

Public Housing Demolition in Galveston, Texas Is Subject to One-for-One Replacement¹

On September 13, 2008, Hurricane Ike made landfall in Galveston, Texas. The powerful storm damaged large swaths of Galveston, including over half of the city's public housing units.² Seventy-five percent of the island was flooded, and the city's population fell to about 45,000 from 57,000.³ In preparation for Ike's landfall, an evacuation order was issued for the area, and residents living in Galveston's public housing were forced to leave their homes.⁴ The public housing units remain boarded up or unavailable, and the displaced public housing families have not been permitted to return.⁵

Many Galveston residents, along with the displaced public housing tenants, qualify for the Department of Housing and Urban Development's (HUD) Disaster Housing Assistance Program (DHAP).⁶ But the vast majority of those who qualified could not find homes where they were able to use the available housing assistance.⁷ Moreover, the need for affordable housing continues to be substantial. Prior to Ike, 57% of Galveston's households were occupied by renters.⁸ Based on HUD criteria, Harish Krishnarao, the executive director of the Galveston Housing Authority (GHA), estimated that 83% of the 6000 displaced Galveston residents eligible for DHAP need some form of ongoing assistance.⁹

On January 28, 2009, the GHA board met and agreed to tear down immediately two of its large public housing developments, Oleander Homes and Palm Terrace, which comprise over 54% of the multifamily housing

stock.¹⁰ In addition, GHA proposed to renovate two other developments, Cedar Terrace and Magnolia Homes, so as to rehouse some public housing tenants more quickly.¹¹ Ultimately, it is anticipated that these units will also be demolished and reconstructed. One month later, GHA submitted a letter to HUD notifying it that GHA intended to demolish Oleander Homes and Palm Terrace.¹² Believing that its actions were permissible under a HUD website guideline regarding accidental losses, GHA wanted confirmation that it had authority to hasten the demolition. GHA had hoped to demolish the complexes by March 23, 2009, the deadline by which the Federal Emergency Management Agency would pay for debris removal, saving GHA an estimated \$1.2 million.¹³

On March 2, 2009, Lone Star Legal Aid (LSLA) filed an administrative complaint with HUD on behalf of displaced Galveston public housing residents, opposing GHA's plans to demolish these public housing developments without complying with laws governing the demolition and disposition of public housing.¹⁴ The parties recently entered into a settlement agreement in which LSLA has agreed to withdraw its opposition to GHA's demolition plans in exchange for GHA agreeing to provide a one-for-one replacement of the multifamily public housing units that it intends to demolish.¹⁵ This article outlines the law governing demolitions related to natural disasters, LSLA's administrative complaint, and the terms of the settlement agreement.

HUD's Policy Regarding Demolition for Accidental Loss

In response to questions raised by a series of particularly destructive hurricanes, HUD issued an undated guidance on its website addressing "demolition to alleviate the damage caused by accidental losses such as fires, storms, and other natural disasters."¹⁶ The guidance states that the standard contract between HUD and public housing agencies, the Annual Contributions Contract (ACC), allows housing authorities to take all necessary steps to ensure the safety of their residents, employees and the general public without waiting for approval from HUD in

¹The author of this article is Julieanna Vinogradsky, a J.D. candidate at the University of California, Hastings, School of Law and an intern at the National Housing Law Project.

²Roma Khanna, *Recovering from Hurricane Ike*, HOUSTON CHRON., Mar. 4, 2009, at B1.

³Leigh Jones, *Galveston Housing Authority Wants \$60M of Ike Fund for New Public Housing Units*, GALVESTON DAILY NEWS, Mar. 25, 2009.

⁴*Id.*

⁵Rhiannon Meyers, *Two Public Housing Complexes To Be Demolished*, GALVESTON DAILY NEWS, Jan. 29, 2009, <http://galvestondailynews.com/story.lasso?ewcd=fa1e3c75cc66215b>.

⁶Press Release, HUD, HUD, FEMA Announce 18-Month Housing Assistance Program for Families Displaced by Hurricane (Sept. 24, 2008), <http://www.hud.gov/news/release.cfm?content=pr08-145.cfm>.

⁷Meyers, *supra* note 5 (reporting that of the 7000 Galveston County families who qualified for the Disaster Housing Assistance Program, only 1800 or 26% had found places to live).

⁸Galveston Community Recovery Plan: Project Recovery Value, http://recoverygalveston.org/documents/RecoveryProjectsbyRanking_100word_4.7.09.pdf.

⁹Leigh Jones, *Housing Authority Officials Defend Plans*, GALVESTON DAILY NEWS, Apr. 1, 2009, <http://galvestondailynews.com/story.lasso?ewcd=0d762c48d0813117>.

¹⁰In re Oleander Homes & Palm Terrace Apartments, Admin. Compl. at 2 (on file with NHLP).

¹¹Meyers, *supra* note 5.

¹²Letter from Harish Krishnarao, Executive Director, Galveston Housing Authority, to Dan Rodriguez, Program Center Coordinator, HUD Houston Field Office (Feb. 27, 2009) (on file with NHLP).

¹³Rhiannon Meyers, *Complaint Halts Planned Public Housing Demolition in Galveston*, GALVESTON DAILY NEWS, Mar. 5, 2009, http://www.khou.com/news/local/galveston/stories/khou090305_tnt_housing-demolition.5e265fa.html.

¹⁴In re Oleander Homes & Palm Terrace Apartments, Admin. Compl. (on file with NHLP).

¹⁵In re Oleander Homes & Palm Terrace Apartments, Settlement Agreement (on file with NHLP).

¹⁶HUD, *Demolition for an Accidental Loss*, http://www.hud.gov/offices/pih/centers/sac/demo_dispo/acclloss.cfm.

the event of “abrupt damage” from a natural disaster.¹⁷

The guidance provides that if a natural disaster occurs, a housing authority may demolish all or part of a damaged structure and dispose of the debris “to the extent needed to maintain the site in a safe condition or to eliminate an attractive nuisance.”¹⁸ If the housing authority decides to rebuild the damaged structure, any additional demolition required to carry out the repair would also not be subject to the required procedure for demolition and disposition of public housing.¹⁹ But if the housing authority decides not to rebuild the structure, an application for demolition and disposition under 42 USC § 1427p must be submitted to formalize the removal of the units from the inventory. This requirement stems from Section 13 of the ACC, which directs housing authorities to “restore, rebuild or reconstruct a damaged or destroyed project to the extent that insurance proceeds permit, unless HUD authorizes otherwise in writing.”²⁰ According to HUD, demolition arising from accidental loss is the one exception where it may approve applications for demolition and disposition after the fact.²¹

HUD based this new guidance upon Section 4 of the ACC, which the website references but does not quote. Section 4 provides as follows:

Mission of the HA. The HA shall at all times develop and operate each project solely for the purpose of providing decent, safe, and sanitary housing for eligible families in a manner that promotes serviceability, economy, efficiency, and stability of the projects, and the economic and social well-being of the tenants.²²

Significantly, the guidance does not mention Section 7 of the ACC, which provides that the housing authority “shall not demolish or dispose of any project, or a portion thereof, other than in accordance with the terms of the ACC and applicable HUD requirements.”²³

Administrative Complaint

On behalf of displaced public housing residents, LSLA filed an administrative complaint with HUD objecting to the proposed demolition. The complaint asserted that HUD’s exception for demolition due to accidental loss did not apply to the situation faced by GHA.²⁴ More than five

months elapsed between the dates the storm damaged the buildings and the date on which GHA sought confirmation that the proposed demolition did not require HUD approval. During that time, the buildings in question were “fenced and secured to keep away residents and general public.”²⁵ Accordingly, the buildings were neither impinging on the safety of the residents, employees and the general public nor creating an attractive nuisance. The administrative complaint also alleged that at the time of GHA’s request to HUD, GHA had maintained the site in a safe condition and was in a position to do so for the duration of an application for demolition and disposition pursuant to 42 U.S.C. § 1427p.

LSLA also objected to GHA’s assertion in its letter to HUD that “residents have been relocated to other developments.”²⁶ As noted above, the displaced public housing tenants were eligible for DHAP because of the nationally declared disaster. However, DHAP payments are set to expire in eighteen months²⁷ or sooner for some tenants.²⁸ Many families have not been able to find a unit where they can use the DHAP subsidy. Moreover, this subsidy may require recipients to pay more than 30% of household income as soon as May 2009, in order to remain eligible for the assistance.²⁹ Most importantly, DHAP assistance does not provide the permanent replacement housing that is required for families displaced due to demolition or disposition of public housing.³⁰

Settlement Agreement

The settlement agreement requires GHA to rebuild the units it plans to demolish on a one-for-one basis and in the same bedroom size configurations as existed pre-Hurricane Ike. Displaced residents will have first preference to return to both repaired housing and replacement housing. GHA further agreed to provide tenant protection vouchers to displaced public housing tenants when the demolition begins. Additionally, GHA committed to a timeframe of no more than three to five years for the construction of replacement housing, and agreed to meet and consult with LSLA on at least a quarterly basis regarding planning and implementation of demolition and replacement housing.³¹

²⁵Letter from Harish Krishnarao, *supra* note 12.

²⁶*Id.*

²⁷Disaster Housing Assistance Program - Ike (DHAP-Ike) Operating Requirements, PIH 2008-38 (Oct. 14, 2008) (some families may become ineligible for DHAP as of July 31, 2009).

²⁸Disaster Housing Assistance Program-Ike (DHAP-Ike) Case Management Guidelines, PIH-2008-45 (Dec. 10, 2008).

²⁹The public housing tenants may be eligible for a hardship waiver. See *id.* at ¶ i.

³⁰See 42 U.S.C.A. § 1437p(a)(4) (West 2003); 24 C.F.R. § 970.21 (2008).

³¹Rhiannon Meyers, *GHA to Move Forward with Demolition*, GALVESTON DAILY NEWS (Mar. 16, 2009), <http://www.galvnews.com/story.lasso?ewc d=5aaca9c35b3632f2> (“I don’t like the idea of Lone Star Legal Aid setting themselves up as a permanent monitor of what we do,” said Robert Bastien, attorney for the Galveston Housing Authority. “But, if the idea

¹⁷*Id.*

¹⁸*Id.*

¹⁹See 42 U.S.C.A. § 1437p (West 2003).

²⁰HUD, *Demolition for an Accidental Loss*, *supra* note 16.

²¹*Id.*

²²Terms and Conditions: Constituting Part A of a Consolidated Annual Contributions Contract Between Housing Authority and the United States of America, HUD 53012A (7/95), § 4, <http://www.hud.gov/offices/adm/hudclips/forms/files/53012-a.pdf>.

²³*Id.* § 7.

²⁴In re Oleander Homes & Palm Terrace Apartments, Admin. Compl. (on file with NHLP).

Conclusion

HUD's guidance regarding demolition in the context of accidental loss violates the public housing demolition/disposition statute and the Administrative Procedure Act rules regarding the publication of rules for notice and comment. There is only one statutory exception to the demolition and disposition statute, which is for a de minimus loss of units.³² The regulations, which were adopted after notice and comment, provide for fifteen additional exceptions to 42 U.S.C. § 1427p.³³ These regulatory exceptions do not mention an exception due to accidental loss or natural disaster. HUD's reliance upon a mission statement in the ACC is insufficient to support its guidance and ignores the most relevant ACC provisions. The ACC must not be read to nullify the statute.

To the extent that the guidance may have some value in instructing public housing agencies to move quickly to address real dangers, any such policy should be limited to situations posing an imminent danger to health or safety. HUD's failure to limit the guidance means that public housing agencies may attempt to eliminate a substantial number of public housing units without seeking HUD oversight, without providing permanent replacement housing, and without consulting with the residents or local government. Moreover, the decision to demolish may be made in situations in which the housing may be rehabilitated. GHA's proposal is an example of what may happen as a result of HUD's overbroad policy of encouraging agencies to demolish public housing post-disaster without even following the provisions of the demolition/disposition statute. ■

here is that we don't want to tie all this stuff up with HUD for months and this addresses their concerns ... and gets the ball rolling, this is what we want to do. And it's not terribly burdensome. It does place some burdens on us, but not terrible burdens.”)

³²42 U.S.C.A. § 1437p(e) (West 2003).

³³24 C.F.R. § 970.3 (2008).

Stimulus Funding Seeks to Improve Energy Efficiency of Multifamily Housing

The American Reinvestment and Recovery Act of 2009 (ARRA)¹ provided unprecedented funding for improving the energy efficiency of housing serving low-income families. The Department of Housing and Urban Development's (HUD's) Green Retrofit Program (GRP) for Multifamily Housing² will provide \$250 million in grants and loans for building rehabilitation that will reduce utility costs, improve tenant health and provide other environmental benefits. This article describes in detail the Notice³ HUD recently published to implement the GRP funds.⁴ Additionally, the Department of Energy's (DOE) Weatherization Assistance Program⁵ will provide \$5 billion to states to make homes more energy efficient, and DOE and HUD are working together to ensure that these funds can be used to improve federally subsidized housing.

Eligible Projects

Eligible projects for GRP include Section 202 projects with at least thirty-two units, Section 811 projects with at least eight units, USDA Section 515 projects with at least twenty units, and all other project-based Section 8 projects with at least seventy-two units.⁶ Project-based voucher units are not eligible for the GRP. Additionally, projects with Real Estate Assessment Center inspection scores of less than sixty are ineligible.⁷

HUD will limit the number of each type of project units that will be accepted into the program. Approximately 3700 Section 202 units, 350 Section 811 units, 1000 Section 515 units, and 15,000 project-based Section 8 units will be accepted into the program.⁸ Further, no more than 3% of all the units initially accepted into the program can be under the control of a single owner.⁹ Additionally, HUD is seeking geographical diversity, and no more than 20% of the units accepted into the program will be located in any one HUD region.¹⁰

¹Pub. L. 111-5 (2009), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.pdf.

²ARRA div. A, tit. XII.

³Green Retrofit Program for Multifamily Housing (GRP), H 09-02 (May 13, 2009) [hereinafter Notice].

⁴For more information about the Green Retrofit Program, visit HUD's Recovery website, which contains a Frequently Asked Questions document and a recording from a presentation HUD conducted on the program on May 13.

⁵ARRA div. A., tit. IV.

⁶Notice at 7.

⁷*Id.* at 9.

⁸*Id.* at 22.

⁹*Id.* at 22-23.

¹⁰*Id.* at 23.