

average nationwide there is approximately a 10% annual attrition rate for vouchers.

As a practical matter, a family who is initially denied the opportunity to port should follow up with a letter expressing continued interest in porting. If one or possibly two months go by without an offer to port, the tenant should re-contact the PHA and make a complaint to HUD.

Advocates who are reviewing the Annual Plans for a local housing authority should recommend changes to the Section 8 Administrative Plan which reflect this clarification of HUD policy. ■

## Public Housing Plan Requirements Continue to Erode

Since passage of the Quality Housing and Work Responsibility Act of 1998,<sup>1</sup> public housing authorities (PHAs) have been required to publish for public review and comment, and to file with the Department of Housing and Urban Development (HUD), Five-Year and Annual Plans that have provided significant information for residents and other interested parties about PHA intentions and operations. This article discusses changes wrought to PHA Five-Year and Annual Plan requirements by both HUD and Congress that alter the amount and accessibility of information maintained by PHAs.

### Revised Template and Its Effective Date

Emblematic of these changes is the dramatic reduction of the required HUD Plan Template from more than fifty pages to a two-page form with three pages of instructions.<sup>2</sup> Approved in April 2008,<sup>3</sup> use of the revised template is required for all PHAs having fiscal years beginning April 1, 2009, and in each quarter thereafter.<sup>4</sup> PHAs must submit their plans to HUD seventy-five days before the end of the current fiscal year. For example, the first wave of PHAs subject to the revised template was required to submit their plans to HUD by January 16, 2009. Because PHAs must give forty-five-day notice prior

<sup>1</sup>Quality Housing and Work Responsibility Act of 1998 (QHWRA), codified at 42 U.S.C. 1437c-1; see 24 C.F.R. Part 903.

<sup>2</sup>See NHLP, *HUD Is Poised to Drastically Alter the PHA Plan Process*, 38 Hous. L. Bull. 68 (2008).

<sup>3</sup>HUD-50075 (4/2008), at <http://www.hud.gov/offices/adm/hudclips/forms/files/50075.pdf>.

<sup>4</sup>Public Housing Agency (PHA) Five-Year and Annual Plan Process for all PHAs, PIH 2008-41, (Nov. 13, 2008) (hereafter PIH 2008-41). Every PHA fiscal year begins on the first day of a calendar quarter, e.g. April 1, July 1, October 1 and January 1. Note that this reflects a one-year delay in the utilization of the revised template from the April 1, 2008, initial use date set forth in the instructions to the template.

to holding the required public hearings on their proposed plans and must then incorporate the public and resident advisory board (RAB) comments into their submissions to HUD, residents and advocates should look for notice of such hearings at least four months (45 + 75 = 120 days) in advance of the beginning of their PHA's fiscal year.

### PHA Annual Plan Submission Dates<sup>5</sup>

FY Beginning	Annual Plans Due (75 days before the start of the PHA's fiscal year)	FY Ending
April 1, 2009	January 16, 2009	March 31, 2010
July 1, 2009	April 17, 2009	June 30, 2010
October 1, 2009	July 18, 2009	September 30, 2010
January 1, 2010	October 19, 2009	December 31, 2011

Note that the above chart, which appears in PIH Notice 2008-41, does *not* alert interested parties of the deadline for publication of notice of the public hearing.

### Five-Year and Annual Plan Yet to Conform to VAWA

The Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA)<sup>6</sup> mandates that PHA Five-Year Plans report on “the goals, objectives, policies, or programs [of the PHA] that will enable the housing authority to serve the needs of child and adult victims of domestic violence, dating violence, sexual assault, or stalking.” (hereinafter collectively referred to as domestic violence).<sup>7</sup> Each Annual Plan must contain “a statement of any domestic violence, dating violence, sexual assault, and stalking prevention programs: (i) a description of any activities, services, or programs provided or offered by an agency. . . to child or adult victims of domestic violence. . . ; (ii) . . . that help child and adult victims . . . to obtain or maintain housing; and (iii) . . . [that] prevent domestic violence . . . or to enhance victim safety in assisted families.”<sup>8</sup>

The revised template<sup>9</sup> does not comply with VAWA. NHLP, along with other advocates and organizations, requested that HUD address the deficiencies. As recently as November 13, 2008, HUD acknowledged that “the VAWA requirement for the Annual Plan submission to HUD is not included in the revised template,” and stated that “HUD expects to modify its current template to incorporate the Annual Plan requirements of VAWA shortly.” On November 28, 2008, HUD issued an Interim Rule

<sup>5</sup>*Id.* at 6.

<sup>6</sup>Pub. L. No. 109-162, 119 Stat. 2960, 3040 (2006).

<sup>7</sup>*Id.* at 119 Stat. 3040, § 603

<sup>8</sup>*Id.* See NHLP, *PHAs and Advocates Begin Early Efforts to Implement VAWA*, 37 Hous. L. Bull. 193 (2007).

<sup>9</sup>HUD-50075 (4/2008) available at <http://www.hud.gov/offices/adm/hudclips/forms/files/50075.pdf> (hereafter HUD-50075).

purporting to conform HUD practices to VAWA,<sup>10</sup> but the Interim Rule did not fully remedy the problems.

First, the template can be used for either the Five-Year or Annual Plan or both. When viewed as a Five-Year Plan, the template does not require PHAs to meet the statutory obligation to state their goals or objectives with respect to serving the needs of victims of domestic violence.<sup>11</sup> In addition, without the goals, the PHA will not be required to report on progress in future Five-Year and Annual Plans.<sup>12</sup>

Second, when used as an Annual Plan, Instruction 6.0 does not make clear that the “elements” identified in the Instructions are integral components of the plan. Rather, it treats them as auxiliary pieces. The template only requires that the PHA “must have the elements listed below readily available to the public.”<sup>13</sup> As a result, although Element 13<sup>14</sup> tracks the statutory<sup>15</sup> and regulatory<sup>16</sup> requirements for descriptions of domestic violence programs (both of which require inclusion of the domestic violence information in the plan itself), PHAs may not integrate this information into their actual plan.

Third, there remains a question of whether the required domestic violence elements will actually be made available by PHAs. By statute, PHAs “may comply [each year] by submitting an update of the plan.”<sup>17</sup> The template conveys this requirement by stating that PHAs are only required to “[i]dentify . . . elements that have been revised . . . since its last Annual Plan submission.”<sup>18</sup> PHAs that have not previously prepared these elements may not, therefore, identify them in the “update” section of their plan, and residents may not be aware that they can ask for access to these critical documents.

### “Qualified PHAs” Need Not File Annual Plan

After two years of controversy over the evisceration of the plan template, Congress dramatically altered the future availability of information from PHAs with a small number of public housing units and vouchers. Title VII of the Housing and Economic Recovery Act of 2008 (HERA)<sup>19</sup> released a large number of the PHAs from the

obligation to file Annual Plans. Crafted as an amendment to Section 5A (b) of the United States Housing Act of 1937,<sup>20</sup> § 2702 exempts PHAs from submission of an Annual Plan if they: (1) administer a combination of 550 or fewer ACC units and Section 8 housing choice vouchers, (2) are not designated “troubled” and (3) have not had a failing Section 8 Management Assessment Program (SEMAP) score during the prior twelve months. HUD has said that it will post lists of these “qualified PHAs” on its website.<sup>21</sup>

While not required to submit Annual Plans, qualified PHAs are still required to: submit annual Civil Rights Certification under 1437c-1(d)(16), have Resident Advisory Boards (RAB)<sup>22</sup> hold annual public hearings and invite public comment to discuss any changes to the goals, objectives and policies of the agency,<sup>23</sup> consider the recommendations of the RAB,<sup>24</sup> make information relevant to the hearings as well as determinations of the agency regarding proposed changes available to the public,<sup>25</sup> and provide notice of hearings and of the availability of the information forty-five days in advance of the hearing.<sup>26</sup>

Each PHA has set out the goals, objectives and policies of the agency in previously filed plans. Changes thereto must still be considered in a public forum. While qualified PHAs will not create documents which are called “plans,” they must continue to put into writing and submit to public scrutiny any proposed or adopted changes in their goals, objectives and policies. To the extent that notice of such proposed changes is consistent both with the statutory directive that PHAs may meet their obligation by “submitting an update of the plan for the fiscal year”<sup>27</sup> and with the instructions for plan submission that the PHA “[i]dentify specifically which plan elements have been revised since the PHA’s prior plan submission,”<sup>28</sup> HERA does not eliminate the public’s ability to oversee qualified PHA operations, but it does make monitoring that much more difficult.

HERA did not change the requirement that qualified PHAs must file Five-Year Plans.

<sup>10</sup>HUD Programs: Violence Against Women Act Conforming Amendments, Interim Rule, 73 Fed. Reg. 72,336 (Nov. 28, 2008).

<sup>11</sup>HUD-50075; compare with 42 U.S.C. § 1437c-1(a)(2) which requires that “[t]he 5-year plan shall include a statement by any public housing agency of the goals, objectives, policies, or programs that will enable the housing authority to serve the needs of child and adult victims of domestic violence, dating violence, sexual assault, or stalking.”

<sup>12</sup>*Id.* at Sections 5.2 and 10.0(a).

<sup>13</sup>Instructions Form HUD-50075, 6.0 (hereafter Instructions Form), available at <http://www.hud.gov/offices/adm/hudclips/forms/files/50075.pdf>.

<sup>14</sup>*Id.* at 6.0 (b)(13).

<sup>15</sup>Pub. L. No. 109-162, 119 Stat. 2960, 3040 (2006).

<sup>16</sup>73 Fed. Reg. 72,336, 72,344; 24 C.F.R. 903.7(m)(5)(2009).

<sup>17</sup>42 U.S.C. § 1437c-1(b) (2).

<sup>18</sup>HUD-50075 Section 6.0(a).

<sup>19</sup>Pub. L. No. 110-289, tit. VII, §§ 2701, 2702, 122 Stat. 2863 (2008) (“Small Public Housing Authorities Paperwork Reduction Act”).

<sup>20</sup>*Id.* 42 U.S.C. § 1437c-1(b)(2009).

<sup>21</sup>HUD website at <http://www.hud.gov/offices/pih/pha/>; See Public Housing Agency (PHA) 5-Year and Annual Plan Process for all PHAs, PIH 2008-41 (Nov. 13, 2008). As this goes to press, HUD had not yet posted the list of “qualified PHAs.” HUD has published a Notice describing these and other applications of HERA to HUD housing. See The Housing and Economic Recovery Act of 2008, Applicability to HUD Public Housing, Section 8 Tenant-Based Voucher and Section 8 Project-Based Voucher Programs, Notice, 73 Fed. Reg. 71,037 (Nov. 24, 2008).

<sup>22</sup>See 42 U.S.C. § 1437c-1 (e) (1)(2009).

<sup>23</sup>*Id.* at (f) (1).

<sup>24</sup>*Id.* at (e) (2).

<sup>25</sup>*Id.* at (f) (2).

<sup>26</sup>*Id.*; Pub. L. No. 110-289, tit. VII, § 2702, 122 Stat. 2864 (July 30, 2008); See Public Housing Agency (PHA) 5-Year and Annual Plan Process for all PHAs, PIH 2008-41 (Nov. 30, 2008);

<sup>27</sup>42 U.S.C. § 1437c-1(b)(2)(2009).

<sup>28</sup>Instruction Form.

## Additional Exceptions to Annual Plan Filings

PHAs that are not designated as “qualified” under HERA must file the revised HUD-50075, the PHA Plan Template. A subset of these PHAs, however, continues to benefit from plan content exemptions which have allowed small, high-performing and tenant-based assistance only PHAs<sup>29</sup> to file streamlined plan forms rather than the traditional fifty-plus page Annual Plan.<sup>30</sup> The “Instructions for HUD-50075” explicitly state that while small and high-performing PHAs must submit Annual Plans, they need complete certain sections only for Annual Plans submitted with their Five-Year Plans.<sup>31</sup>

The required sections are:

- Section 9.0, “a statement of the housing needs of families residing in the jurisdiction serviced by the PHA and the means by which the PHA intends, to the maximum extent practicable, to address the needs;”<sup>32</sup>
- Section 9.1, “a description of the PHA’s strategy for addressing the housing needs of families in the jurisdiction and on the waiting list in the upcoming year;”<sup>33</sup>
- Section 10.0 (a), “a statement of the PHA’s progress in meeting the mission and goals described in the 5-Year plan” and the criteria for determining significant amendments and modifications to the Five-Year and Annual Plans; and
- Section 10.0 (b), definitions of “significant amendment” and “substantial deviation/modification.”<sup>34</sup>

PHAs need not complete these sections in intervening years. HUD regulations contain detailed requirements for each of these three categories of partially exempt PHAs which must be consulted to determine if a particular PHA is compliant.<sup>35</sup>

Only once every five years, therefore, must small and high-performing PHAs report to HUD, their residents and community stakeholders regarding the housing needs of their jurisdiction, their strategy for addressing

those needs and their progress in meeting their stated mission and goals. Omission of the narrative progress reports may substantially affect resident advocacy as they allow residents to assess the progress of the PHA in meeting its goals.

## Access to Information and Challenges to Plan Content

The instructions to HUD-50075 further alter the facial requirement of the template. PHAs are not required to file plan “elements” with HUD for field office review. PHAs are only required to make the elements “readily available to the public.”<sup>36</sup> The plan elements covered by this provision include virtually all of the operational aspects of housing agency activity that affect residents.<sup>37</sup>

PHAs must identify and describe to HUD their anticipated HOPE-VI, mixed finance modernization or development projects, demolition, disposition or conversion projects, needed capital improvements, and a statement of housing needs.<sup>38</sup>

Significantly, the required submissions to HUD include “Resident Advisory Board . . . comments,” the PHA’s “narrative describing their analysis of the recommendations and the decisions made on those recommendations” and “Challenged Elements.”<sup>39</sup>

Residents should obtain copies of all plan elements from their PHA, review all major project descriptions and bring concerns to the attention of the RAB, the PHA and HUD. They should also be careful to file any resident objections or challenges to any portion of an attachment or exhibit to the agency plan with the PHA, either as a RAB comment or as a challenge to the plan, to make a record for future advocacy or litigation under the Administrative Procedures Act or 42 U.S.C. § 1983.

## Conclusion

In the past two years, HUD has taken a number of steps to decrease the alleged burden on PHAs of producing and publishing detailed and accessible Annual and Five-Year Plans. HUD has, at the same time, resisted the mandate from Congress to conform its information collection tool to the requirements of VAWA. Congress has recently carved out a significant new exception to the plan

<sup>29</sup>See 24 C.F.R. §§ 903.11: (1) PHAs that are determined to be high-performing PHAs as of the last annual or interim assessment of the PHA before the submission of the 5-Year or Annual Plan; (2) PHAs with less than 250 public housing units (small PHAs) and that have not been designated as troubled in accordance with Section 6(j)(2) of the 1937 Act; and (3) PHAs that only administer tenant-based assistance and do not own or operate public housing.

<sup>30</sup>24 C.F.R. §§ 903.11 and 903.12 (2009). Prior to implementation of the revised HUD-50075, special versions of HUD-50075 were available for small and high-performing PHAs (HUD-50075-SA and HUD-50075-Small PHA). The revised HUD-50075 and instructions replace these specialized versions.

<sup>31</sup>Instructions Form 9.0-10.0.

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

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

<sup>34</sup>*Id.*

<sup>35</sup>24 C.F.R. §§ 903.11 and 903.12 (2009).

<sup>36</sup>Instructions Form, 6.0.

<sup>37</sup>*Id.* The elements which need not be part of the plan include: Eligibility, Selection and Admissions Policies, including Deconcentration and Wait List Procedures, Financial Resources, Rent Determination, Operation and Management (including maintenance, pest control, management and agency programs), Grievance Procedures, Designated Housing for Elderly and Disabled Families, Community Service and Self-Sufficiency, Safety and Crime Prevention, Pets, Civil Rights Certification, Fiscal Year Audit, Asset Management and Violence Against Women Act.

<sup>38</sup>Instructions Form, 7.0- 9.0.

<sup>39</sup>HUD-50075, Section 11.0(f); Instructions Form, 11.0.

requirements of QHWRA. In conjunction with previously existing exceptions, PHA obligations of transparency are becoming increasingly intricate and resident oversight of PHA operations continues to become more difficult. ■

## Recent Cases

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

### Public Housing: Criminal Activity and Grievance Hearing

*Hous. Auth. of City of New Haven v. DeRoche*, \_\_A.2d\_\_, 2009 WL 153933 (Conn. App. Ct. 2009). A public housing tenant became intoxicated and started a fire in her apartment. The housing authority sought to evict on the grounds that the tenant violated her lease and created a nuisance, and the trial court granted the housing authority summary possession. The appellate court rejected the tenant's argument that the housing authority's pre-termination notice was insufficient, finding that the notice included the statutorily required cure period. The court also rejected the tenant's argument that she was entitled to a grievance hearing prior to termination. Citing 24 C.F.R. § 966.4(l)(5)(iii)(A), the court found that no grievance hearing is required where a tenant has engaged in criminal activity. Finally, the court found that the housing authority was not required to include in the notice the criminal statute that the tenant allegedly violated.

### Public Housing: Judicial Review of Termination

*Brooks v. New York City Hous. Auth.*, \_\_N.Y.S.2d\_\_, 2009 WL 202752 (N.Y. App. Div. 2009). The housing authority sent a notice to a public housing tenant informing her that a recommendation had been made to terminate her tenancy for late rent payments, and that a hearing was scheduled. The tenant failed to appear, and the hearing officer upheld the termination. The tenant submitted a request to the hearing officer for a new hearing. Shortly thereafter, the housing

authority adopted the hearing officer's recommendation and terminated the tenancy. While the tenant's request for a new hearing was pending, the tenant sought judicial review of the housing authority's decision to terminate. The court dismissed the case as premature, because the tenant's request for a new hearing was still pending.

### Public Housing: Private Right of Action to Prevent Demolition; Monetary Damages Under the Administrative Procedures Act; Preliminary Injunction Standard

*Anderson v. Jackson*, \_\_F.3d\_\_, 2009 WL 162412 (5th Cir. 2009). Displaced public housing tenants filed suit against the Department of Housing and Urban Development (HUD) and the Housing Authority of New Orleans (HANO), alleging that failure to repair and reopen four public housing developments violated the Fair Housing Act, the United States Housing Act of 1937, and the Equal Protection Clause. The district court dismissed the § 1983 claim against HANO, because the court found that 42 U.S.C. § 1437p did not confer rights enforceable via § 1983. The appellate court affirmed this result, finding that it was ambiguous as to whether Congress intended for the current version of § 1437p to create a federal right. The tenants also appealed the district court's dismissal of their § 1437p claim filed against HUD under the Administrative Procedures Act. The appellate court upheld the dismissal, finding that the APA barred their claim for money damages. Finally, the appellate court held that the district court was not required to hold an evidentiary hearing on the tenants' motion for a preliminary injunction, because the district court did not rely on any disputed facts in denying the motion.

### Public Housing: Discrimination on the Basis of Religion in Admissions and Transfers

*Ungar v. New York City Hous. Auth.*, 2009 WL 125236 (S.D.N.Y. 2009). Hasidic Jews applying for or living in public housing within the New York City Housing Authority's (NYCHA) jurisdiction alleged that admission and transfer policies functioned in such a way that Hasidic applicants were offered housing in neighborhoods in which they could not live due to their religious beliefs. The applicants sought an order that Hasidic applicants be allowed to specify a preference for the Williamsburg developments, which were near synagogues and yeshivas. The applicants sought summary judgment on their claims under the Religious Freedom Restoration Act (RFRA). Because NYCHA is an agency of the city of New York, and RFRA applies only to the federal government, the court denied the applicants' motion for summary judgment on their

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

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

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