodation would substantially eliminate the threat.[10] Significantly, the Statement helpfully specifies that a "direct threat" must rely on objective evidence and cannot be based on fear, speculation or stereotype.[11] The Statement specifically states that housing providers must "take into account intervening treatment or medication that has eliminated a past direct threat," including a history of overt acts.[12] The precise contours of the direct threat exception and the reasonable accommodation duty will undoubtedly remain the subject of case-by-case negotiation,[13] since the Statement also requires the requester to provide satisfactory assurances that the requested accommodation will in fact be implemented to address the threat.

How and When Are Reasonable Accommodation Requests to Be Made?

Persons with disabilities may make a request for an accommodation at any time, and it is not necessary that the request be made in any particular manner. They need only ask the housing provider for an exception, change or adjustment to a rule, policy, practice or service because of their disability.[14] The Statement recites that they should explain the requested accommodation, and need only explain the relationship between the requested accommodation and the disability if the need is not readily apparent or already known to the provider. The persons with the disability, or someone acting on their behalf, must merely bring the request to the housing provider's attention, in a manner that a reasonable person would understand as a request for an exception or change because of a disability, with no use of specific terminology required. This can be done either in writing or orally, although the Statement naturally recommends written requests. Although a provider may adopt forms or procedures for reasonable accommodation requests, the tenant is under no obligation to follow them.[15] The Statement is clear that the provider's

Persons with disabilities may make a request for an accommodation at any time, and it is not necessary that the request be made in any particular manner.

[6]Joint Statement, Q&A2, at 3.

[7]Joint Statement, Q&A 3, at 3-4 (including definitions of "physical or mental impairment," "substantially limits," and "major life activity"); 42 U.S.C.A. § 3602(h) (West, WESTLAW through P.L. 108-303 (excluding P.L. 108-293) approved 09-08-04). The Statement's listing of "major life activities" of central importance to daily life, such as seeing, hearing, walking, breathing, performing manual tasks, self-care, learning and speaking, is not exhaustive.

[8]Joint Statement, Q&A 4, at 4. The Joint Statement defines the term "physical or mental impairment" to include, but not be limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, HIV infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

[9]*Id*.

[10]*Id*.

[11]*Id*. Q&A 5, at 4-5; 42 U.S.C.A. § 3604(f)(9) (West, WESTLAW through P.L. 108-303 (excluding P.L. 108-293) approved 09-08-04).

[12]Joint Statement, Q&A 5, at 5.

[13]*See, e.g.*, Bazelon Center for Mental Health,.Fair Housing Information Sheet #4, *at* http://www.bazelon.org/issues/housing/infosheets/fhinfosheet4.html (last visited June 9, 2004).

[14]Joint Statement, Q&A 12, at 10.

[15]*Id*., Q&A 12 and 13, at 10-11.

duty to evaluate a reasonable accommodation request is triggered by a request from a qualified individual.

What Is a Reasonable Accommodation and When Is One Required?

Although a request is required, precision about the precise accommodation is not. Cases have imposed a high standard upon the housing provider to "identify and implement a reasonable accommodation, even when one is not proposed by the tenant herself."[16] Nonetheless, demonstrating a close nexus between the requested accommodation and the individual's disability increases the chances for successful resolution of reasonable accommodation requests, especially in court.[17] The Statement offers examples of appropriate relationships. For example, a housing provider must accommodate a deaf person by allowing an assistive hearing dog in the apartment, despite a "no pets" policy, since the requested accommodation is directly related to the individual's disability. Similarly, a tenant who fears leaving her apartment due to a mental disability may not be required to pay her rent in person, even if that is the housing provider's general policy.[18]

Providers can deny requests if the person seeking the accommodation lacks a qualifying disability or if the requested accommodation is not sufficiently related to the disability. In addition, requests that impose undue financial and administrative burdens on the housing provider or fundamentally alter the nature of the provider's operations are unreasonable and need not be honored.[19] The Statement provides little clarification of "undue burden," calling for case-by-case analysis involving several factors.[20] Some cost alone is insufficient to justify denial of a request. Providers cannot just say "no"—even the making or rejection of a request for an unreasonable accommodation does not end the matter, as the Statement indicates that the parties should work together through an interactive process to seek an alternative reasonable accommodation.[21] If agreement concerning an alternative reasonable accommodation still proves unreachable, the tenant may file a complaint.[22]

May Housing Providers Charge Fees or Deposits for Granting Requests for a Reasonable Accommodation?

The Statement reiterates that it is illegal to charge persons with disabilities a fee for providing reasonable accommodations.[23] However, if the reasonable accommodation leads to property damage to the unit or common area, the housing provider may charge the tenant for the cost of repairing the damage. Permissible charges would include charges for an assistive pet that causes damage, or for use of a motorized scooter that scrapes the walls.[24]

How Quickly Must Providers Respond and May They Request Additional Information?

The Statement specifies a general rule that reasonable accommodation requests warrant a prompt response and an undue delay may be deemed a failure to provide a reasonable accommodation,[25] but no other details on the timeliness of responses are provided.

One confusing area has been what information concerning disabilities may legally be requested by housing providers. Current or potential residents are not required to disclose if they have a disability or the severity of a known disability as long as they have not requested an accommodation.[26] Generally, housing providers may not inquire about the disabilities of applicants or their households or associates, including their nature and severity. However, a housing provider may inquire to determine if an applicant: (1) can meet the requirements of tenancy; (2) is a current illegal abuser or addict of a controlled substance; or (3) qualifies for a dwelling legally available only to or on a priority basis to persons with a disability or to persons with a particular type of disability, so long as the provider asks all applicants these questions.

When a tenant or applicant with a qualifying disability requests a reasonable accommodation, a housing provider may request information to determine if a reasonable

---

[16]Bazelon Center for Mental Health Law, Fair Housing Information Sheet #4, *at* http://www.bazelon.org/issues/housing/infosheets/fhinfosheet4.html (last visited June 9, 2004) (referencing Roe v. Hous. Auth., 909 F. Supp. 814 (D.Colo. 1995) and Roe v. Sugar River Mills Assocs., 820 F.Supp. 636 (D.N.H. 1993)).

[17]Joint Statement, Q&A 6, at 6. S*ee also* Fair Housing Information Sheet #4, *at* http://www.bazelon.org/issues/housing/infosheets/fhinfosheet4.html (last visited June 9, 2004).

[18]Joint Statement, Q&A 6, at 6.

[19]*Id*., Q&A 7, at 7.

[20]*Id*. at 7. *E.g.*, Citywide Assocs v. Penfield, 409 Mass. Super. Ct. 140, 564 N.E.2d 1003 (Mass. 1991) ($520 not an "undue burden"). The Statement describes a request by a mobility-impaired tenant for transportation and assistance in grocery shopping when the provider has never offered such services as an example of a "fundamental alteration" that is refusable. Joint Statement, Q&A 8, at 8.

[21]*Id*., Q&A 7, at 7. Providers may also offer alternative accommodations to ones that are reasonable, but requesters need not accept them.

[22]*Id*., Q&A 10, at 9.

[23]*Id*., Q&A 11, at 9.

[24]*Id*. at 9.

[25]*Id*., Q&A 15, at 11.

[26]*Id*., Q&A 16 at 11-12.

accommodation is necessary, but may not request such information if the disability is obvious or known and the need for the requested accommodation is readily apparent or known.[27] If only the need for the accommodation is not apparent or known, the inquiry may also seek information necessary to evaluate the disability-related need for the accommodation.[28] Generally, information concerning the extent of the actual disability should be limited to verifying the existence of a qualifying condition and establishing the nexus to the requested accommodation.[29] This information can often be provided by the requester, but third-party verification can also come from both medical professionals (not just doctors) and non-medical persons or agencies in a position to know about the disability. The Statement indicates that generally verification through medical records is unnecessary.[30]

Conclusion

The HUD-DOJ Joint Statement provides a helpful summary of the law concerning reasonable accommodation. By incorporating existing rules and most cases and administrative rulings in the area, the Statement provides more guidance from a relatively vague statute than is generally available to advocates and providers alike. The Statement should significantly advance Congress' intent in adopting the reasonable accommodation duty. ■

[27]*Id*. at 12.

[28]*Id*., Q&A 18, at 13-14.

[29]*Id*. at 13.

[30]*Id*. at 14.

FY 2005 Appropriations Update

This article first appeared in the Nov.-Dec. 2004 Bulletin

Negotiations over the Fiscal Year (FY) 2005 VA-HUD Appropriations Act drew to a hurried close on November 20.[1] Where the Bush Administration sought to slash federally subsidized housing (and other discretionary spending and social programs), Congress is, instead, authorizing sufficient funds to maintain a host of programs, but at a reduced level. These reductions come at a time when the public's need for assistance has only increased. It is hard to say whether Congress is showing backbone in insisting that social programs receive a basic level or support—or whether it indicates that Congress is gradually succumbing to pressure to abandon the growing number of have-nots who comprise the body politic of the United States.

The Fiscal Backdrop

The Congressional Budget Office's 2001 projection of a surplus in 2004 has turned out to be unfounded. Instead, our country now has a federal deficit of $422 billion.[2] The dollar's value has declined markedly, which could trigger inflation.[3] The resulting rise in interest rates nationally would, historically, result in higher credit card and other personal finance rates, increasing the debt burden of the American public. An increased debt burden will mean less money available to pay for housing and increased demand for shrinking affordable housing programs. The 2005 "Defense and Homeland Security" bills constitute more than half of the total proposed 2005 budget.

Section 8 Voucher Assistance

Organizing by community groups, advocates and PHAs helped to stop some of the worst of the Section 8 proposals. Neither the House nor the Senate approved the proposed block-granting of the voucher program. The Bush Administration's proposal to cut voucher funding

[1]The official title of the Act is the "Fiscal 2005 HUD Appropriation (H.R. 5041, S. 2825), Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2005."

[2]Congressional Budget Office, The Economic and Budget Outlook: Summer Update (2004).

[3]*See* David Streitfeld, *Dollar's Decline Is Reverberating: If foreign investors look elsewhere, interest rates could climb and living standards could fall*, Los Angeles Times (Nov. 2004), *at* http://www.latimes.com/business/la-fi-dollar14nov14,0,5679791.story. See also, Richard Kogan, David Kamin, Center on Budget And Policy Priorities, New Congressional Budget Office Estimates Show Continued High Deficits And Further Fiscal Deterioration (2004).

drastically has also been rejected. Still, proposed funding levels by the House and Senate committees probably fall a little short of funding needs for maintaining current voucher levels. HUD will fund PHAs on a formula/dollar basis, as contrasted with the cost-based system which was in place prior to FY 2004.

The Act funds tenant-based Section 8 at $14,836,096,000—a level that is slightly above the 2004 funding level. Allowable expenditures include renewal of expiring housing choice vouchers, enhanced vouchers, relocation assistance, and payment of fees to public housing agencies administering voucher programs. The Family Self-Sufficiency program funding has dropped down to $46 million—a loss of $2 million compared to FY 2004 levels.

PHAs will be forced to operate within prescribed budgets, as determined by HUD, without any flexibility or amendments. Thus, there will be no allowance for such exigencies such as rent increases in the private market or overall average reductions in tenants' incomes.

The Act reduces administrative funds for the program below FY 2004 levels as well as reducing program reserves to one week. Readers are well aware of the debacle of the Department of Housing and Urban Development's (HUD) limitation on the distribution of voucher funds last year and its formula change which resulted in a 3% decline in the number of vouchers in use. Approximately 60,000 families were not assisted as a result. PHAs continue to hold back vouchers and have reduced the amount of rent paid per voucher as a result of HUD's actions. It is likely that PHAs will continue to release fewer vouchers in order to try to safeguard themselves against further funding hardships or regulatory hurdles that HUD may impose in the future.[4]

Regrettably, the conference report instructs that "HUD may also provide agencies with flexibility to adjust payment standards and portability as necessary to manage within their 2005 budgets."[5] How HUD will interpret and implement this comment is not known. However, if calendar year 2004 is any guide, the interpretation will not be expansive or generous. The language allows HUD to institute restrictive policies for reducing the payment standard and limiting portability, which is a basic element of the voucher program. Perhaps recognizing that there must be some restraint, the congressional conferees further caution that "[a]gencies shall ensure that current elderly and disabled voucher families be protected against significant impact resulting from adjustment made by agencies to maintain their voucher programs within their 2005 budgets"[6] and elsewhere instructed PHAs to "protect the most at-risk families."[7]

HUD is required to renew PHA funding contracts in calendar year 2005 based on Voucher Management System leasing and cost data averaged for the months of May, June and July of 2004, and applying a 2005 Annual Adjustment Factor to be established by HUD. Some flexibility is allowed only for first-time renewals of tenant protection or HOPE VI vouchers. Moving to Work (MtW) PHAs will continue to be funded per their MtW agreements. PHAs are prohibited from using voucher funds to support the leasing of more units than the agency's authorized level.

PHAs will be forced to operate within prescribed budgets, as determined by HUD, without any flexibility or amendments. Thus, there will be no allowance for such exigencies such as rent increases in the private market or overall average reductions in tenants' incomes. As a consequence, any increase in the cost of the voucher program will be passed on to participants as a higher cost burden or fewer vouchers will be released onto the market in affected jurisdictions. HUD does not have a central fund or other funds to replenish program reserves. In other words, PHAs that have reserves and dip into them will not be reimbursed by HUD under Fiscal Year 2005 Appropriations. Thus, there is no encouragement to PHAs to increase utilization up to the authorized level. In fact, because of the fixed dollar amount of the subsidy, the only way that PHAs could increase utilization above the May, June and July of 2004 level would be by reducing their average costs. PHAs should know what those costs are shortly: within 45 day of the enactment of the FY 2005 Act, HUD must inform each PHA of its annual budget. HUD cannot cause additional harm, as it did in FY 2004, by delaying in informing PHAs of the dollar amount of their annual budgets.

Within the Working Capital Fund is a $25 million set-aside, which HUD may allocate to PHAs "that need additional funds to administer their section 8 programs." Though it is clear that the set-aside may be used only

[4] *Id.*

[5] H.R. REP. NO. 108-792, at 21 (2004), *available at* http://thomas.loc.gov/home/omni2005/index.htm.

[6] *Id.*

[7] *Id.*

to support Section 8 tenant-based program activities, it is not clear how eligibility for funds will be determined. HUD has thirty days from the enactment of this Act to issue notice implementing this provision. It is not clear whether that will be a notice to the public. If it is, advocates and PHAs should avail themselves of the opportunity to comment on HUD's proposal for how and when these funds may be accessed. This may represent the best opportunity to ensure a minimal safety net for PHAs and program participants.

Tenant-based rental assistance and project-based assistance will be funded in two different "accounts," theoretically to establish better oversight of expenditures.

Project-Based rental assistance will be funded approximately 10% more than the Fiscal Year 2004 level.

Public Housing

Already strapped PHAs will be buffeted by decreasing public housing funding levels. The Act sets the Public Housing Operating Fund at 68% of 2004 levels. Most of the reason for the huge differential between this year and last year's funding levels is that PHA funding is being shifted from a fiscal year to a calendar year. Thus, for example, a PHA already funded in its original fiscal year through March of 2005 would receive only another nine months' worth of funding under the FY 2005 Appropriations Act. Consequently, the total funds needed to maintain PHAs' public housing operations, even at 2004 levels, will be greatly reduced. This does not, however, mean that the Operating Fund will be sufficient to meet PHAs' true cost of operations. In real terms, the Public Housing Capital Fund has been cut by approximately 3.6%.[8] Moreover, Congress failed to provide funding for PHAs to transition from a fiscal year to a calendar year basis. The Senate had proposed to allocate $30 million for this transition.

HOPE VI revitalization funds have been cut by around 3.4% compared to FY 2004 levels. However, HUD has not asked for any HOPE VI funding for FY 2005. HOPE VI presents a mixed blessing, as it has resulted in a net loss of public housing units affordable to extremely low-income residents and widespread displacement of such families from their neighborhoods while providing substantial funds to redevelop a small number of public housing sites.[9]

A program designed to provide supportive services and resident empowerment activities to public housing residents will also suffer a reduction. The Resident Opportunity and Self-Sufficiency (ROSS) program will receive almost 3% less in funding than it did in 2004.

Significantly, the Congressional conferees removed from the appropriations bill the Senate proposal regarding limitations on PHA activities regarding voter participation. The Conference Report, however, states that PHAs cannot use HUD funds for partisan activities, which is redundant, as such partisan activities are already precluded by the Hatch Act.[10] In addition, Congress added an inartfully drafted provision that proposes to include within tenant income that is available for housing costs the amount of scholarship income received by an athlete.

Native American Housing Funds

Congress reduced Native American Housing Block Grant funds by approximately 3.6 % compared to 2004 levels. A smaller reduction was made to the Indian housing Loan Guarantee Fund Program. The Block Grant program provides flexible funds to Indian tribes and tribally designated housing entities to address their community housing needs. Funds may be used for operating expenses and capital needs. These funds are the primary, and in many cases only, source of funding for desperately needed housing for Native Americans. The guaranteed loan program permits Native Americans to build or purchase homes on trust land. Without the guarantee, private lenders are reluctant to loan money for homeownership on trust land.

Housing joins the list of the myriad of Native American programs that the federal government proposes to cut significantly.

Despite the fact that Native Americans continue to be the most impoverished and underserved group in the United States, housing joins the list this year of the myriad of Native American programs that the federal government proposes to cut significantly. Other proposed cuts target education programs (primary through university level), health services, and law enforcement/tribal court services.

[8]See NHLP, *Proposed Cuts to Public Housing Remain Unresolved*, 34 Hous. L. Bull. 199, 213 (2004) (discussing the effect of the then-proposed cut of 4.3%).

[9]*See* NHLP, et al., False HOPE: A Critical Assessment of the HOPE VI Public Housing Redevelopment Program (2002), *available at* http://www.nhlp.org/html/pubhsg/FalseHOPE.pdf.

[10]*See* NHLP, *Proposal to Limit Public Housing Authority Voter Participation Programs Is Criticised*, 34 Hous. L. Bull. 199, 212 (2004).

Native Hawaiian Housing Funds

The Hawaiian Housing Block Grant Program, created in the year 2000, will be continued at last year's funding level of $9 million under the Community Development Fund. Funds may be used for affordable housing development to serve low-income Native Hawaiians. It is not clear why the funds are being included under Community Development instead of being funded as a separate line item. The Native Hawaiian Housing Loan Guarantee Fund, similar in purpose to the Native American program, will be funded at $1 million—a slight reduction from last year's funding level.

A study commissioned by the Department of Hawaiian Home Lands found that 62% of Native Hawaiian households on Hawaiian homelands are low or very low-income.

Housing needs in Hawaii, for Native Hawaiians in particular, are severe. For purposes of state programs, "Native Hawaiian" is currently defined as a person with at least 50% Hawaiian blood, and their successors or assignees of less than 50% Hawaiian blood. Government figures on the total number of Hawaiian residents who fall into this category range from a low of 45,000 to a high of 70,000.[11] A 2003 study commissioned by the Department of Hawaiian Home Lands found that 62% of Native Hawaiian households living on Hawaiian homelands are low or very low-income—a 20% increase in poverty level since a 1995 HUD study.[12] Of low-income Native Hawaiian households, 68% experience housing problems, such as affordability, overcrowding, structural quality, availability or some combination of these problems. For very low-income households, nearly 75% experience a housing problem of some sort.[13]

Housing for Persons with AIDS

The Housing Opportunities for Persons with AIDS (HOPWA) program, which has been vitally important for helping to ensure that people living with HIV/AIDS and their families are housed, will receive less funding this year than in 2004. The Act reduces HOPWA funding by approximately 4%. Existing permanent supportive housing contracts that are expiring will receive continued funding before any new, competitive grants (provided the housing was funded under the national competition for HOPWA funds and still meets program requirements). HOPWA funds pay for permanent housing, rental assistance and supportive services. The majority of people served are extremely low-income, while another almost 30% are low-income.[14]

Housing for the Elderly

Housing for the Elderly refers to the Section 202 program, which funds acquisition, rehabilitation or construction of housing for low-income seniors, as well as project-based rental assistance for units already constructed under the program. The Act reduces funding for this program by about 3.5% below its 2004 level.

Housing for People with Disabilities

The Act reduces funding for Housing for People with Disabilities (also known as the Section 811 program) by almost 4%. The program funds acquisition, rehabilitation or construction of supportive housing for people with disabilities, as well as project-based rental assistance for existing Section 811 buildings. In addition to the funding cut, it is worth noting the House and Senate's admonishment of HUD for not anticipating the true cost of its tenant-based contracts entered into prior to fiscal year 2004. Congress, however, did authorize additional funds to address the expense. The admonishment is in alignment with the general suspicion Congress seems to have of how HUD manages its assisted housing programs.

Fair Housing

The federal government funds the Fair Housing Assistance Program, which assists HUD-certified, state and local fair housing enforcement agencies. The Fair Housing Initiatives Program provides support to nonprofit organizations, state and local government agencies as well as other, non-federal entities, for the purpose of eliminating or preventing housing discrimination and improving housing opportunities for protected classes. Funding under the Act for these activities is reduced by over 3%.

[11]Approximately 57% of Native Hawaiians live in Hawaii, per U.S. Census 2000 figures.

[12]Department of Hawaiian Home Lands, Native Hawaiian Housing Plan 6 (2003) *available at* http://www.hawaii.gov/dhhl/accepted.2004nhhp.pdf.

[13]*Id. at* 7.

[14]*See* HUD, Office of Policy Development and Research, National Evaluation of the Housing Opportunities for Persons with AIDS Program (HOPWA) (2001), *available at* http://www.huduser.org/periodicals/rrr/rrr_4_2001/0401_1.html.

Rural Housing and Economic Development

The House proposes a 3.5 % cut in Rural Housing and Economic Development funding for 2005. These funds help nonprofits, community development corporations, Native-American tribes, state housing finance agencies, and other economic development agencies provide for the housing and development needs of rural communities. The Section 515 Rural Rental Housing Program will receive a massive 14% cut, with funding at $100 million for Fiscal Year 2005 compared to $116.5 million in 2004. The new preservation loan program will receive $3 million.[15]

Conclusion

Congressional acquiescence to underfunding and defunding of essential federal programs is hurtful and short-sighted. Line items labeled "defense" and "anti-terrorism" are sacred cows when it comes to appropriations discussions. Few Americans, including members of Congress, are willing to question these items in the federal budget for fear of being labeled un-American or unpatriotic. As a consequence, these sacred cows eat their way through precious funds that could make the lives of residents in this country safer and better. Other policies of this administration—including massive tax cuts to those who are already wealthy, and handouts to large corporations—have also threatened the safety, security, and quality of life of the other residents in this country. Until we address these fundamental inequities, we will continue to fight a piecemeal battle to save the frayed strands that constitute America's disappearing safety net. ■

On December 8, 2004, President Bush signed into law the Consolidated Appropriations Act, 2005, Pub. L. No. 108-447 (2004), which incorporated the 2005 VA-HUD Appropriations Act.

[15]For more analysis of the impact of cuts on rural housing programs, visit the Housing Assistance Council's Web site at http://www.ruralhome.org.

Recent Cases

These cases appeared in the Sept.-Dec. 2004 Bulletins.

The following are brief summaries of recently reported federal and state 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.

Emergency Low Income Housing Preservation Act (ELIHPA); Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA)

Independence Park Apts. v. United States, 2004 WL 1918718 (Fed. Cl. Aug. 27, 2004). On remand from the Federal Circuit, the Court of Federal Claims considered the calculation of damages to Plaintiff owners of HUD-assisted housing developments for temporary regulatory takings claims related to the Emergency Low Income Housing Preservation Act of 1987 and the Low-Income Housing Preservation and Resident Homeownership Act of 1990. This case is an offshoot of *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003). The claims court adopted Plaintiffs' model for the calculation of damages, which was based on rents Plaintiffs were unable to receive as a result of being unable to prepay their federally insured mortgages, plus interest.

Fair Housing — Disability

United States v. Edward Rose & Sons, 2004 WL 1882662 (6th Cir. Aug. 25, 2004). Plaintiff-Appellee United States filed suit against Defendant-Appellants property developers and architects for violation of the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq*., related to inaccessible front entry doors at 19 apartment buildings being developed by Defendant-Appellants. The district court preliminarily enjoined the construction and occupancy of the buildings. Defendant-Appellants appealed. The court of appeals affirmed the district court's granting of preliminary relief holding that entrances are "common areas" required to be accessible under 42 U.S.C. § 3604(f)(3)(C)(i).

[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.

Housing Choice Voucher Program — Enhanced Vouchers

Jeanty v. Shore Terrace Realty Assoc., 2004 WL 1794496 (S.D.N.Y. Aug. 10, 2004). Plaintiff resident filed suit against Defendant project-based Section 8 property owner challenging Defendant's refusal to accept Plaintiff's enhanced Section 8 voucher as a violation of 42 U.S.C. § 1437f)(t). The district court declared that Defendant's refusal to accept Plaintiff's enhanced voucher violated 42 U.S.C. § 1437f)(t) and HUD regulations and permanently enjoined Defendant to accept Plaintiff's voucher and to renew Plaintiff's lease so long as she retained the voucher and other conditions are met.

Multifamily Housing Property Disposition Act

Dean v. Martinez, 2004 WL 2115605 (D. Md. Sept. 21, 2004). Plaintiff residents filed suit to challenge a plan by the Department of Housing and Urban Development (HUD) and local entities to demolish a federally assisted multifamily housing development and replace it with a mix of market-rate and "affordable" units. Plaintiffs asserted that the plan violated the Multifamily Housing Property Disposition Act, 12 U.S.C. § 1701z-11, Fair Housing Act, 42 U.S.C. §§ 3601, 3608(e)(5), and the Uniform Relocation Act, 42 U.S.C. §§ 4601, 4625. On parties' motions for summary judgment, the district court, *inter alia*, granted partial summary judgment to Plaintiffs on their claim that HUD failed adequately to consider factors specified in the Disposition Act and remanded the matter to HUD for further consideration.

Project-Based Section 8 Programs—Opt-Outs

Baker v. Property Investors of Connecticut, 2004 WL 2251848 (D. Conn. Sept. 21, 2004). Plaintiff residents of a project-based Section 8 property filed suit challenging the termination of Section 8 assistance at the property. The district court granted Defendant HUD's motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), Federal Rules of Civil Procedure. In particular, the court concluded that the availability of enhanced vouchers and "the absence of an allegation that HUD denied or diminished Plaintiffs' rights under the section 8 program in any tangible or substantial way" meant that Plaintiffs had not adequately alleged concrete harm sufficient on which to base their claims against HUD.

Fair Housing — Disability

McGary v. City of Portland, 386 F.3d 1259 (2004). Citing, *inter alia*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) and its recent decision in *Giebeler v. M&B Assocs.*, 343 F.3d 1143 (9th Cir.2003), the Ninth Circuit reversed an order by the U.S. District Court for the District of Oregon dismissing under Rule 12(b)(6), Federal Rules of Civil Procedure, claims by Plaintiff disabled homeowner against Defendant city under the Fair Housing Amendments Act, 42 U.S.C. §§ 3601 *et seq*., and state and local laws. Plaintiff alleged that by refusing to allow him additional time to clean his yard under a municipal nuisance abatement ordinance Defendant had failed to provide legally required reasonable accommodation of his AIDS-related disability.

Housing Choice Voucher Program — Utility Allowances; Federal Courts — Private Right of Action

Johnson v. Hous. Auth. of Jefferson Parish, 2004 WL 2414095 (E.D. La. Oct. 28, 2004). Plaintiff Housing Choice Voucher program participants filed suit against Defendant public housing authority and officers challenging Defendants' failure to adjust voucher utility allowances since 1995 despite increases in utility costs. Defendants moved to dismiss pursuant to Rule 12(b), Federal Rules of Civil Procedure. Distinguishing *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), the district court granted the motion, concluding, *inter alia,* that Plaintiffs had no private right of action to enforce the utility allowance provisions of the voucher statute, 42 U.S.C. § 1437f.

State Courts — Sovereign Immunity

Evans. v. Hous. Auth. of the City of Raleigh, 602 S.E. 2d 668 (N.C. Sup. Ct. 2004). The Supreme Court of North Carolina reversed an order by the Wake County Superior Court denying Defendant public housing authority's motion to dismiss based on governmental immunity in a lead paint tort action brought by Plaintiff public housing resident. The state supreme court held that public housing authorities are entitled to governmental immunity under state law. The supreme court remanded the matter to the district court to make factual determinations as to whether Defendant had waived immunity in this case. ■

Recent Housing-Related Regulations and Notices

These regulations appeared in the Nov.-Dec. 2004 Bulletin.

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD) and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued in October of 2004. 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 Federal Register Final Rules

69 Fed. Reg. 62,164 (Oct. 22, 2004)
Participation in HUD's Native American Programs by Religious Organizations; Providing for Equal Treatment of All Program Participants

Summary: This final rule removes barriers to the participation of faith-based organizations in HUD regulations implementing the Indian HOME Program, the Indian Community Development Block Grant Program, the Indian Housing Block Grant Program, the Title VI Loan Guarantee Assistance Program, and the Section 184 Loan Guarantees for Indian Housing Program. HUD has decided to adopt the June 21, 2004, proposed rule without change.

Effective Date: November 22, 2004.

69 Fed. Reg. 59,004 (Oct. 1, 2004)
Fair Market Rents for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program Fiscal Year 2005

Summary: Proposed FY 2005 Fair Market Rents (FMRs) were published in the *Federal Register* on August 6, 2004. The proposed FMRs were calculated for the first time using 2000 Census data and new Office of Management and Budget (OMB) metropolitan area definitions. Both changes in how FMRs were calculated had significant impacts. A number of public comments from public housing agencies and major interest groups raised concerns about the magnitude of FMR changes experienced by many areas. HUD is required by law to utilize the most recent available data in calculating FMRs, and all federal agencies are instructed to use current OMB metropolitan area definitions unless there are strong program reasons to use alternative definitions. As a result of public comments and further consideration of the proposed FMRs, HUD determined that there was sufficient reason to not use the new OMB metropolitan area definitions in calculating the final FY 2005 FMRs. The final FY 2005 FMRs provided in this publication are therefore based on the most recent available data but use the same FMR area definitions used in the FY 2004 FMR publication, which were based on old OMB metropolitan area definitions.

Effective Date: October 1, 2004.

69 Fed. Reg. 61,517 (Oct. 19, 2004)
Homeless Management Information Systems (HMIS) Data and Technical Standards Final Notice; Clarification and Additional Guidance on Special Provisions for Domestic Violence Provider Shelters

Summary: This notice clarifies and provides further guidance on the special provisions for domestic violence provider shelters participating in Homeless Management Information Systems (HMIS). This clarification and additional guidance follows issuance of the HMIS Data and Technical Standards Final Notice published on July 30, 2004, and the HMIS Data and Technical Standards Draft Notice, published on July 22, 2003.

Effective Date: August 30, 2004.

69 Fed. Reg. 62,070 (Oct. 22, 2004)
Delegation of Authority for Multifamily Housing Mortgage and Assistance Restructuring

Summary: Effective October 1, 2004, the Secretary is delegating authority and responsibilities to the Assistant Secretary for Housing-Federal Housing Commissioner that were previously administered by the Director of HUD's Office of Multifamily Housing Assistance Restructuring.

***Effective Date*:** October 1, 2004.

69 Fed. Reg. 62,071 (Oct. 22, 2004)
Revocation and Redelegation of Authority: Office of Affordable Housing Preservation

Summary: Under this notice, the Assistant Secretary is redelegating authority to carry out provisions of MAHRA to the General Deputy Assistant Secretary—Deputy Federal Housing Commissioner (General Deputy Assistant Secretary) and to staff within the Office of Affordable Housing Preservation.

Dates: Effective October 1, 2004.

69 Fed. Reg. 62,281 (Oct. 25, 2004)
Privacy Act of 1974; Notice of Matching Program: Matching Tenant Data in Assisted Housing Programs

Summary: Pursuant to the Computer Matching and Privacy Protection Act of 1988, as amended, and the Office of Management and Budget's (OMB) Guidance on the statute, HUD is updating its notice of a matching program involving comparisons between income data provided by applicants or participants in HUD's assisted housing pro-

grams and independent sources of income information. The matching program will be carried out to detect inappropriate (excessive or insufficient) housing assistance under the National Housing Act, the United States Housing Act of 1937, Section 101 of the Housing and Community Development Act of 1965, the Native American Housing Assistance and Self-Determination Act of 1996, and the Quality Housing and Work Responsibility Act of 1998. The program provides for the verification of the matching results and the initiation of appropriate administrative or legal actions. This notice supplements the overview of computer matching for HUD's assisted housing programs published in the *Federal Register* on March 9, 2004. The March notice describes HUD's program for computer matching of its tenant data to: (a) The Social Security Administration's (SSA's) earned income and the Internal Revenue Service's unearned income data; (b) SSA's wage, Social Security, supplemental security income and special veterans benefits data; and (c) State Wage Information Collection Agencies' wage and unemployment benefit claim information.

Effective Date: Computer matching is expected to begin November 24, 2004, unless comments are received which will result in a contrary determination, or forty days from the date a computer matching agreement is signed, whichever is later.

Comments Due Date: November 24, 2004.

69 Fed. Reg. 62,717 (Oct. 27, 2004)
Notice of Planned Closing of Portland, OR; Omaha, NE; Albuquerque, NM; and Birmingham, AL; Post-of-Duty Stations

Summary: This notice advises the public that the HUD Office of Inspector General (OIG) plans to close its Portland, Oregon; Omaha, Nebraska; Albuquerque, New Mexico; and Birmingham, Alabama post-of-duty stations, and also provides a cost-benefit analyses of the impact of these closures.

69 Fed. Reg. 62,992 (Oct. 28, 2004)
Notice of Regulatory Waiver Requests Granted for the First Quarter of Calendar Year 2004

Summary: Section 106 of the Department of Housing and Urban Development Reform Act of 1989 requires HUD to publish quarterly *Federal Register* notices of all regulatory waivers that HUD has approved. This notice contains a list of regulatory waivers granted by HUD during the period beginning on January 1, 2004, and ending on March 31, 2004.

HUD PIH Notices

Notice PIH 2004-20 (HA) (Oct. 4, 2004)
Elimination of the Use of Code "5" in Line 3q of the Form HUD 50058 in Reporting Compliance with Public Housing Community Service and Self-Sufficiency Requirements

Summary: This notice eliminates the use of code "5" in line 3q of the Form HUD 50058 in reporting compliance with Public Housing community service and self-sufficiency requirements. Code "5" was used for public housing agencies to whom the community service requirements did not yet apply. As of October 31, 2003, all public housing agencies should have a policy in effect for the community service or self-sufficiency requirements according to PIH Notice 2003-17 titled "Reinstatement of the Community Service and Self-Sufficiency Requirement." Therefore, public housing agencies should no longer be selecting code "5" (option n/a) for line 3q of Form HUD-50058 since this will be an invalid response that will cause the form to be rejected by the PIC system.

Expires: October 4, 2005.

RHS Federal Register Notice

69 Fed. Reg. 62,639 (Oct. 27, 2004)
Notice of Funds Availability (NOFA) Inviting Applications for the Rural Community Development Initiative (RCDI)

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

Dates: January 25, 2005. ■

Here's what the experts say about why the *Bulletin* is essential for advocates and attorneys…

If you are representing clients on housing matters related to federal housing programs, it borders on malpractice not to subscribe to the *Housing Law Bulletin*.

Fred Fuchs, Attorney
Legal Aid of Central Texas, Austin, TX

The *Housing Law Bulletin* is an excellent resource for resident leaders, organizers and community-based groups. It provides greater understanding of federal housing issues and information that promotes efforts to improve poor people's housing rights.

Sandy Rollins
Texas Tenants Union

I read the *Housing Law Bulletin* religiously and use the materials to help teach my housing rights law class, to advise legal services attorneys in DC on housing issues, and to inform my work as a Public Housing Commissioner for the D.C. Housing Authority.

Lynn E. Cunningham, Associate Professor of Clinical Law
George Washington University Law School, Washington DC

I consider the *Housing Law Bulletin* as one of the essential resources that enables us to successfully understand housing law and represent our clients.

Rick Glassman, Managing Attorney
Harvard Legal Aid Bureau

The National Housing Law Project is the premier housing law organization in the country. No entity has done more to advance and protect the rights of the poor to decent and affordable housing.

Alan W. Houseman, Director
Center for Law and Social Policy

Here's what the experts say about why the *Bulletin* is essential for law libraries and clinical professors…

The *Housing Law Bulletin* is essential for every law school library. It is an indispensable resource for students in property, poverty law, housing, benefits, and homelessness courses; for law review note and article writers; for clinicians working on housing cases; and for professors researching and writing about housing issues.

Florence Wagman Roisman, Michael McCormick Professor of Law
Indiana University School of Law, Indianapolis

I read the *Housing Law Bulletin* religiously and use the materials to help teach my housing rights law class, to advise legal services attorneys in DC on housing issues, and to inform my work as a Public Housing Commissioner for the D.C. Housing Authority.

Lynn E. Cunningham, Associate Professor of Clinical Law
George Washington University Law School, Washington DC

I consider the *Housing Law Bulletin* as one of the essential resources that enables us to successfully understand housing law and represent our clients.

Rick Glassman, Managing Attorney
Harvard Legal Aid Bureau

The National Housing Law Project is the premier housing law organization in the country. No entity has done more to advance and protect the rights of the poor to decent and affordable housing.

Alan W. Houseman, Director
Center for Law and Social Policy

Here's what the experts say about why the *Bulletin* is essential for PHAs and Housing Providers…

The well-researched analysis contained in the *Housing Law Bulletin* provides our agency with a broader understanding of housing issues, lets us know what pitfalls to avoid, and, most importantly, helps us provide better service to our clients.

Sal Gonzalez, Housing Director
City of Oxnard, California

I strongly recommend the *Housing Law Bulletin* as a resource for current information on low-income federal housing programs and subsidies. Its regular news, thorough analysis, and thoughtful articles are extremely useful in helping non-profit and government housing providers to make their programs more effective and efficient.

Janet Falk, Executive Director
California Housing Partnership Corporation

If you are representing clients on housing matters related to federal housing programs, it borders on malpractice not to subscribe to the *Housing Law Bulletin*.

Fred Fuchs, Attorney
Legal Aid of Central Texas, Austin, TX

I read the *Housing Law Bulletin* religiously and use the materials to help teach my housing rights law class, to advise legal services attorneys in DC on housing issues, and to inform my work as a Public Housing Commissioner for the D.C. Housing Authority.

Lynn E. Cunningham, Associate Professor of Clinical Law
George Washington University Law School, Washington DC