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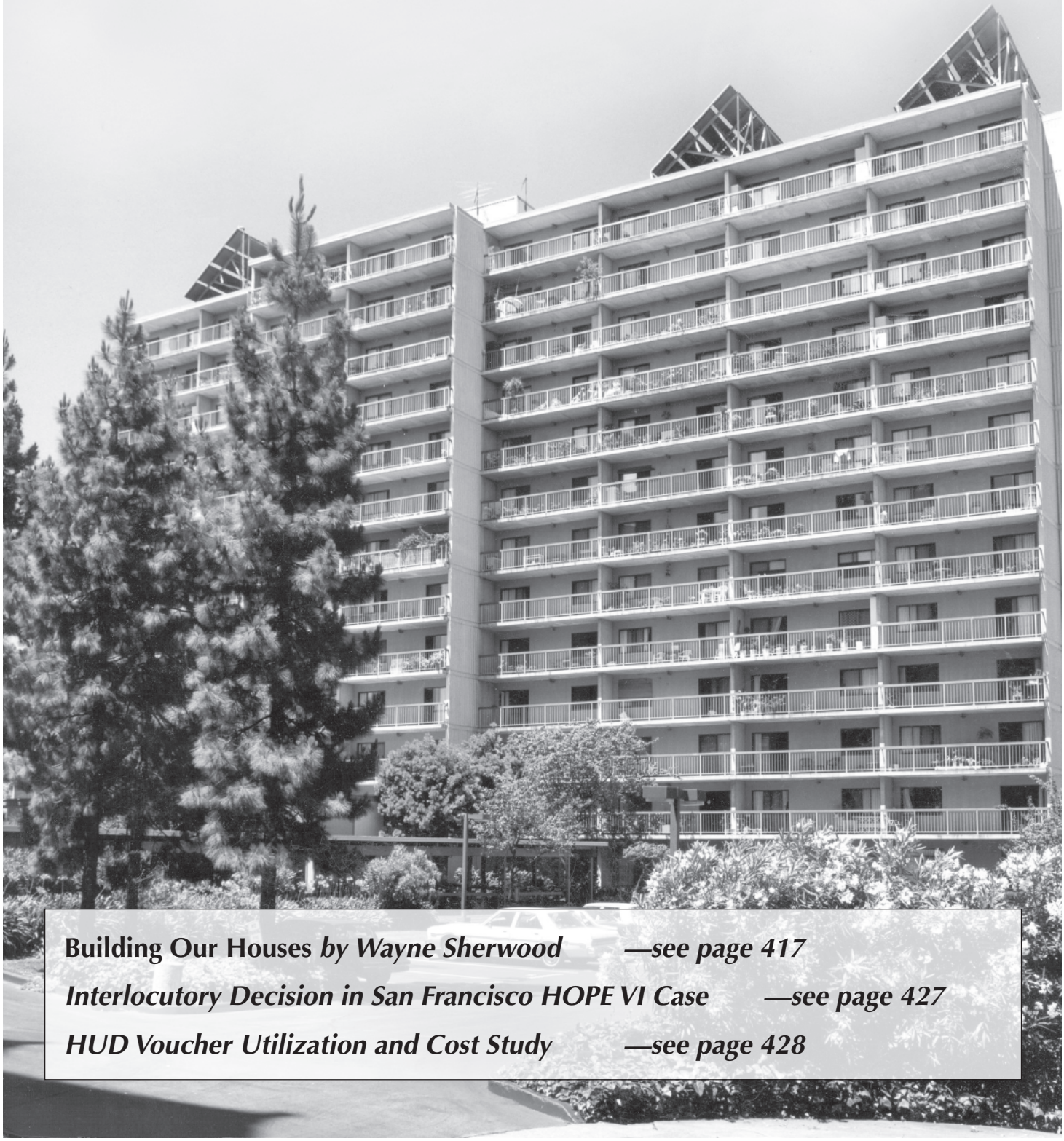

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Cover: Westlake West, Oakland, California. A 200-unit Section 236 development for seniors subsidized in part with project-based Section 8. Managed by Christian Church Homes of Oakland.

Photo courtesy of Christian Church Homes.

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Building Our Houses: Public Housing and Section 8 at the Crossroads[1]

Introduction

The federal public housing program was created in 1937 in the depths of the Great Depression. At that time, the program's principal goals were to clear slums, create jobs and expand the supply of affordable housing for unemployed and underemployed American workers. Public housing did not solve the economic problems of the Great Depression, but it was one part of a larger national effort.

How have social and economic conditions changed today? FNMA (Fannie Mae) held a conference at the turn of the millennium and called for papers on the challenges ahead. The consensus of the responders was that the biggest challenge facing American society in the 21st century is the growing disparity of income and wealth. Wages for the lowest 20 percent of the population have declined in real terms since 1980 (with a brief and only temporary reversal at the end of the 1990s), and have been nearly stagnant during this time for much of the middle class. Public housing authorities (PHAs) cannot solve all of these problems, but they can be one part of a larger national effort.

The Harvard Joint Center for Housing Studies issues a report each year called *The State of the Nation's Housing*. Each year this report finds that the supply of private market rental housing that is affordable to low-income Americans is shrinking in absolute terms, and that the rent-income ratio of lower-income Americans (the percentage of their income they pay for housing) continues to grow. Most very low-income Americans (those with less than 50 percent of the area median income) now pay more than 50 percent of their income for housing. The recognized standard is 30 percent.

At the federal level, the picture is not encouraging. The federal income tax code continues to subsidize middle and upper class homeownership to the tune of over $100 billion a year, through the mortgage interest and local property tax deductions. The government-sponsored enterprises (GSEs) like FNMA and FHLMC (Freddie Mac) help reduce housing costs for middle-income homebuyers. The Low Income Housing Tax Credit (LIHTC) enjoys strong support, but tax-credit developments house primarily households with over 50 percent

[1]The following was adapted from a paper prepared by Wayne Sherwood for a recent meeting of the board of the Public Housing Authorities Directors Association (PHADA) held in Washington State. The views expressed are the author's and do not necessarily reflect those of the National Housing Law Project.

Wayne Sherwood received a master's degree in city planning from the Harvard Graduate School of Design in 1966. From 1975-79, he was the Director of the Office of Policy Development and Research of the Massachusetts Office of Communities and Development, and from 1981 through 1995 he was the research director for the Council of Large Public Housing Authorities (CLPHA). Since then, he has been a low-income housing advocate, researcher and newsletter publisher operating as Sherwood Research Associates in Takoma Park, Maryland.

of area median income (AMI). HUD continues to tout homeownership, even though homeownership is not feasible for everyone.

Since the 1994 elections, federal outlays for public housing have shrunk in real (inflation-adjusted) terms. The funding available a decade ago for the public housing stock as a whole for routine operations, maintenance and modernization (not counting HOPE VI) comprised: the operating fund at about $3 billion, the capital fund at about $3.3 billion, and Public Housing Drug Elimination Program (PHDEP) at $300 million, a total of $6.6 billion. Today the operating fund is about $3.5 billion, the capital fund about $2.8 billion, and there is no PHDEP program, a total of $6.3 billion. If the total had grown by 2 percent a year for 10 years, that amount would now be $8 billion. *In inflation-adjusted dollars the annual funding that is available generally to all PHAs is now 20 percent lower than it was a decade ago.* While it is true that over 100 public housing authorities have received HOPE VI revitalization grants during that time, this has done nothing to ease the pain of the other nearly 3,000 PHAs.

PHAs should be able to choose to serve a broader range of incomes, but the flow of federal subsidies under the public housing and Section 8 programs should continue to be targeted entirely to those households with under 50 percent of AMI.

Apart from HOPE VI, public housing now receives about $6.3 billion a year, or about $5,040 per unit per year. In contrast, the latest Congressional Budget Office (CBO) estimates are that housing choice vouchers will probably cost the federal government nearly $7,000 per unit per year in Fiscal Year (FY) 2004, almost 40 percent more per unit than public housing. And public housing lasts longer. Yet the Office of Management and Budget (OMB) continues to claim that vouchers are cheaper. OMB's claim is wrong and needs to be vigorously rebutted.

I do not think that the average voucher amount should be reduced. Public housing spending should be increased. If public housing were given $6,500 per unit for the total of the operating and capital fund for FY 2004, that would come to $8.1 billion, nearly 30 percent higher than is currently expected. I think that would be completely reasonable.

I do not know whether there is any future for public housing or for PHAs. Given increasing budgetary pressures on domestic discretionary programs, I would say that it looks very bleak.

Some have suggested that the only rational course of action is for PHAs to cut loose from the federal government, go their own way and try to survive by raising rents, upscaling the income of their tenant populations, and housing middle income residents instead of the poor. They can make their own case.

I agree that PHAs should be able to choose to serve a broader range of incomes, *but* I think that the flow of federal subsidies under the public housing and Section 8 programs should continue to be targeted entirely to those households with under 50 percent of AMI—*i.e.* "very low-income" people (with a large proportion of that funding going to those under 30 percent of AMI—*i.e.*, "extremely low-income" people).

I have written this paper not to rehash the current bad news, nor to try to predict where we are most likely to go in the near future (I don't know), but as an expression of my hopes about where we can go in the longer term.

Large and Growing Need for Affordable Housing for Many Different Groups of Very Low-Income Americans

The need for affordable housing for very low-income Americans has never been greater. These needs have been documented in a variety of reports such as:

- *The State of the Nation's Housing*, issued annually by the Harvard Joint Center for Housing Studies; and
- reports on America's housing needs by HUD's Office of Policy Development and Research, the National Low Income Housing Coalition, and the National Housing Conference.

In addition, newspaper articles from around the country have documented severe and growing needs for affordable housing by very low-income Americans.

There are many different groups of Americans who have different types of needs.

The Working Poor

One of the biggest needs for affordable housing is in the area of working people who have low-wage jobs. Households in this group who have or are seeking low-wage jobs need affordable housing that is close to these jobs, and that is decent, safe and sanitary. Increasingly, such jobs are in suburban areas. Households in this situation cannot afford to stay on public housing waiting lists for years. They need housing close to work. In dealing with this group of people, it is also necessary to take into account the growing racial and ethnic diversity of America's households, and how this affects their housing needs. The idea of partnering is important here, *e.g.* looking for ways in which urban PHAs can channel federal subsidies to community development corporations (CDCs) and nonprofits in the suburbs to help them develop low-income housing for low-wage working people.

The Low-Income Elderly and Frail Elderly

A second major group is the low-income elderly. A large percentage of our present elderly population have some savings and are homeowners. The private market will respond to much of this need.

However, there is also an unprecedented demographic wave of the elderly coming along in the form of aging Baby Boomers. There will be a growing demand for affordable elderly housing for those in this group who have substantially below-average financial resources.

The elderly are living longer, too, and there is a need for more options for "frail elderly" persons who could continue to live outside of nursing homes if they had adequate support.

Right now, public housing is probably not the first choice for most seniors. Does public housing have a negative image among seniors, and if so, what can be done about that? What role do PHAs want to play in this market, and how are they going to play it? How can they provide attractive, safe and supportive living environments? Where will the funding come from? Can some of the funding come from the Medicare/Medicaid streams?

Asset management can be a valuable tool when used within the framework of the social goals of the public housing program, but asset management is not the principal job of PHAs.

Supportive Housing for Very Low-Income Families with Children (the Unemployed and Underemployed)

There will always be some very low-income families with children, where the adult does not have a steady job, not even one with a low wage. This seems almost inevitable in our system for a variety of reasons. One is that it is the official policy of the Federal Reserve Bank to minimize inflation, and this can be done only by insuring that the job market never gets too tight, which in turn means that there will always be a large unemployed or underemployed group. The second is that our society does little to invest in education, job training or health care for those at the very bottom of our economic ladder. Some PHAs have said that they do not wish to serve as "housing as last resort" for the poorest of the poor, but all PHAs should set aside a significant proportion of their units for households in this group and arrange for supportive services.

People with Physical and Mental Disabilities, Including HIV/AIDS

PHAs can play a wide variety of creative roles in this area. This will almost always involve working with other agencies at the state and local level. In some cases, PHAs will be able to receive funding from other federal agencies such as the Department of Health and Human Services (HHS), either directly or indirectly.

"Asset Management"

It is sometimes claimed that the primary job of PHAs is "asset management." HUD says it agrees. Many PHA directors agree. I respectfully disagree.

The term "asset management" in the real estate field means that property owners need to continually review the economics of their various properties, including the projected future income from each property, as well as the projected future costs associated with operating, maintaining and (where necessary) upgrading each property. Then they calculate what their expected rate of return is on various properties over some future time period, as well as what their rate of return might be if they developed new properties. Then property owners make decisions based upon how they can maximize the overall rate of return on their investments. If possible, they raise rents, keeping in mind that their properties must compete with other properties in the same market. They also decide what level of amenities is desirable, as well as how much money to spend on maintenance and modernization. If the calculation for an individual property seems to indicate a probable low future rate of return, they consider options such as selling the property, demolishing it, or converting it to other use. In all of these decisions, the goal is to maximize the return on investments.

PHAs also have property to manage, and of course they need to consider the physical and financial condition of individual properties as they decide whether it is worth making continued investments in each property. But, unlike the private sector, it is not a PHA's principal goal to maximize the financial return on its housing properties over the long term. PHAs have social goals, and the principal one is to provide affordable housing to very low-income households. This social goal takes precedence over the goal of maximizing return on investment, which might be achieved, for example, by raising rents and/or seeking higher-income residents.

Most large organizations operate and maintain some type of physical plant. A school department operates and maintains many schools. No one, however, says that the principal goal of a school department is asset management. Its principal purpose is to educate. Its physical plant is one necessary tool for doing that.

A similar situation exists in the case of public housing, which like a public school system is an institution with a social purpose. Asset management can be a valuable tool when used within the framework of the social goals of the public housing program, but asset management is not the principal job of PHAs.

In my opinion, the principal objective of PHAs is to provide decent, safe and sanitary housing that is affordable to very low-income households so that they will have a sound base for their other activities of life (holding a job, going to school, etc.), have more money for other essentials such as food, health care and transportation, and be able to make some progress in improving their own economic condition.

The Role of the Private Sector

There are many ways in which PHAs can work with the private sector. PHAs can contract with the private sector for management services, maintenance, security, various other administrative tasks (*e.g.* payroll), insurance, resident training, resident services, and a variety of other activities. PHAs can also develop relationships with the private sector to help residents link up with jobs, job training and job referral services. There may be many other desirable forms of involvement, too.

The history of the HOPE VI program shows that it has been extremely difficult to secure private investment in these complex and risky deals. According to one GAO report, only 12 percent of the funds claimed as "expected to be leveraged" by PHAs in their HOPE VI plans is expected to come from the private sector. The inability to close these complex deals and get them approved by HUD has also been a major reason why HOPE VI has progressed so slowly, with fewer than 20 out of a total of over 165 HOPE VI revitalization grant awards having been completed as of HUD's latest reports.

Recently, HUD has come up with something called the Public Housing Reinvestment Initiative (PHRI), under which PHAs would supposedly be able to borrow money in the private sector for their modernization and other capital improvements needs. HUD says this is intended to be a partial replacement for HOPE VI. Yet it appears that PHRI would depend heavily upon the availability of housing choice vouchers in the future, for use in these deals, and the future of Section 8 itself seems at best uncertain. (HUD is proposing block granting housing choice vouchers and turning them over to the states. HUD is also saying that it wants to reduce the average amount of each voucher.) PHAs have also come up with new ways of floating bonds on their own, asserting that they will have enough operating or capital funds to pay back the private sector.

I think that if Congress and HUD would provide multi-year budget authority and appropriations for these purposes, then it would be reasonable to seek private sector investment in public housing development, revitalization or other capital improvements. The risk to the private sector would be low, and the time and effort involved in creating these deals would be less. The costs to the PHAs and the public housing program would be less. However, this is not the case now.

For HUD to say that in the future PHAs must turn to the private sector for such investments also makes it seem as if there is an inevitable trend that the federal government will get out of the business of providing adequate funding for public housing operations, modernization, revitalization and replacement. I disagree. This is not inevitable. The federal government provides funding for a lot of things, and public housing is a better purpose than many. It should continue to provide such assistance to public housing.

HUD Is in Need of Major Overhaul

HUD is doing a terrible job of overseeing the nation's public housing program. This cannot be allowed to continue.

What can explain why HUD itself has become such a disaster for the public housing program? I think one reason is the nearly total lack of interest at the top levels of HUD as to what HUD's statutory mission is and what HUD is supposed to be doing. Many must never have read any of the statutes under which Congress has established the nation's housing programs, or the Congressional intent behind them.

The federal government provides funding for a lot of things, and public housing is a better purpose than many.

Many top HUD officials appear to be oblivious to the fact that they are supposed to support the nation's housing programs and help PHAs and other housing delivery systems provide affordable housing. Instead, they apparently consider their job to be:

- giving speeches saying that everyone should become a homeowner, regardless of their income or circumstances (this while mortgage default rates are rising);
- issuing ever-more-detailed and unreasonable report cards to PHAs; and,
- making excuses for why they have not asked and will not ask for adequate funding for the housing programs they are charged with administering.

Consider the following:

- The Allowable Expense Level (AEL), which HUD uses for the public housing operating subsidy eligibility calculation, was established in 1973. Whatever amount a PHA was spending (per unit) in 1973 became its PFS (Performance Funding System) base in 1975 (with the exception of a very small number of PHAs considered "above range" that were subsequently brought down "into range"). Since 1975, the AEL has been adjusted only by a modest inflation factor each year for 28 years. HUD has given no consideration to the changing operating circumstances of PHAs, the deterioration of the public housing stock due to inadequate capital funding, the changing population served, changing statutes and regulations that apply to public housing, the changing patterns of unionization, or the impact of costs (such as employee health benefits) that have increased faster than ordinary inflation.
- The only time that HUD has *ever* sent inspectors into the field to evaluate the modernization needs of public housing systematically and carefully was in 1985. A sample of over 900 public housing developments was inspected that year. A report was published in 1987 saying that in order to eliminate the backlog of modernization needs in 10 years, as well as keep up with new needs accruing as a result of normal aging and wear and tear, HUD should

request and Congress should appropriate over $4 billion a year for public housing modernization. (HUD has never asked for such sums.) This study also identified about 80,000 units of public housing with "high end" needs, *i.e.* over $40,000 per unit in modernization needs, but said it could not estimate, given the limited time available, what it might cost to redevelop or replace those units.

- In 1992, the National Commission on Severely Distressed Public Housing (NCSDPH) issued its Final Report. In it, the Commission said that it did not know how many units of severely distressed public housing there were, but it developed criteria for evaluating public housing developments to determine this, and urged HUD to do that as quickly as possible. Lacking any such information, it *estimated* that it would cost a little over $7 billion to redevelop or replace the 80,000 units mentioned as having "high end" modernization needs in the 1985 survey. HUD has never conducted such an evaluation. No one to this day knows how many SDPH units or developments there were then or are now.

- In 1998, Congress passed a law reformulating public housing subsidies into the "operating fund" and the "capital fund," and called upon HUD to establish new formulas and procedures for allocating each, based upon real needs. When the "operating fund" negotiated-rulemaking panel sat down to do its work, HUD brought no new information to the table about the costs of operating well-managed public housing. HUD had apparently not even considered that it might be HUD's job to do this kind of research. When the capital fund negotiated rulemaking panel began getting ready to do its job, HUD hastily contracted for a consultant to gather some information from a few public housing developments as to what it would cost to "restore them to original condition." (Since most public housing was built between 1937 and 1970, this meant that the HUD study was basically a survey of "repair" needs, not an evaluation of what was needed to truly modernize and upgrade various major building systems, such as electrical, plumbing, heating systems, etc., to current standards. It also did not include any estimate of the costs needed to improve the design and appearance of public housing so that it would be more attractive and blend better into the surrounding neighborhoods.) HUD then brought this information to the table and said this was a modernization needs study, which it definitely was not. The operating fund panel made a few tweaks to the formula, and called for further study. The capital fund study condemned the HUD study, but then agreed to let it be used to make a few tweaks to the capital formula.

- HUD has never responded to the call of the NCSDPH to use the Commission's criteria to evaluate how many developments and units of severely distressed public housing there were then (or are now). Nevertheless, HUD announced in 2003 that the goals of the HOPE VI program had been accomplished because over 100,000 units of public housing had been approved for demolition. Given the substantial underfunding of public housing operating and capital funds over the past decade, I personally believe that there are probably *more* severely distressed public housing developments today than there were 10 years ago.

- The recent study of public housing operating costs carried out by the Harvard Graduate School of Design used a methodology which had been examined in two major studies by Abt Associates, Inc., one in 1982 and one in 1993. In both of those studies, the consultant decided that there were major problems in comparing cost data from the HUD subsidized FHA-insured stock with data on the operating costs of public housing.

- HUD has rules and procedures concerning how utility costs will be funded. When actual utility prices, as paid by PHAs, exceed the predicted prices used for the initial determination of operating subsidy eligibility, PHAs are eligible for an end-of-the-year utility adjustment equal to 100 percent of the difference. HUD routinely requires that PHA do these calculations, but then ignores the increased subsidy eligibility, simply telling PHAs: It's not going to happen, and don't even think about asking for the money. As a result, PHA operations are underfunded to the tune of hundreds of millions of dollars every year. This is outrageous!

- HUD has repeatedly been unable to predict how much money it will need to renew Section 8 contracts plus or minus $2 billion in any one year. This has frustrated Congress and resulted in the possibility that the program will be underfunded in the future.

Some of the things that HUD must do in order to fulfill its own legal responsibilities are:

- Make an estimate of the amount of funding that is needed every year in order that local agencies may carry out their missions successfully. *Make these estimates public and explain the details*.

- Ask the White House, OMB and Congress for adequate funding. Fight for adequate funding for the Department's programs, like every other department does.

- Distribute the funding provided fairly, equitably, on a timely basis and in proportion to need.

- Monitor the expenditure of funds to ensure that such funds are spent legally and appropriately, and that accurate financial records are kept by local entities.

- Get its own record-keeping systems in order so that it knows how much money it is spending and for what.

OMB and the White House

No significant decisions about public housing or Section 8, or their funding levels, are made at HUD any more. Top HUD officials simply act on instructions from the White

House and OMB. In order to influence major decisions concerning public housing and Section 8, therefore, it is necessary for PHAs to go to the President, the Vice President, their chief domestic policy advisors and OMB.

OMB is always looking for ways to cut funding for public housing and Section 8. Then OMB tells HUD what kinds of budgets to submit every year. Then OMB cuts them further. There is no commitment on OMB's part to provide funding levels that are adequate to operate, maintain and modernize public housing, much less to replace the developments when they reach the end of their useful life span.

OMB's agenda for a long time, including during the Clinton Administration, has been to gradually get rid of family public housing, because OMB claims that all project-based subsidy programs cost more than vouchers. But that is not the end of OMB's agenda. For over a decade, OMB has claimed that it would be desirable to convert all project-based housing subsidies to tenant-based assistance, block grant it and turn it over to the states, and then merge it with the welfare program (and its successor TANF), effectively eliminating a separate program of housing assistance entirely.

I suspect that in order to get at the folks at OMB, you have to get the attention of the senior domestic policy staff in the White House. That means the President will have to OK these ideas. The next presidential election is in 2004 and the primaries are coming up in a few months. The candidates are starting to put together their teams and their platforms now. Get to them and demand that housing be on the agenda, that PHAs and public housing be on the agenda, and that the federal government support housing programs and get some people in at the top levels of HUD who are committed to this.

Improving Existing Funding Mechanisms

This section sketches out some very quick ideas about modifying existing funding systems for public housing, *i.e.* the public housing operating and capital funds.

PFS has been in place for 30 years, and has never been changed substantially, largely because no one has been able to come up with adequate proof that an alternative would be better or more equitable. Lacking convincing arguments, any discussion of possible changes quickly deteriorates into a "formula war," *i.e.* a brawl about dividing up the existing pie in some new way. It will only be possible to make significant improvements in the system if there is more money.

I think that the goal of creating some new formula for the operating fund that will then be locked into place for the next 30 years, as PFS was, is a mistake. Probably the worst thing about PFS is that it is so rigid, and so unable to respond to changing circumstances and needs. Why repeat this for the next 30 years, using a slightly different formula?

Just going back to a negotiated rule-making process that has the mandate of taking the results of the Harvard study and converting them into a new formula is pointless. This wouldn't get at the principal issue, which is how much does it cost to run well-managed public housing—the question the Harvard study was supposed to answer but didn't.

I think it is reasonable to say that public housing should cost *no less than* a housing choice voucher on a per-unit basis. The most important goal is to get the total public housing figure increased substantially, *e.g.* to around a total of $8 billion.

I think that another major change that is needed to accompany this is to establish a Board of Adjustment that would annually hear a limited number of appeals, and make adjustments of housing authorities' Allowable Expense Level (AEL). The mandate of the Board would be to select from among all of the appeals submitted to it those that seemed furthest out of line, and limit its efforts each year to those. Gradually over time it could eliminate the worst disparities. The Board of Adjustment would need to comprise true housing professionals appointed from outside of HUD. They would make recommendations to HUD, and the HUD Secretary would have the final say.

The total amount of the subsidy to public housing should include amounts that would enable PHAs to replace their developments when they have reached the end of their useful lifespan. The amount should also be adequate to enable PHAs to manage their stocks according to all applicable statutes and regulations. These require PHAs to do things that private housing managers do not have to do.

What are the adequate costs? I do not think that it is possible to develop one absolute standard for all public housing. But one could develop estimates of what it would cost to provide different levels of services under different operating conditions and circumstances, and then Congress can make a choice about what level it wants to fund. For example, you could say that *if* you wanted to provide one full-time social worker for each 80 individuals living in senior public housing, it would cost so much per year.

I also think that public housing subsidies should be increased to include a much larger element of Payment in Lieu of Taxes (PILOT). Public housing now is often rejected because local communities believe it costs far more to the local community than the PHAs provide in the way of PILOT. PHAs need to receive from the federal government enough money to fully cover the costs to the local community, and more than pay their own way (*e.g.* in terms of costs of local services, schools, etc.) and *also* provide an incentive to the local community. Trying to keep PILOT low will result in increased competition to get out of the low-income housing business by local communities. HUD needs to provide local communities with a substantial incentive to accept such housing, by covering its direct costs and then some.

The most important thing that could be done with the capital fund is to get it up to where it should be, *i.e.* around $4 billion a year.

Conclusion

Political and social conditions can change. I hope that in the not-too-distant future our nation will realize that in order to survive as a society, we need to acknowledge that we are all in the same boat, rich and poor, and need to pay attention to the needs of all Americans, not just the top 10 percent. There once was a day when Americans were glad to help each other build their houses. Maybe that day will come again. ■

Ninth Circuit Rules Los Angeles May Set Base Rents for Converted HUD-Subsidized Properties

The United States Court of Appeals for the Ninth Circuit recently affirmed a district court decision holding that Los Angeles' Rent Stabilization Ordinance, which sets base rents for former federally subsidized properties at the last rent charged under the federal program, is not expressly or impliedly preempted by federal law. *Topa Equities, Ltd. v. City of Los Angeles*, 342 F.3d 1065 (9th Cir. Sept. 8, 2003). The Ninth Circuit's ruling thus safeguards an important element of the preservation strategies used by both the cities of Los Angeles and San Francisco. However, by endorsing the reasoning of a recently issued Eighth Circuit opinion,[1] the ruling fails to dispel the threat to other state and local preservation laws requiring notices and other procedural protections prior to the conversion of assisted properties to market-rate housing.

Summary

While holding that the long-dormant *Low Income Housing Preservation and Resident Homeownership Act* (LIHPRHA)[2] and its express preemption provision[3] still apply to HUD-subsidized properties not operating under a federal preservation plan because they have never been repealed, the Ninth Circuit nevertheless ruled that Los Angeles' law did not violate that provision, which invalidates any state or local law that "restricts or inhibits" prepayment. Because the Los Angeles' Rent Stabilization Ordinance (LARSO) does not prevent the owner from prepaying its subsidized mortgage under federal law, it remains effective. The court also found that LARSO falls within the exemption from preemption[4] as a "law of general applicability." Finally, the court found that, because LARSO does not frustrate federal objectives, it is not preempted by the doctrine of conflict preemption.

Background of the Case

Topa Equities involved a Los Angeles property developed in 1971 with a HUD-insured 40-year mortgage under the Section 236 program, in which HUD agreed to subsidize the mortgage interest payments in return for regulatory restrictions on rents and occupancy. As for other Section 236 properties, HUD's regulatory agreement did not include a prepayment right, but a provision in the promissory note allowed the owner to prepay the loan after 20 years expired. This option was also included in HUD's regulations for the program,[5] along with another provision explicitly stating that the regulations could be changed at any time, so long as the interests of the lender were not harmed. Facing a wave of threatened conversions in the mid-1980s, Congress first passed a temporary moratorium on prepayments in 1988, and replaced that law with the more comprehensive LIHPRHA program in 1990. While continuing to restrict prepayments,[6] LIHPRHA provided generous market-value incentives to allow owners to remain in the federal program for the building's remaining useful life or transfer the property at market value to another preservation owner.[7]

In 1994, the property owner filed a preservation plan under LIHPRHA to obtain rent increases and other HUD incentives to stay in, but this plan was never funded by the federal government. Starting in 1995, Congress had begun to reduce funding for LIHPRHA, while permitting owners to again prepay.[8]

Because of its inability to receive preservation incentives, in 1998 the owner prepaid the Section 236 mortgage under the new prepayment authorization and raised rents to market-rate. However, the owner failed to comply with LARSO's local rent control provisions, which required base rents to be set at the last rent charged under the federal program, and restricted future increases to specified annual adjustments and specific grounds, while allowing market rents upon voluntary vacancy. For a time, both the owner and the City apparently believed that LARSO was preempted due to a 1997 ruling in another case by the federal Claims Court, which was later vacated for other reasons on appeal.[9] In 2000, Los Angeles informed the owner that it would have to roll back rents to the former Section 236 levels pursuant to LARSO. The owner responded by filing suit to challenge LARSO's

[1] *Forest Park II v. Hadley*, 336 F.3d 724 (8th Cir. 2003) (ruling that Minnesota's notice and tenant impact statements are expressly and impliedly preempted, as applied to prepayments of HUD-subsidized mortgages). *See Federal Court Issues Stunning Preemption Decision*, 33 HOUS. L. BULL. 378 (Aug. 2003).

[2] 12 U.S.C. §§ 4101 *et seq.*

[3] 12 U.S.C. § 4122(a), which provides in part: "No State or political subdivision of a State may establish, continue in effect, or enforce any law or regulation that (1) restricts or inhibits the prepayment of any mortgage . . . on eligible low income housing ...."

[4] 12 U.S.C. § 4122(b).

[5] 24 C.F.R. § 236.30 (1994) (now superceded).

[6] LIHPRHA allowed prepayment only when HUD could find that prepayment would not adversely affect the availability of affordable housing in the market area served. 12 U.S.C. § 4108.

[7] Under LIHPRHA, if HUD approved a plan of action but did not provide the needed funding within 15 months, the owner also had the right to prepay (12 U.S.C. § 4114), but this owner prepaid under Congress' general prepayment authority restored annually beginning in 1995.

[8] *See, e.g.*, the prepayment authorizations in the 1996 *Housing Opportunity Program Extension Act*, Pub. L. No. 104-120, § 2(b)(1), 110 Stat. 834 (1996), and Section 219 of the FY 1999 *Appropriations Act*, Pub. L. No. 105–276, § 219, 112 Stat. 2487-88 (Oct. 21, 1998).

[9] *Cienega Gardens v. United States*, 38 Fed. Cl. 64 (1997), *vacated and remanded*, 194 F.3d 1231 (Fed. Cir. 1998), *on remand*, 46 Fed. Cl. 506 (issuing summary judgment to government on takings claim due to failure to exhaust administrative remedies), *aff'd in part and rev'd in part and remanded*, 265 F.3d 1237 (Fed. Cir. 2001) (taking claims ripe despite failure to seek HUD approval due to futility exception; no *per se* taking under physical occupation theory), *on remand*, No. 94-1C (finding no regulatory taking), *reversed* 331 F.3d 1319 (Fed. Cir. 2003) (finding regulatory taking). For more on *Cienega Gardens*, *see Recent Takings Decisions on Preservation Laws Could Subject Feds to Big Liability*, 33 HOUS. L. BULL. 350 (July 2003).

base rent provision and seeking injunctive relief, contending LARSO was preempted by federal law.

LARSO was amended in 1990 to address the problem of setting base rents for units that were formerly exempt from local rent control for any reason, including their participation in a federal affordable housing program where local rent controls cannot apply due to the express provisions of federal law.[10] The 1990 amendment provided that formerly exempt units become subject to LARSO and its base rent provisions immediately upon termination of the federal restrictions.[11] The owner sought injunctive relief from enforcement of this requirement, as well as LARSO's vacancy decontrol provision, which was also amended in 1990 to restrict rent increases where a vacancy results from the termination of any local, state or federal program regulations.[12]

In the district court, the City had asserted that these amendments were just clarifications of existing law, while the owner claimed that they were intentionally targeted at federally assisted housing.

On the owner's preemption claims, the district court ruled that the owner had not asserted any express preemption claim. It also found that because the owner never operated under an approved LIHPRHA preservation plan, LIHPRHA's express preemption provisions did not apply to LARSO.[13] On the implied "conflict" preemption claim, where an actual conflict renders it impossible to comply with both state and federal law, or where local law impermissibly obstructs federal policy expressed in the *National Housing Act* and LIHPRHA,[14] the trial court also rejected the owner's position that allowing prepayment was a Congressional goal. Instead, it found that Section 236 was primarily designed to benefit residents, not owners, and that its text included no prepayment right. The trial court had also found that while HUD's prepayment regulation[15] did allow prepayment, it did not further guarantee exemption from local ordinances or unrestricted market rents. For that court, LIHPRHA's express preemption provision added no weight to the owner's claim that Los Angeles could not regulate properties not participating in LIHPRHA. Significantly, however, the trial court found that Congress halted HUD funding for incentives and "dismantled LIHPRHA's balance, thereby obviating the need for preemption."[16]

The Ninth Circuit's Analysis

Taking a different path from the trial court on appeal, the Ninth Circuit analyzed both the express and implied preemption claims. Although it ultimately rejected both, its reasoning carries important implications for other preservation laws.

Regarding the question of whether LIHPRHA's express preemption provision applies, the appellate court disagreed with the position of both the trial court and the City, which was that, because LIHPRHA is no longer operational for new properties, its preemption provision cannot logically be applied to properties that did not execute a LIHPRHA plan. In other words, Congress intended that preemption only apply in the context of operating a program to preserve housing through federally funded incentives. Agreeing with the Eighth Circuit's opinion in *Forest Park*, the Ninth Circuit rejected this view, finding that Congress' subsequent prepayment authorizations and defunding of LIHPRHA did not expressly or impliedly repeal the statute, and that allowing those actions are not irreconcilable with the rest of the statute.[17] This superficial analysis leaves LIHPRHA's express preemption provision standing while the entire program has been vitiated.

In applying the preemption provision, however, the Ninth Circuit found that LARSO did not violate its terms, for two distinct reasons. First, the court analyzed whether LARSO "restricts or inhibits" prepayment,[18] although without resorting to LIHPRHA's legislative history. It concluded that LARSO does not do so, since the owner is free to prepay its mortgage and leave the federal program, at which point it becomes subject to LARSO—"an economic choice [the owner] is free to make."[19] Second, the court found further support for this conclusion in the exemption language of the express preemption provision, which provides that rent control and other zoning and habitability laws of general applicability are not preempted.[20] Because LARSO is a municipal rent control ordinance of general applicability within the meaning of Section 4122(b), and is not inconsistent with LIHPRHA, it is thus exempt from the express preemption provisions of Section 4122(a).

The Ninth Circuit proceeded to distinguish the Eighth Circuit's *Forest Park II* decision, pointing out that the Minnesota statutes at issue in *Forest Park II*, unlike the 1990 LARSO amendments, prohibited prepayment for a specified period of time even if the owner had complied with the federal notice requirements.[21] In the view of the Eighth Circuit, that Minnesota law allegedly had a compulsory effect that forced

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[10] *See, e.g.,* 24 C.F.R. § 246.21 (2003) (express preemption of local rent controls for properties which still have HUD-subsidized mortgages).

[11] Los Angeles Mun. Code §§ 151.02.

[12] *Id.*, § 151.06(c).

[13] *Topa Equities v. City of Los Angeles*, No. CV 00-10455 GHK (RNBx) (C.D. Cal. April 8, 2002). The trial court cited *Kenneth Arms Tenant Ass'n v. Martinez,* 2001 U.S. Dist. LEXIS 11470, at *25-26 (E.D. Cal. July 3, 2001), also available online at www.nhlp.org/html/pres/cases.cfm.

[14] *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287 (1997).

[15] 24 C.F.R. § 236.30 (1994) (now superceded).

[16] *Topa Equities*, No. CV 00-10455 GHK (RNBx) (C.D. Cal. April 8, 2002), slip op. at 21. The trial court also explicitly disagreed with the 1997 *Cienega Gardens* decision on preemption that was subsequently vacated by the appellate court, because the promissory notes were not signed by HUD and provided no evidence of Congressional intent, and there is no support in the legislative history for the conclusion that Congress intended to guarantee unfettered prepayment rights.

[17] Citing *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 575 (9th Cir. 2000) (intention of legislature to repeal must be clear and manifest, and absent affirmative showing of intent to repeal, repeal by implication requires irreconcilability).

[18] The court also found inapplicable another subsection of the express preemption provision, 12 U.S.C. § 4122(a)(4), which purports to preempt state laws "limited only to eligible low-income housing for which the owner has prepaid the mortgage," because LARSO is not so limited.

[19] 342 F.3d at 1070.

[20] 12 U.S.C. §4122(b).

[21] *Forest Park II*, 336 F.3d at 733.

the federal government to continue providing financial assistance to participants when both parties no longer wanted to sustain a relationship.[22] Because in the court's view LARSO does not limit the ability to prepay or force a continuing relationship, it is not expressly preempted by LIHPRHA. While the applicability of LIHPRHA and its express preemption provision to nonparticipating properties is extremely troublesome, the Ninth Circuit's remaining discussion to distinguish *Forest Park* is dicta. Any challenges to the validity of other state and local notice laws elsewhere will raise new opportunities to reargue some of these issues in the context of those other laws.

Turning to the owner's conflict preemption claim, the court considered whether LARSO so significantly frustrated federal objectives in the operation of the Section 236 program that the city's traditionally strong interest in local rent control must yield. Here, the owner's claim was that private participation was a federal goal, that HUD's regulations permit prepayment after 20 years so that owners could raise rents to market level, and that LARSO impedes this objective. The Ninth Circuit rejected this daisy chain:

> The fallacy of this argument is its mischaracterization of the HUD regulations and its failure to account for the plain language of § 4122(b). There is no assurance in the HUD regulations, or in any other federal statute or regulation, that after 20 years an owner may raise rents to market levels. [footnote omitted] The assurance is that after 20 years an owner may prepay his federally subsidized mortgage, exit the federal program and free himself of federal regulation, including federal rent control. Nothing in the HUD regulations purports to limit states from enacting their own rent control laws of general applicability which apply equally to apartment owners who exit the federal program as well as other apartment owners. Indeed, the express language of § 4122(b) provides that states and political subdivisions may establish rent control laws of general applicability.[23]

In doing so, the court also rejected the owner's attempt to rely on the earlier 1997 decision of the Claims Court in *Cienega Gardens*, which was vacated by the Federal Circuit and remains unaddressed in that court's latest decision.[24]

Conclusion

Topa Equities fortunately holds that the application of local rent controls to properties exiting the federal affordable housing programs is not preempted. However, its analysis that the dead letter of a long-dormant federal statute remains applicable to properties not participating in that program presents a significant challenge to other state and local preservation laws. Other courts must reject or distinguish this analysis, or Congress should reaffirm that state and local authority to enact preserv1ation laws suited to local housing conditions remains intact. ■

[22] *Topa*, 342 F.3d at 1071. The Eighth Circuit's inaccurate statement about Congress' intent in authorizing prepayments, and the supposed compulsive effect of a state procedural requirement, may become significant in other cases. In authorizing but not compelling prepayments, the federal government is at worst neutral about continuing to pay Section 236 assistance appropriated many years ago, since it is far cheaper than the enhanced vouchers provided upon prepayment.

[23] 342 F.3d at 1071-1072.

[24] *See* note 9, *supra*.

Bringing America Home Act Introduced to End Homelessness

In late July, Representative Julia Carson (D-IN) and 27 other House members introduced H.R. 2897, the *Bringing America Home Act*, new omnibus legislation aimed at ending homelessness in America. The bill also includes provisions to provide job training, civil rights protections, vouchers for child care and public transportation, emergency funds for families facing eviction, increased access to health care for all, and Congressional support for living incomes. The Act would provide states and localities with critically needed resources to make efforts to end homelessness a reality.

The Act also includes a provision to establish a National Housing Trust Fund that would provide communities with funds to build, rehabilitate and preserve 1.5 million homes over the next 10 years—a provision which has already been introduced separately in the House (H.R. 1102, more than 200 co-sponsors) and the Senate (S. 1411). More than 4,450 organizations and local leaders have endorsed the National Housing Trust Fund and are working for passage of National Housing Trust Fund legislation.

The National Coalition for the Homeless has made the *Bringing America Home Act* a centerpiece of their "Bringing America Home" Campaign, launched earlier this year. A conference and kick-off rally were held in Washington, D.C. in early October.

More information on the Bringing America Home Campaign, including sample local resolutions and organizing materials, is available online at www.bringingamericahome.org. More information on the National Housing Trust Fund Campaign is available at www.nhtf.org. ■

First Circuit Refuses Remedies for Improper Opt-Out Notice

Who said violating the law doesn't pay? In a case where there was little dispute about the inadequacy of the federal notice provided to tenants prior to an owner's withdrawal from the project-based Section 8 program, the First Circuit recently affirmed a trial court's dismissal of claims against HUD and private owners. *People To End Homelessness Inc., v. Develco Singles Apts.*, 339 F.3d 1, 2003 WL 21757274 (1st Cir. July 31, 2003). The tenants had claimed that, where the opt-out notice failed to meet the requirements of federal law, HUD should have required the owner to execute a renewal contract or at least not provide him with higher enhanced voucher subsidies that undercut the statutorily specified remedy. The First Circuit disagreed, primarily because of its view that the governing statutes required neither action.

The case involved a community organization's suit against HUD and the owners of four separately owned but jointly managed Section 8 developments. The owners had executed project-based Section 8 contracts with HUD that were scheduled to expire on May 31, 2001. Six weeks prior to that date, the owners provided the tenants with notice of their intent to opt out of the federal program, even though federal law (42 U.S.C. §1437f(c)(8)) required such notice at least one year in advance. The suit sought to compel HUD to renew expiring Section 8 contracts in such circumstances of improper notice or, in the alternative, to prevent HUD from providing enhanced voucher subsidies to the residents when the contracts expired. Federal law also specifies that in the case of improper notice, the owner may not evict the tenants or increase the tenants' rent until such time as the owner has provided the notice and the full one year has expired. 42 U.S.C. § 1437f(c)(8)(B). When the HAP contracts expire, the law also allows HUD to renew the contract with the owner, but it does not require renewal.

The trial court first issued a voluntary restraining order preventing any evictions or any increase in the tenants' rent contributions for a term of one year from the date of the deficient notice. HUD then moved to dismiss the claims against it for the plaintiff's failure to state a claim, which the trial court granted because it found no other available remedy under the applicable statutes. The owners then moved for summary judgment on the ground that the residents lacked standing to compel the owners to renew the project-based Section 8 contracts, which the trial court also granted.

Affirming both decisions, the First Circuit took a very narrow view of the applicable statutes. It concluded that no law *required* HUD to renew expiring Section 8 contracts when the owners failed to give proper notice, so that the renewal decision lies within HUD's discretion. Moreover, it rejected the argument that HUD lacked authority to issue enhanced vouchers at higher subsidy levels upon expiration of the Section 8 contract after improper notice. Because the statute authorizes enhanced vouchers at expiration, without limiting such subsidies to cases involving proper notice, the court declined to read into the statutes any qualification that the termination have been conducted legally. The plaintiff had also attempted to demonstrate that HUD had told Congress, which had previously expressed concern about HUD actions to reward owners acting illegally, that its policy was to deny such higher subsidies to those owners. The court, however, remain unmoved, pointing out that these statements were no more than indications of future policy intentions, certainly not in force at the time of the events in question.

The First Circuit concluded that no law required HUD to renew expiring Section 8 contracts when the owners failed to give proper notice, so that the renewal decision lies within HUD's discretion.

On the standing claim, the First Circuit held that there was nothing the trial court could have done to redress the plaintiff's injuries beyond issuing the restraining order, which had simply parroted the statutory language prohibiting the owner from increasing the tenants' share of the rent or evicting them, pending proper notice and completion of the one-year period. As in the court's view nothing more was possible under the governing laws and the plaintiff's injuries were not redressable, it then affirmed the dismissal.

Once again, the courts' unwillingness to look beyond the narrow confines of the statutory language at issue to ascertain Congress' actual intent means that Congress must do a far better job of anticipating future events and speaking clearly to address them. Certainly reliance upon HUD to exercise its discretion to make good judgments will often prove insufficient to preserve vanishing affordable housing. ■

Correction

An article appearing in the September 2003 issue of the *Housing Law Bulletin* contained an error. The fourth sentence of the final paragraph of the article, *The Harvard Joint Center for Housing Studies Releases 2003 Report on State of the Nation's Housing*, 33 HOUS. L. BULL. 407-10, 410 (Sept. 2003), read: "The report also should be lauded for calling attention to such factors as racism and predatory lending which continue to plague the economic and social well-being of the people of the United States." Instead, this sentence should have read: "The reader should also be deeply concerned over factors such as racism and predatory lending, which continue to plague the economic and social well-being of the people of the United States."

Court Allows Disqualification of HOPE VI Application, Cites Fair Housing

On July 18, 2003, the San Francisco Housing Authority's (SFHA) efforts to prevent disqualification of its HOPE VI application were thwarted when the U.S. District Court for the Northern District of California denied its request for a preliminary injunction.[1] The injunction would have required HUD to consider SFHA's application for a HOPE VI demolition grant despite a pending suit against it by the U.S. Department of Justice for alleged fair housing violations.[2]

The court set forth a brief but detailed description of the origins and history of the HOPE VI program.[3] HOPE VI provides funds to public housing authorities (PHAs) to redevelop or demolish public housing sites.[4] The Secretary of HUD may establish criteria for the award of such grants.[5] The 2002 HOPE VI Notice of Funding Availability (NOFA) provided, *inter alia*, that a PHA that is a defendant in a suit by the Department of Justice alleging an ongoing pattern or practice of discrimination would be ineligible to be considered for funding.[6] HUD disqualified SFHA's application on this basis.

SFHA argued to the court that HUD's disqualification of SFHA's HOPE VI application was a violation of its procedural due process rights under the Fifth Amendment to the U.S. Constitution, as well as a violation of HUD's debarment regulations.[7] To obtain a preliminary injunction, procedurally, SFHA had to show that it would suffer irreparable injury, that other legal remedies were inadequate, and a likelihood of success on the merits of its claims.

As a threshold question, the court accepted, and HUD did not dispute, that it was proper for the court to review HOPE VI eligibility pursuant to the *Administrative Procedures Act*.[8] The court then turned its attention to the Fifth Amendment claim, first considering whether SFHA was a person for purposes of the amendment, and, secondly, whether it had been deprived of a protected liberty interest.

The court found that SFHA is a person for Fifth Amendment purposes, distinguishing from a well-established line of cases finding that a state is not a "person" under the amendment.[9] The court adopted the analysis of *Board of Natural Resources of State of Washington v. Brown*, 992 F.2d 937 (9th Cir. 1993), a Ninth Circuit case holding local school districts to be persons under the Fifth Amendment.[10] The district court focused on the reliance of *Board of Natural Resources* on a Third Circuit case that held a school district to be a person for Fifth Amendment purposes because the school district was closest in nature to a private corporation, and private corporations may be persons under the Fifth Amendment.[11] The court acknowledged that school districts are "state actors," but held that this fact is not dispositive, noting that private corporations may also be classified as such. The district court thus concluded that SFHA would likely succeed in its argument that it is a person under the Fifth Amendment.

District court: "HUD's affirmative fair housing duty extends to its administration of the HOPE VI program with special force."

SFHA's remaining arguments met with less success. SFHA argued that the disqualification of its application impaired its protected interest in liberty insofar as the disqualification damaged its reputation. To establish infringement of a liberty interest, SFHA had to show, in addition to injury to its reputation, "'either the denial of a right specifically secured by the Bill of Rights…or the denial of a [government]-created property or liberty interest' such that due process is violated."[12] The court concluded that SFHA did not meet this burden and, thus, did not consider whether the process afforded SFHA was adequate.

The court concluded as well that SFHA's debarment claim was inapposite insofar as debarment excludes a particular recipient of funding, as opposed to the setting of grant eligibility under a NOFA, which HUD had express authority to do in this case.[13] SFHA also failed to show it would suffer irreparable harm, as it could not show that its HOPE VI application would have been granted.

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[1] *San Francisco Housing Authority v. United States of America*, C 03-2619 CW (N.D. Cal. July 29, 2003) (Wilken, J.) (hereinafter, *SFHA*).

[2] The pending suit, *United States of America v. San Francisco Housing Authority*, C-02-4540 CW (N.D. Cal.) (Wilken, J.), was filed in the Northern District of California in 2002.

[3] *See SFHA*, at 3-6.

[4] For a comprehensive discussion of the HOPE VI program, see NHLP, et al., *False HOPE: A Critical Assessment of the HOPE VI Public Housing Redevelopment Program* (June 2002), *available at* www.nhlp.org/html/pubhsg/FalseHOPE.pdf.

[5] *See* 42 U.S.C. § 1437v(e)(2) and (3) (2003).

[6] *See* 68 Fed. Reg. 16,672 (Apr. 4, 2003).

[7] *See* 24 C.F.R., §§ 1 and 24 (2003).

[8] *See* 5 U.S.C. §§ 701 *et seq.* (2003).

[9] That well-established line includes *Puerto Rico Public Housing Administration v. U.S. Dept. of Housing and Urban Development*, 59 F. Supp. d 310 (D. Puerto Rico 1999).

[10] *See Board of Natural Resources of State of Washington v. Brown*, 992 F.2d 937 (9th Cir. 1993).

[11] *Id.* at 943.

[12] *SFHA*, at 12 (citing *Cooper v. Dupnik*, 924 F.2d 1520, 1532, n. 22 (9th Cir. 1991)).

[13] *Id.*, at 13.

Lastly, the court emphasized the public's interest in the elimination of discrimination in housing. In particular, the court cited HUD's affirmative obligation under the *Fair Housing Act*[14] to further fair housing in the administration of its programs.[15] This obligation was born, in part, of the historical failure of federal officials "to prevent local communities and agencies from using federal housing funds for racially discriminatory purposes."[16] The court stated:

> HUD's affirmative fair housing duty extends to its administration of the HOPE VI program with special force. The HOPE VI program involves the demolition of housing, the large-scale redevelopment of neighborhoods and the displacement and relocation of families. It is of a type with the slum clearance and urban renewal programs of decades past, the deficiencies with which prompted Congress to impose HUD's affirmative fair housing duty in the first place. The public has a vital interest in ensuring that the HOPE VI program is administered in accordance with the Fair Housing Act. HUD has a duty to see that this is done . . . .

"[HOPE VI] is of a type with the slum clearance and urban renewal programs of decades past, the deficiencies with which prompted Congress to impose HUD's affirmative fair housing duty in the first place."

Together with the Eighth Circuit's recent decision in *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Housing Authority*,[17] the district court's decision and analysis should encourage advocates to pursue fair housing claims all the more vigorously and advocate against HOPE VI projects that are contrary to fair housing objectives. Because HOPE VI nearly always involves the displacement of large numbers of low-income households of color, fair housing concerns lie at the very heart of the program. Yet, all too often, these problems remain unaddressed and unacknowledged. ■

[14]42 U.S.C. § 3608(e)(5) (2003).

[15]*See* NHLP, *HUD's Fair Housing Duties and the Loss of Public and Assisted Housing*, 29 HOUS. L. BULL. 1 (Jan. 1999), *available at* www.nhlp.org/html/hlb/199/199fairhsg.htm.

[16]*SFHA*, at 13-14 (citing *114 Cong. Record* 2281, 2527-28 (1968) (statement of Sen. Edward Brooke)).

[17]339 F.3d 702 (2003) (Melloy, J., author). See also NHLP, *Eighth Circuit Reverses Unfavorable District Court Ruling in HOPE VI Fair Housing Case*, 33 HOUS. L. BULL. 396-97 (Sept. 2003).

HUD Study Identifies Factors Affecting Voucher Utilization and Subsidy Costs

A recent study prepared by Abt Associates for HUD examines why certain public housing authorities (PHAs) have higher voucher utilization rates than others.[1] The study also looked at the factors that affect the cost of vouchers in a sample of sites nationwide. The PHAs included in the study were selected to include those with high and low utilization rates and high and low voucher costs across a range of program sizes and geographic locations.[2] The study, which used the utilization standard under the Section 8 Management Assessment Program (SEMAP),[3] revealed that utilization rates tended to fluctuate over time. It identified some key factors that affect utilization and grouped possible factors into external circumstances that are outside the control of a PHA and internal factors that a PHA can control.

The external factors examined include:

- rental market condition, which was described as availability of affordable rental housing as indicated by rental vacancy rates;
- the physical condition of the local affordable housing stock; and
- the receipt of new voucher allocations in the previous two years, particularly a special allocation of vouchers.[4]

Internal, or "controllable" factors refer to PHA management practices and policies that can be expected to affect an agency's ability to fully use voucher program resources. In particular, the study examined:

- overall quality of program management;
- methods used to determine the number of vouchers to issue each month;
- quality of landlord relations;

[1]Meryl Finkel, et al., *Costs and Utilization in the Housing Choice Voucher Program*, July 2003, (Abt Associates, Inc., Cambridge, MA), hereinafter *Cost & Utilization*, *available at* www.huduser.org/publications/pubasst/cost_util_voucher.html.

[2]Data in the study were derived from computerized HUD files, other secondary sources and primary data collected on-site at 48 sample PHAs collected between December 2001 and April 2002. *Cost & Utilization*, at v.

[3]24 C.F.R. § 985.3(n) (2003). Utilization of greater than 98 percent is considered full performance, 95-97 percent is adequate utilization and less than 95 percent is not adequate utilization. For this study utilization was defined "as the number of units leased with voucher assistance as a percentage of the number of units under the Annual Contributions Contract (ACC) between HUD and the PHA at the beginning of the PHA's fiscal year." *Cost & Utilization* at 7. Utilization rate refers only to unit utilization, not budget utilization. *Id*., at vi.

[4]*Id*. at 10.

- degree of rigor in rent reasonableness calculations;
- level of housing search assistance offered to participants;
- staffing resources;[5]
- leasing success rates;
- level of payment standards relative to fair market rents;
- emphasis placed on deconcentration;[6] and
- waiting list management.[7]

With respect to each of the external factors, the study reached the following conclusions.

- **Rental market conditions**. Utilization rates are generally higher in loose markets and lower in tight markets.[8]
- **Condition of the affordable housing stock**. Utilization rates are higher in locations with better quality housing stock.
- **Receipt of new voucher allocation**. Agencies that place a priority on program expansion have developed strategies for handling new allocations efficiently, allowing the leasing-up of newly allocated vouchers without neglecting regular program operations.

With respect to the internal factors, the study reported that the key factors affecting utilization included the following.[9]

- **PHA management**. Well-managed PHAs have higher utilization rates. In evaluating management, the study looked at factors such as sequencing of activities, timely completion of inspections, accurate calculation of payments and rent reasonableness, maintenance of records adequate for effective planning, etc.
- **Method used to determine voucher issuance**. PHAs with an effective system for determining the number of vouchers to issue each month had higher utilization rates. These PHAs tracked each step of the process from eligibility through leasing and issued vouchers, making adjustments as needed.
- **Frequency of updating wait lists**. PHAs that review and update their waiting lists more often have higher utilization rates. The study classified the PHAs in accordance with whether they purged their waiting list annually or less frequently.[10]
- **Leasing success rates**. PHAs with high success rates also tend to have high utilization rates. Success rate is determined by the number of families issued a voucher compared with those who are successful in leasing up. For example, if 100 vouchers are issued and 75 families find a home and lease-up, the success rate is 75 percent.
- **Other controllable factors**. These factors, such as realigning staff to administer new allocations of vouchers,[11] providing additional search assistance to families[12] and focusing on landlord relations,[13] also help increase utilization rates.

In addition, the study found that attention to these factors compensated for unfavorable market conditions. Conversely, inattention to these controllable factors could lead to low utilization even in favorable market conditions.

Subsidy Costs

In looking at the cost of voucher subsidies, the study found that local market rents and the income of local residents were major influences. A formula was created to control (or "normalize") for these factors to determine what other factors affected subsidy costs. The additional factors identified that affected subsidy costs included:

- **Participant income distribution**. PHAs with larger concentrations of extremely low-income households have higher normalized subsidy costs.
- **Age/disability status**. PHAs with higher concentrations of elderly or disabled households have lower normalized subsidy costs. This is because family sizes are smaller and, thus, bedroom sizes are also smaller.

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[5]The study saw no correlation in the level of staffing between high and low utilization PHAs. In fact, the high-utilizing PHAs had a slightly lower ratio between staff and number of vouchers. The average number of full-time staff to vouchers was 124; high performers had 130 and low performers had 117. This information may be of use for advocates responding to complaints of insufficient staff to achieve full utilization.

[6]No pattern emerged to indicate that high-utilization PHAs had better deconcentration records.

[7]*Cost & Utilization*, at 10.

[8]The study did note that there were PHAs with high utilization rates operating in tight rental markets. Further, "management practices in general and rigorous success procedures in particular help overcome difficult market conditions." *Id*. at 16.

[9]*Id*. at viii.

[10]Purging is a factor that often negatively affects the lowest income families and families with disabilities. To the extent that a PHA seeks to change its policies with respect to updating its waiting list, the policy ought to be developed in the PHA plan process. Any policy that is adopted should provide that applicants are given clear and simple information about the process and what if anything is required of them. PHAs must allow for reinstatement of applicants withdrawn from the waiting list by the PHA as necessary to provide reasonable accommodation to families with members who are disabled. 24 C.F.R. § 982.204(c) (2003).

[11]As noted previously, the level of staffing does not seem to affect utilization as those PHAs with high utilization had a slightly lower ratio of voucher/staff as compared with PHAs with low utilization. *Cost & Utilization*, at 26.

[12]The types of search assistance that were helpful are briefly discussed in the section of the study on paired PHAs.

[13]"Developing good relationships with landlords seems to be an important step PHAs can take to enhance their utilization of vouchers." *Cost & Utilization*, at 26.

- **Use of exception payment standards**. PHAs that use exception payment standards or pay rent above the payment standard have higher normalized subsidy costs.[14]
- **Enforcement of rent reasonableness**. PHAs that are more rigorous about enforcement of rent reasonableness have lower normalized subsidy costs.
- **Standard of assigning bedroom sizes**. PHAs that apply stricter-than-average standards for assigning bedroom size to families have lower normalized subsidy costs. The examples given include assigning a one-bedroom unit rather than a two-bedroom unit to a mother and infant daughter, a two-bedroom unit rather than a three-bedroom unit for a mother, 7-year-old daughter and 11-year-old son, etc.
- **Special program**. Higher numbers of enhanced vouchers lead to higher normalized subsidy costs.

The study found no correlation with costs for PHAs with admission preferences for families who are working, homeless, in school or in training.

It is interesting to note that the study found no correlation with costs for PHAs with admission preferences for families who are working, homeless, in school or in training. There was, however, a cost correlation for those PHAs with preferences for extremely low-income (ELI) families. PHAs with a preference for ELI families had increased costs.[15] These findings may be helpful in the PHA plan process rebutting arguments against a preference for homeless families based upon a claim that such a preference would increase the cost of the program.

Also, there was no correlation between high-cost and low-cost PHAs depending upon whether the minimum rent was $25 or $50. In other words, the overall cost of the program was not affected by the level of the minimum rent. This information may be helpful in seeking to lower minimum rents or resist increases in minimum rents.

The study concludes that PHAs do not consider the cost of the subsidy and may need to be educated about the importance of it for planning and budgeting purposes. It also found that there is no noticeable difference in subsidy costs between PHAs depending upon their utilization categories. Thus, approximately the same percentage of high, medium and low utilization PHAs had high, medium and low costs.[16]

Paired Study

The study also paired 28 (of the 48) PHAs to highlight other factors that affect utilization apart from the more general market-related factors. A pair was defined as two PHAs that served either the same or similar housing markets and had at least a 10-point difference in utilization rates.[17] The paired study suggests that:

- Programs with high utilization rates typically have strong leadership.
- Administrators of programs with high utilization rates have better ability to perform the data analysis and calculations needed to determine program flow and allocate staff to achieve full utilization.
- Programs with high utilization rates are usually administered more strategically, which means that the PHA is focused on serving more families and maximizing its income.
- In some cases, the paired PHA with the higher rate of utilization provided more housing search assistance, concentrated more on outreach to landlords, and/or provided better service to owners of rental housing.[18]

Conclusion

The *Costs and Utilization in the Housing Choice Voucher Program* study highlights important factors that should be taken into consideration when analyzing the effectiveness of a PHA's voucher program. Although some of the conclusions reached by the study may be commonsensical, the study nevertheless provides a useful checklist that administrators and advocates seeking to improve program performance can draw upon. The study's findings should encourage housing advocates to get involved with their PHAs to ensure that voucher utilization rates are and remain high. ■

[14] "Exception payments standards were used in nearly 40 percent of high cost PHAs, but in only about 10 percent of low cost PHAs." *Id*. at 44.

[15] *Id*. at 46.

[16] *Id*. at xi.

[17] *Id*. at v.

[18] *Id*. at ix.

FY 2004 Voucher Funding Remains Uncertain

Block Grant Proposal Dead for Now

Prior issues of the *Bulletin* this year have reported on two major developments concerning the Section 8 voucher program, the largest federal affordable housing program that provides assistance to nearly 2 million families nationwide. These were the Administration's Block Grant proposal[1] and the prospect of insufficient appropriations to renew all vouchers currently authorized.[2]

The Administration's proposal to block grant the voucher program to the states has gained few supporters, and will proceed no further in this session. Most apparently understood that breaking the link between federal funding levels and actual local housing costs would require states to eventually administer real benefit cuts. Look for some variation on the theme in the Administration's budget for next year, directed at reducing the long-run costs borne by the federal government.

On voucher appropriations, anything less than full funding would mark the first time in the history of Section 8 that Congress would break the government's long-standing and oft-repeated commitment to fully fund the renewal of all existing Housing Choice Vouchers and other Section 8 subsidies. House floor action in late July had raised FY 2004 renewal funding significantly, but only to a level of $433 million, or 63,000 vouchers short, of the full renewal funding level.

During September, facing difficult constraints imposed by the budget resolutions, the Senate Appropriations Committee adopted a novel approach that nominally provides a lower guaranteed funding level than the House, but also requires HUD to return to Congress to request additional funding if the appropriated level proves inadequate. This approach may avoid cuts to housing vouchers that probably would occur under the House-passed version, if funds ran short.[3] The Conference Committee on Appropriations could take additional steps to ensure full funding or an effective voucher program during FY 2004.

The Senate approach would:

- provide inadequate direct funding for all voucher renewal needs because, like the Administration's request and the House approach, it is based on outdated data. The Senate bill provides $200 million less than the House bill. Without additional funding later on, the Senate's funding level could result in the loss of between 92,000 to 135,000 vouchers that are expected to be in use as of October 1, 2003.
- require HUD to supplement these funds with available funds from prior years. HUD would have to draw on unspent funds from prior years, if needed to renew all existing vouchers in use, and OMB data suggest that HUD should have sufficient funds available.

The risk in this approach is that Congress could divert any available prior-year funds to other purposes before they can be used to fund unmet voucher needs. Although the Senate has not yet done so, Congress could ensure that sufficient funds are available by rescinding and reappropriating whatever amounts are anticipated to be needed for vouchers. Advocates are working with Senators to line up support for a "Sense of the Senate" resolution to solidify this commitment.

The Senate Appropriations Committee adopted a novel approach that nominally provides a lower guaranteed funding level than the House, but also requires HUD to return to Congress to request additional funding if the appropriated level proves inadequate.

The Senate approach also provides sufficient funds for PHA administrative fees, as well as some funding for the Family Self-Sufficiency program—both features lacking in the House version. If the Senate actually passes a bill, a conference committee may resolve the differences. Alternatively, staff could meet and negotiate a compromise as part of an omnibus spending package to replace the Continuing Resolutions that commonly sprout in the autumn landscape. ■

[1] *See Housing Assistance for Needy Families Act Threatens Neediest Families*, 33 HOUS. L. BULL. 309 (June 2003).

[2] *See, e.g., Congress Continues Wrestling with FY 2004 Voucher Funding*, 33 HOUS. L. BULL. 374 (Aug. 2003).

[3] *See Center on Budget and Policy Priorities, Senate Committee Bill May Avert Cuts to Housing Vouchers Despite Inadequate Appropriation, available at* www.cbpp.org/9-23-03hous.htm.

Recent Cases

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.

Fair Housing

Giebeler v. M&B Assocs., 2003 WL 22119329 (9th Cir. Sept. 15, 2003). Plaintiff filed suit alleging violation of the *Fair Housing Act*, 42 U.S.C. §§ 3601 et seq., by Defendant apartment owner. Plaintiff was disabled by AIDS and sought to rent an apartment close to his mother's home. Plaintiff was unable to work and his application for housing was rejected because he did not meet Defendant's minimum income requirements. Plaintiff contended that Defendant failed to provide reasonable accommodation of his disability by allowing his mother to serve as a co-signer to his lease. The district court granted Defendant's motion for summary judgment, and Plaintiff appealed. The Ninth Circuit reversed and remanded. It declined to follow *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293 (2nd Cir.1998) and *Hemisphere Building Co. v. Village of Richton Park*, 171 F.3d 437 (7th Cir.1999), which held that accommodations related to financial situation were outside the scope of the Fair Housing Act. It concluded that Plaintiff's request for a reasonable accommodation was "within the intendment of the FHAA, and should have been honored."

HOPWA

Cotton v. Alexian Bros. Bonaventure House, 2003 WL 22110501 (N.D. Ill. Sept. 9, 2003). Plaintiff residents were terminated without written notice from a transitional housing program for people living with HIV/AIDS operated by Defendant with *Housing Opportunities for People With AIDS Act* (HOPWA), 42 U.S.C. §§ 12901 *et seq.*, funds. Plaintiffs sued alleging violations of HOPWA program requirements, due process and state and local landlord-tenant law. In an amended memorandum opinion and order, the district court denied the parties' cross motions for summary judgment. However, the court concluded pursuant to Rule 56(d), Federal Rules of Civil Procedure, that Plaintiffs had established a violation of their rights under HOPWA to written a pre-termination notice. The court also declined to exercise supplemental jurisdiction over Plaintiff's state and local landlord-tenant law claims and dismissed those claims without prejudice. The prior order held that the termination and lock-out of Plaintiffs did not violate state and local law.

Housing Choice Voucher Program

Laramore v. Richie Realty Mgmt. Co., 2003 WL 22227148 (N.D. Ill. Sept. 25, 2003). Defendant real estate management company moved to dismiss one-count complaint alleging violation of the *Equal Credit Opportunity Act* (ECOA), 15 U.S.C. §§ 1691 et seq. Plaintiff sought to apply to a rental unit advertised by Defendant but was denied because Defendant would not accept Plaintiff's housing choice voucher. The district court granted Defendant's motion, concluding that a residential landlord's renting of property does not fall within the category of "deferred payment of debt" required under 15 U.S.C. § 1691(a)(d). The court reasoned that rental payments are generally due on the first day of a month and are applied for the month in which they are paid. Thus, leases are not deferred debt subject to ECOA requirements.

Public Housing

Robinson v. Martinez, 764 N.Y.S.2d 94 (N.Y. Sup. Ct. App. Div. Sept. 16, 2003). Petitioner public housing resident filed a petition challenging the termination of her 21-year tenancy. The trial court granted the petition. Respondent New York City Housing Authority appealed. Respondent sought to terminate Petititioner's tenancy based on Petitioner's alleged failure to comply with a prior agreement to exclude Petitioner's son from her apartment. Petitioner's son had been charged in an unspecified criminal matter; this charge was later dismissed. In affirming the trial court's decision, the appellate division noted Respondent's failure to comply with its tenancy termination procedures. The appellate division further noted that Petitioner had allowed her son, who was seriously ill, to stay in her unit for only one night in order to attend an important medical appointment. The appellate division stated that, under such circumstances, "the penalty of termination is shockingly disproportionate."

Rodriguez v. Cambridge Hous. Auth., 59 Mass. App. Ct. 127 (Sept. 3, 2003). Plaintiff public housing residents asserted state law negligence claims against Defendant housing authority. These claims related to home invasion robberies of Plaintiffs' unit allegedly caused by Defendant's failure to provide adequate security. The superior court granted judgment in favor of Defendant, notwithstanding the jury verdict. Plaintiffs appealed. The appeals court reversed and remanded in part, concluding, *inter alia*, that Defendant's failure to change locks was sufficient evidence of causation on which the jury could have based its verdict in favor of Plaintiffs on the negligence claims.

Relocation

Grayden v. Rhodes, 2003 WL 22137047 (11th Cir. 2003 Sept. 17, 2003). Plaintiff residents of an apartment complex filed suit under 42 U.S.C. § 1983 against Defendant city code enforce-

[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.

ment chief for violation of federal due process rights. Plaintiffs were evicted from their homes with less than 36 hours' notice and without notice of their right to appeal Defendant's condemnation action. The district court denied Defendants' qualified immunity defense, and Defendant filed an interlocutory appeal. The Eleventh Circuit concluded that due process required that Plaintiffs receive notice of their appeal rights. However, it further concluded that this right to receive notice was not clearly established at the time of Plaintiffs' eviction and therefore reversed the district court's denial of Defendant's qualified immunity defense. ■

Recent Housing-Related Regulations and Notices

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 July of 2003. 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

68 Fed. Reg. 54,335 (Sept. 17, 2003)
Housing Choice Voucher Program Homeownership Option: Eligibility of Units Owned or Controlled by a Public Housing Agency

Summary: This final rule provides that units owned or substantially controlled by a public housing agency (PHA) are eligible for purchase under the Housing Choice Voucher Program homeownership option. The inclusion of PHA-owned or controlled properties among properties eligible for purchase under the homeownership option will expand the availability of housing and affordable homeownership opportunities for voucher families participating in the homeownership option. The final rule also establishes procedures to remove potential conflicts of interest where the PHA is the seller. These provisions are modeled on the requirements for PHA-owned units in the voucher rental program. The final rule follows publication of an October 28, 2002, interim rule. After consideration of the issues raised by the single public commenter on the interim rule, HUD has decided to adopt the interim rule without change.

Effective Date: October 17, 2003.

68 Fed. Reg. 54,600 (Sept. 17, 2003)
Required Conversion of Developments from Public Housing Stock

Summary: This final rule implements Section 537 of the *Quality Housing and Work Responsibility Act of 1998*. Section 537 requires public housing agencies (PHAs) to identify distressed public housing developments that must be converted to tenant-based assistance. If it would be more expensive to modernize and operate a distressed development for its remaining useful life than to provide tenant-based assistance to all residents, or the PHA cannot assure the long-term viability of a distressed development, then it must develop and carry out a plan to remove the development from its public housing inventory and convert it to tenant-based assistance. Since the cost methodology necessary to conduct the cost comparisons for required conversions has not yet been finalized, PHAs are not required to undertake conversions under this final rule until the effective date of the cost methodology. HUD has published a proposed rule elsewhere in the September 17, 2003, *Federal Register* to provide the public with an opportunity to comment on the methodology that HUD proposes be used for the required cost comparisons. This final rule follows publication of a July 23, 1999, proposed rule and takes into consideration the public comments received on the proposed rule.

Effective Date: March 15, 2004.

68 Fed. Reg. 54,612 (Sept. 17, 2003)
Voluntary Conversion of Developments from Public Housing Stock

Summary: This final rule furthers HUD's implementation of Section 533 of the *Quality Housing and Work Responsibility Act of 1998.* Section 533 authorizes PHAs to convert a development to tenant-based assistance by removing the development or a portion of the development from its public housing inventory and providing for relocation of the residents or provision of tenant-based assistance to them. This action is permitted only when that change would be cost effective, be beneficial to residents of the development and the surrounding area, and not have an adverse impact on the availability of affordable housing. Since the cost methodology necessary to conduct the cost comparisons for voluntary conversions has not yet been finalized, PHAs may not undertake conversions under this final rule until the effective date of the cost methodology. HUD has published a proposed rule elsewhere in the September 17, 2003, Federal Register to provide the public with an opportunity to comment on the methodology that HUD proposes be used for

[1] *At* www.access.gpo.gov/su_docs.

[2] *At* www.hudclips.org/cgi/index.cgi.

[3] To order notices and handbooks from HUD, call (800) 767-7468 or fax (202) 708-2313.

[4] *At* www.rdinit.usda.gov/regs.

the required cost comparisons. This final rule follows publication of a July 23, 1999, proposed rule and takes into consideration the public comments received on the proposed rule.

Effective Date: March 15, 2004.

68 Fed. Reg. 56,116 (Sept. 29, 2003)
Environmental Review Procedures for Entities Assuming HUD's Environmental Responsibilities

Summary: This final rule updates the list of programs and statutory authorities in HUD's environmental regulations for which other entities may assume HUD's environmental responsibilities. This rule makes other changes to update these regulations that address the assumption of HUD's environmental responsibilities. This final rule also makes conforming changes to the affected environmental provisions contained in various program regulations. This final rule follows publication of a June 26, 2002, proposed rule and takes into consideration the public comments received on the proposed rule.

Effective Date: October 29, 2003.

68 Fed. Reg. 56,396 (Sept. 30, 2003)
Participation in HUD Programs by Faith-Based Organizations; Providing for Equal Treatment of all HUD Program Participants

Summary: This final rule revises HUD regulations to remove barriers to the participation of faith-based organizations in certain HUD programs. In general, no group of applicants competing for HUD funds should be subject, as a matter of HUD's discretion, to greater or fewer requirements than other organizations solely because of their religious character or affiliation, or absence of religious character or affiliation. Applicants for HUD funds and those applicants selected to receive HUD funding should generally be subject to the same requirements. The purpose of the revisions made by this rule is to ensure that faith-based organizations are able to compete on an equal footing with other organizations for HUD funding. This final rule follows publication of a January 6, 2003, proposed rule and takes into consideration the public comments received on the proposed rule.

Effective Date: October 30, 2003.

HUD Federal Register Proposed Rules

68 Fed. Reg. 53,926 (Sept. 15, 2003)
Native American Housing Assistance and Self-Determination Negotiated Rulemaking Committee; Meeting

Summary: This document announces a meeting of the Native American Housing Assistance and Self-Determination Negotiated Rulemaking Committee. The purpose of the Committee is to discuss and negotiate a proposed rule that would change the regulations for the Indian Housing Block Grant (IHBG) program allocation formula, and other regulatory issues that arise out of the allocation or reallocation of IHBG funds.

Dates: The committee meeting was held on Monday, September 22, 2003, Tuesday, September 23, 2003, Wednesday, September 24, 2003, and Thursday, September 25, 2003.

68 Fed. Reg. 54,624 (Sept. 17, 2003)
Conversion of Developments from Public Housing Stock; Methodology for Comparing Costs of Public Housing and Tenant-Based Assistance

Summary: This proposed rule would establish the cost methodology that PHAs must use under HUD's programs for the required and voluntary conversion of public housing developments to tenant-based assistance. Both programs require that PHAs, before undertaking any conversion activity, compare the cost of providing tenant-based assistance with the cost of continuing to operate the development as public housing. The cost methodology was originally contained in HUD's July 23, 1999, proposed rule on voluntary conversions (although the methodology also applies to required conversions). HUD has decided to significantly revise the proposed methodology, based both on public comments received on the proposed rule and upon further consideration of the cost factors that should be assessed by PHAs in making conversion determinations. Accordingly, HUD is issuing this new proposed rule, which will provide the public with an additional opportunity to comment on the methodology that will be used for the required cost comparisons.

Comments Due Date: November 17, 2003.

HUD Federal Register Notices

68 Fed. Reg. 53,989 (Sept. 15, 2003)
Notice of Certain Operating Cost Adjustment Factors for 2004

Summary: This notice establishes annual factors used in calculating rent adjustments under Section 524 of MAHRA as amended by the *Preserving Affordable Housing for Senior Citizens and Families into the 21st Century Act of 1999*, and under LIHPRHA.

Effective Date: February 11, 2004.

68 Fed. Reg. 54,270 (Sept. 16, 2003)
Section 8 Housing Assistance Payments Program—Contract Rent Annual Adjustment Factors, Fiscal Year 2004

Summary: This notice announces revised Annual Adjustment Factors (AAFs) for adjustment of Section 8 contract rents on housing assistance payment contract anniversaries for calendar months commencing after the date of publication of this notice. The AAFs are based on a formula using data on residential rent and utilities cost changes from the most current Bureau of Labor Statistics Consumer Price Index (CPI) survey and from HUD's Random Digit Dialing (RDD) rent change surveys.

Effective Date: September 16, 2003.

68 Fed. Reg. 54,737 (Sept. 18, 2003)
Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request HOME Program Competitive Reallocation of Funds; Notice of Proposed Information Collection for Public Comment

Summary: HUD has submitted a proposed information collection to the Office of Management and Budget (OMB) for emergency review and approval. The information collection

relates to the competitive reallocation of funds to provide permanent housing for the chronically homeless in a Notice of Funding Availability (NOFA). These grants are to fund acquisition, rehabilitation or new construction of rental housing, to be occupied by persons meeting the definition of chronically homeless at the time they are selected as tenants.

Comments Due Date: September 25, 2003.

68 Fed. Reg. 54,936 (Sept. 19, 2003)
Notice of Regulatory Waiver Requests Granted for the First Quarter of Calendar Year 2003

Summary: Section 106 of the *Department of Housing and Urban Development Reform Act of 1989* (the *HUD Reform Act*) requires HUD to publish quarterly Federal Register notices of all regulatory waivers that HUD has approved. Each notice must cover the quarterly period since the previous Federal Register notice. The purpose of this notice is to comply with the requirements of Section 106 of the *HUD Reform Act.* This notice contains a list of regulatory waivers granted by HUD during the quarter beginning on January 1, 2003, and ending on March 31, 2003.

68 Fed. Reg. 55,986 (Sept. 29, 2003)
Notice of Proposed Information Collection for Public Comment—Resident Opportunities and Self-Sufficiency (ROSS) Grant Program

Summary: HUD will be submitting a proposed information collection to the Office of Management and Budget (OMB) for review and approval. The information request relates to forms used in the Resident Opportunities and Self-Sufficiency (ROSS) Grant Program. The forms are used by HUD in the rating and ranking of applications from PHAs, resident associations and nonprofit organizations.

Comments Due Date: November 28, 2003.

HUD Housing Notices

Notice H 2003-19 (Sept. 2, 2003)
Lead Disclosure Requirements and Addendum Format

Summary: In order to ensure that HUD's Management and Marketing (M&M) contractors, and the brokers working with HUD in the sale of its single family properties constructed prior to 1978 are in full compliance with the requirements of the Lead Disclosure Rule (24 C.F.R. 35, subpart A), the following guidance is provided relative to the disclosure of known lead-based paint and lead-based paint hazards.

Expires: September 30, 2004.

Notice H 2003-20 (Sept. 11, 2003)
Fiscal Year 2003 Interest Rate for Section 202 and Section 811 Capital Advance Projects

Summary: This notice sets forth the Fiscal Year (FY) 2003 nominal interest rate for the Section 202 and Section 811 Capital Advance Programs. Based on the formula specified in the Housing and Community Development Act of 1987, the interest rate is 5 3/8 percent.

Expires: September 30, 2004.

HUD PIH Notices

Notice: PIH 2003-19 (PHA) (July 23, 2003)
Fiscal Year 2003 Capital Fund Grants Processing Notice

Summary: The purpose of the notice is to provide PHAs information and guidance on the FY 2003 Capital Fund. It also provides other program information regarding the Capital Fund.

Expires: July 31, 2004.

Notice PIH 2003-20 (HA) (Aug. 29, 2003)
Housing Choice Voucher Program—Homeownership Option PHA Reporting Requirements

Summary: The purpose of this notice is to emphasize the importance of reporting homeownership activities under the housing choice voucher program in PIC, alert PHAs that the accuracy of Form HUD 50058 submissions on families participating in the homeownership program is inadequate and problematic, and review the HUD Form 50058 reporting procedures.

Expires: August 31, 2004.

Notice PIH 2003-21 (HA) (Sept. 9, 2003)
Deregulation for Small Public Housing Agencies (PHAs) and Submission Requirements for New Small PHA Streamlined Annual PHA Plans

Summary: This notice provides guidance to small PHAs on how to prepare and submit a new Small PHA Streamlined Annual PHA Plan, and a new streamlined Annual Plan submitted only in years in which a five-year PHA Plan is also due (Five-Year/Annual PHA Plan). The notice also explains other deregulatory changes applicable to small PHAs and to all PHAs contained in the June 24, 2003, final rule.

Expires: September 30, 2004.

Notice PIH 2003-22 (HA) (Sept. 11, 2003)
Guidance on Methods and Schedules for Calculating Federal Fiscal Year (FFY) 2004 Operating Subsidy Eligibility and Issuance of Local Inflation Factors, Formula Expense Level Equation Multipliers, and Related Tables

Summary: This notice provides PHAs with information needed to complete their FFY 2004 operating budgets and subsidy eligibility calculations. It includes a schedule for the submission of certain items to HUD, as well as local inflation factors, data needed for the recalculation of the Formula Expense Level, and other special notes related to the Operating Subsidy calculation and processing. Following review of the submitted material, HUD will determine funding levels. The amount obligated by HUD will be scheduled for eLOCCS drawdown.

Expires: September 30, 2004.

Notice PIH 2003-23 (HA) (Sept. 22, 2003)
Implementation of FFY 2003 *Omnibus Appropriations Act* Provisions for the Housing Choice Voucher Program

Summary: This notice implements changes to the funding of the Housing Choice Voucher Program resulting from the Federal Fiscal Year (FFY) 2003 Omnibus Appropriations

Act (Public Law 108-7), which was signed into law on February 20, 2003. In this law, Congress revises the method of calculating renewal funds, separates funding for Housing Assistance Payments (HAP) from funding for public housing agency (PHA) administrative expenses, appropriates funds for a central fund and for administrative expenses, and prohibits the use of FFY 2003 funds for over-leasing.

Expires: September 30, 2004.

Notice PIH 2003-24 (HA) (Sept. 26, 2003)
Procurement of Legal Services by Public Housing Agencies

Summary: This notice sets forth procedures for the procurement of legal services by PHAs. This notice supersedes similar guidance previously provided to HUD staff and PHAs including PIH 90-47, Procedures for Procuring Professional Services. This notice is not intended as the primary source of guidance in this area, but is provided to remind all HUD Offices and PHAs of the proper procedures for procuring legal services and to briefly review areas of common interest and concern. This notice applies to all PHA procurements of legal services that are funded in whole, or in part, with HUD grant funds subject to 24 C.F.R. part 85 (*e.g.*, Operating Fund subsidies and Capital Fund).

Expires: September 30, 2004.

RHS Federal Register Final Rule

68 Fed. Reg. 55,299 (Sept. 25, 2003)
Prompt Disaster Set-Aside Consideration and Primary Loan Servicing Facilitation

Summary: Farm Service Agency (FSA) is amending its regulations for the Disaster Set-Aside (DSA) program to provide a disaster set-aside more quickly to those who can most benefit from the program. The changes also will reduce the government's risk associated with the delay in debt collection by adding security requirements.

Dates: This rule is effective on October 27, 2003. ■

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