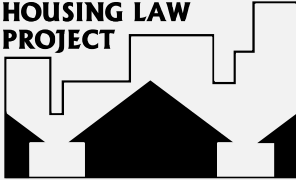


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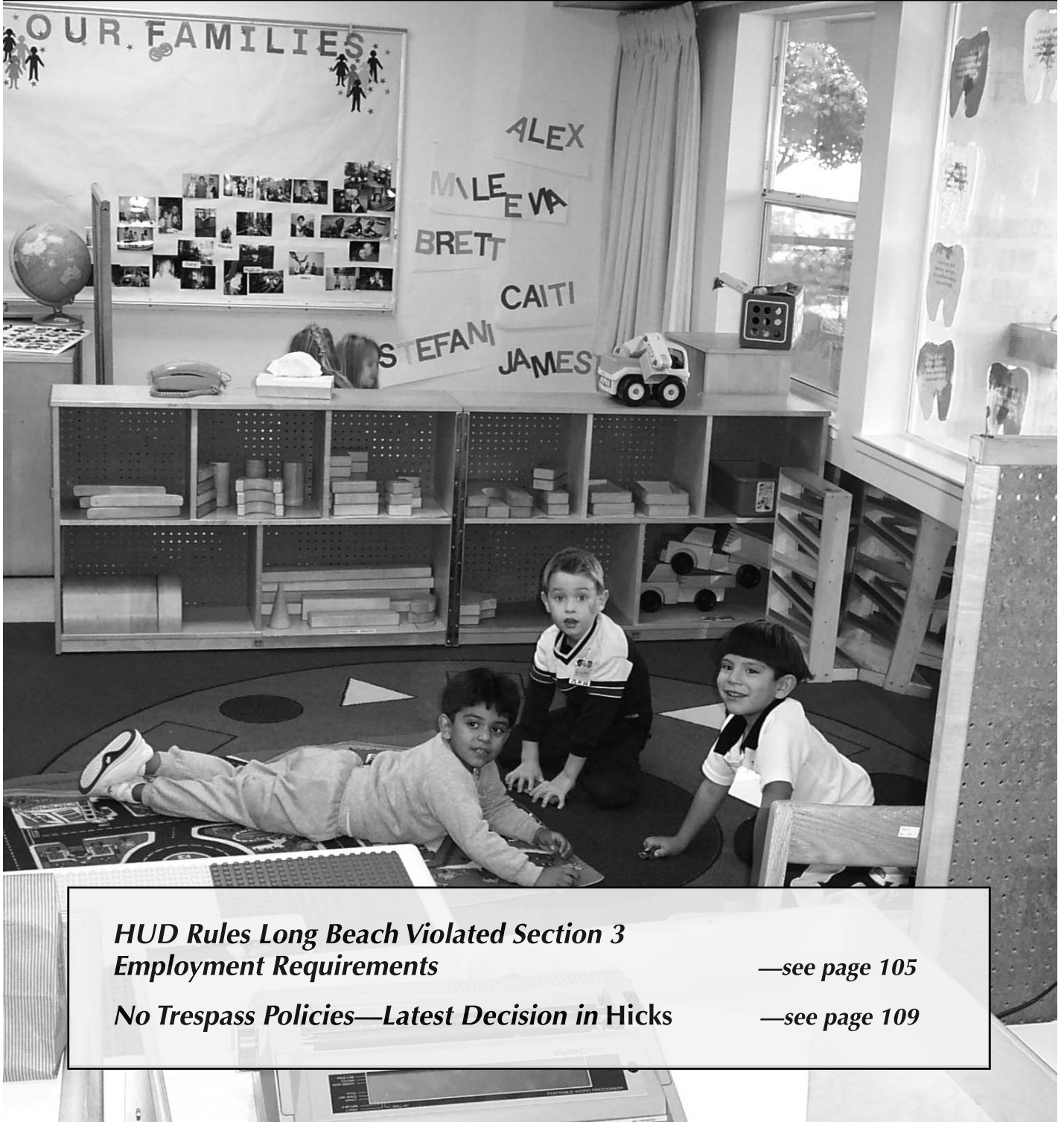


advancing housing justice

Housing Law Bulletin

Volume 34 • June 2004

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***HUD Rules Long Beach Violated Section 3
Employment Requirements***

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No Trespass Policies—Latest Decision in Hicks

—see page 109

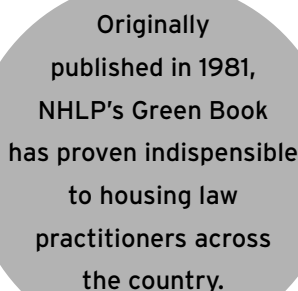

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**HUD
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Tenants' Rights**


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 SPECIAL
FEATURE

AN ESSENTIAL RESOURCE FROM THE NATIONAL HOUSING LAW PROJECT

Housing Law Bulletin

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Cover: East of Eaton's Head Start program. East of Eaton, located in Chico, California, is a 76-unit family residential complex operated by the Community Housing Improvement Program. *Photo courtesy of CHIP.*

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HUD Rules Long Beach Violated Section 3 Employment Requirements

The Department of Housing and Urban Development (HUD) has handed low-income residents and job seekers of the City of Long Beach, California, a significant victory. After a six-year wait, HUD responded to an administrative complaint filed by individual public housing residents and the Carmelitos Tenants Association, ruling in an April 26, 2004, letter that the City of Long Beach violated Section 3 of the Housing and Urban Development Act of 1968.¹

The purpose of Section 3 is to ensure that employment and other economic opportunities generated by certain HUD financial assistance shall, to "the greatest extent feasible," and consistent with existing federal, state, and local laws and regulations, be directed to low- and very low-income persons, particularly those who are recipients of government assistance for housing, and to business concerns which provide economic opportunities to low- and very low-income persons.² The Section 3 regulations provide that recipients of housing and community development funds may establish that they have met the "greatest extent feasible" requirement by committing to employ and ensuring that their contractors employ "Section 3 residents" as at least 30% of all new hires.³ A Section 3 resident is a very low-income person residing in the metropolitan area.⁴ Priority in hiring is provided to Section 3 residents of the service area or neighborhood of the project.⁵ Recipients of housing and community development funds must receive a threshold amount of assistance before they are subject to Section 3.⁶

HUD ruled that the city violated Section 3 by failing to ensure that it and its contractors met or exceeded the 30% minimum requirements of the Section 3 regulations. In reaching that conclusion, it stated that Section 3 "emphasizes results" and that numerical goals of Section 3 "'represent minimum numerical targets' because 'the greatest extent

¹Letter from Carolyn Peoples, HUD Assistant Secretary for Fair Housing and Equal Opportunity, to Heather A. Mahood, Long Beach, CA, Deputy City Attorney (April 26, 2004) [hereinafter HUD Letter].

²12 U.S.C.A. § 1701u(b) (West 2001).

³24 C.F.R. § 135.30(b)(3)(iii) (2003). For recipients of community development assistance, Section 3 is applicable to work (including administrative and management) arising from housing rehabilitation, construction and other public works. 24 C.F.R. § 135.3(a)(2) (2003). For example, the City of Long Beach hired fifteen Section 3 residents to do construction and landscape maintenance. HUD Letter, *supra* note 1, at 4.

⁴24 C.F.R. § 135.5 (2003).

⁵*Id.* at § 135.34(a)(2)(i).

⁶*Id.* at § 135.3(a)(3) (Section 3 applies for community development funds if the assistance exceed \$200,000 and the contract exceeds \$100,000).

feasible' is the standard by which a recipient's compliance with Section 3 is measured."⁷ Most significantly, HUD determined that compliance with this standard enabled it to quantify the percentage of hours worked by Long Beach Section 3 new hires and compare it to the hours worked by all new hires on the project in order to evaluate if the hours worked reflect the "greatest extent feasible."⁸

To rely solely on the number of new hires would allow a recipient to "defy the intent of Section 3 by having a 'hiring surge' on the last day(s) of a project."⁹ In addition, HUD stated that the city had to demonstrate compliance for the duration of the project, which involved "many points of view and of time to measure meaningful compliance."¹⁰ Notably, compliance was required for each year of the contract and full compliance only in the last year (or "catch up" compliance) would not satisfy the obligation of "greatest extent feasible." Finally, HUD emphasized that the appropriate beneficiaries of Section 3 were residents of the City of Long Beach.¹¹

Factual Background of the Case

The City of Long Beach received a Section 108 loan guarantee for \$40 million.¹² Section 108 authorizes HUD to guarantee the issuance of local taxable bonds to help finance community development activities. The maximum loan amount may not exceed five times the most recent Community Development Block Grant (CDBG). To assure repayment, the recipient must pledge future CDBG grants received.¹³ The application must also show how the proposed activities will meet the national objectives of the CDBG program. Recipients of Section 108 loans are obligated to comply with Section 3.¹⁴

The purpose of the loan was to construct a "commercial harbor and public esplanades in support of a high-quality, downtown waterfront project involving retail and restaurant development, entertainment facilities, commercial boat tours and charters, and a 150,000 square

foot aquarium."¹⁵ The city signed documents stating that it would comply with Section 3 and made statements in its application that the city would use resources provided under the Jobs Training Partnership Act (JTPA) to train underemployed and unemployed residents of Long Beach.¹⁶ The application also described the extreme poverty surrounding the proposed project site and asserted that "[t]hese are the census tracts which would benefit most directly from the service and construction jobs created by [the project] initiated by the loan."¹⁷

Valley Crest became the principal contractor for phase two despite the fact that only 2% of its new hires in the first phase were Section 3 residents.

The city executed the loan agreement with HUD in September 1995, and entered into a construction agreement with C.A. Rasmussen, Inc. to begin the first phase of the development on October 29, 1996.¹⁸ The contractors finished the second and final phase of the work in the spring of 2000.¹⁹ Valley Crest, a subcontractor for phase one of the project, became the principal contractor for phase two despite the fact that only one out of fifty new employees—2% of its new hires—in the first phase were Section 3 residents.²⁰ The city did not advise Valley Crest of the legal preference for Section 3 residents from Long Beach until February 5, 1998, fourteen months after the development began and five months after the commencement of the second phase of the project.²¹

Prior to the signing of the contract with Rasmussen, the complainants contacted the director of the project to "encourage compliance with Section 3."²² Also prior to the signing of the contract, they sought assistance from the director of the civil rights division of the Los Angeles HUD office who investigated and advised the city

⁷*Id.* at § 135.30(a)(4) (2003); HUD Letter, *supra* note 1, at 12 (emphasis in original).

⁸HUD Letter, *supra* note 1, at 11.

⁹*Id.* at 10. "After notice of the complaint, however, evidence shows that Valley Crest hired 18 Long Beach Section 3 new hires from June 10, 1998, to June 30, 1998. Also, from July 1, 1998 to the end of the Project, Valley Crest and its subcontractors hired most of their Long Beach Section 3 new hires." *Id.* at 8.

¹⁰HUD Letter, *supra* note 1, at 9.

¹¹HUD Letter, *supra* note 1, at 7.

¹²42 U.S.C.A. § 5308 (West, WESTLAW through P.L. 108-234, approved May 28, 2004).

¹³*Id.* at § 5308(d).

¹⁴24 C.F.R. § 135.3(a)(2) (2003) (community development assistance that is used for housing construction or rehabilitation or other public construction is subject to Section 3); 24 C.F.R. § 570.208(a)(4) (2003) (criteria for national objectives for CDBG program includes job creation or retention activities).

¹⁵HUD Letter, *supra* note 1, at 1.

¹⁶Administrative Complaint of the Carmelitos Tenants Association and individual tenants at 2 (June 9, 1998) [hereinafter Administrative Complaint]. The legal aid attorneys who filed the Administrative Complaint were Dennis Rockway, Senior Counsel and Susanne Browne, Staff Attorney. They are now with the Legal Aid Foundation of Los Angeles (LAFLA).

¹⁷*Id.* at 3.

¹⁸HUD Letter, *supra* note 1, at 3.

¹⁹*Id.* at 4.

²⁰HUD Letter, *supra* note 1, at 7.

²¹*Id.* at 6-7.

²²Administrative Complaint, *supra* note 16, at 3.

to “begin to understand and implement Section 3 as required.”²³ On June 9, 1998, after the city continued to ignore the complainants, with virtually no participation from low-income residents of Long Beach, complainants filed an administrative complaint with HUD.

Elements of the Administrative Complaint

The administrative complaint filed by the Carmelitos Tenants Association and public housing residents with HUD alleged that the city failed:

1. to undertake activities to facilitate the training and employment of Section 3 residents from the City of Long Beach and to award contracts to Section 3 businesses in violation of the regulations;²⁴
2. to notify Section 3 residents of training, employment and contracting opportunities in a manner consistent with the regulations;²⁵
3. to assist and actively cooperate with HUD to obtain compliance with Section 3 by its contractors and subcontractors;²⁶ and
4. to document actions taken to comply with Section 3 including the results of such actions and impediments encountered.²⁷

Relief Sought in Administrative Complaint

The complainants sought a comprehensive remedy for the city’s violation of Section 3 requirements.²⁸ They requested that HUD suspend financial support to the city until compliance with Section 3 was documented. The documentation sought included information regarding the hiring of Section 3 residents from the City of Long Beach

²³*Id.*

²⁴Administrative Complaint, *supra* note 16, at 8-9; HUD Letter, *supra* note 1, at 2. See also 24 C.F.R. § 135.32(c) (2003) (obligates recipients to undertake activities to facilitate training and employment of Section 3 residents and the award of contracts to Section 3 business concerns by engaging in activities such as those set forth in the appendix to 24 C.F.R. Part 135). The term Section 3 business is defined at 24 C.F.R. § 135.5.

²⁵Administrative Complaint, *supra* note 16, at 4-5; HUD Letter, *supra* note 1, at 2. See also 24 C.F.R. § 135.32(a) (2003) (obligates recipients to implement procedures to notify Section 3 residents and businesses about training and employment opportunities and Section 3 businesses about contracting opportunities).

²⁶Administrative Complaint, *supra* note 16, at 6-8; HUD Letter, *supra* note 1, at 3. See also 24 C.F.R. § 135.32(d) (2003) (obligates recipients to assist and actively cooperate with the Assistant Secretary to obtain the compliance of contractors and subcontractors with Section 3 regulations).

²⁷Administrative Complaint, *supra* note 16, 10-13; HUD Letter, *supra* note 1, at 3. See also 24 C.F.R. § 135.32(e) (2003) (requires recipients to document action taken to comply with Section 3 requirements, the results of such actions taken and impediments encountered, if any).

²⁸Administrative Complaint, *supra* note 16, at 15-18.

and activities undertaken to facilitate economic opportunities for Section 3 businesses. In addition, the complaint sought to impose strict monitoring and reporting requirements on the city, and a plan setting forth strategies to promote the economic benefits for Section 3 residents and businesses. The complaint further requested that the city set aside funds for the training and employment of low-income individuals who should have benefitted from the project, independent monitoring and technical assistance for local Section 3 businesses. The relief sought also included a request that the city establish a local oversight committee composed of representatives of the city, the community, legal services organizations, HUD, state and federal legislative officials and organized labor. Finally, the complainants requested that HUD assistance should be divided into smaller projects to provide maximum participation by small local businesses, that the city set aside bonding and loan guarantee funds to assist small local business participation and that the project construction contracts include language providing for penalties for failure to fulfill Section 3 employment obligations.

SAVE THE DATES

2004 Housing Justice Network Meeting

October 3-4

Housing Training October 2

The next meeting of the Housing Justice Network (HJN) is October 3 and 4 in Washington, D.C. HJN is a national association of attorneys and other advocates focusing on federal low-income housing programs. The 2004 HJN meeting will give members of the various HJN working groups—which address issues from public housing to federal relocation requirements to civil rights—an opportunity to meet in person and work on issues of concern to housing advocates and their clients.

A one-day training session will be held on October 2, immediately preceding the HJN meeting to address recent judicial, legislative and administrative changes affecting the federal housing programs. The training and meeting are separate events, although many participants attend both.

A more detailed announcement about the 2004 HJN meeting and the training event will appear in a future issue of the *Housing Law Bulletin*. To be added to the HJN mailing list, contact Amy Siemens at NHLP, 510-251-9400 ext. 111, asiemens@nhlp.org.

HUD Analysis, Conclusions and Relief

In addition to the key findings mentioned above, HUD determined in its review that when the complaint was filed on June 9, 1998, the percentage of new hires of residents from the City of Long Beach was 5.19% for Phase I which was completed on February 20, 1998, and 7.5% for Phase II of the project which began on September 8, 1997, and was completed in the spring of 2000. HUD therefore concluded that the 30% minimum requirement had not been met.²⁹ After the complaint was filed, the contractor did attempt to hire more Section 3 residents from the City of Long Beach. Eventually, HUD found that cumulatively for the period of the project, 31.4% of the new hires were Section 3 residents. Significantly, however, HUD also found that level of compliance was not sufficient because “[r]ecipient’s new Section 3 employee hiring, however, resulted in them working 19% of the ‘total hours’ by all new hires.”³⁰ In addition, HUD found that no Section 3 businesses benefitted from the project.³¹

HUD also found other examples that demonstrated that the city and its contractors did not attempt “to the greatest extent feasible” to comply with Section 3. These included:

- The city did not as promised provide to the carpenters’ and laborers’ unions names of qualified Section 3 residents who had received pre-employment training under the JTPA.
- During the construction stage, the city had no mechanism to collect data regarding Section 3 compliance and its community outreach strategy was never fully developed.
- The city failed to direct the Section 3 opportunities to residents of government assisted housing, including public housing residents and tenant-based Section 8 program participants.³²
- There was no evidence that the city notified Section 3 businesses about contracting opportunities available at the project.³³

Having found the city in violation in its April 26 letter, HUD ordered the city to submit a plan within ninety days which in “clear and convincing” detail specifies how it will restore all Section 3 employment and business opportunities within the next three years. The opinion is clear that the opportunities set forth “must *not* duplicate existing

obligations or commitments.”³⁴ The city must file quarterly reports. If within the next five years HUD determines that the city is not in compliance, the letter states that the city’s “eligibility for continued HUD federal funding will be evaluated in relation to the amount of Section 3 requirements remaining to be restored.”³⁵

Conclusion

The results obtained by the Carmelitos complainants are significant. Advocates have been urging HUD for many years to adopt standards and measure compliance with Section 3 based on the number of hours worked by Section 3 residents, rather than simply counting new hires. Failure to count the actual hours worked has resulted in the manipulation of the process and a surge of new hires at the end of a contract period. HUD has now formally recognized the critical importance of this concept.

The decision is also significant because it measures compliance by year and not cumulatively at the end of the contract term, which may span several years. In addition, the letter opinion is important as it recognizes another issue emphasized by advocates: with the expenditure of housing and community development funds, cities and other entities have a special duty to reach out to public housing residents and voucher participants.³⁶ The HUD opinion leaves some gaps, the most glaring of which is that, although it states that the city did not meet the contracting goals for Section 3 businesses, it does not expressly cite the Section 3 business contracting goals: 10% of all contracts for public construction and 3% of all other contracts.³⁷

These favorable determinations, if widely publicized by HUD and advocates and applied nationwide, will go a long way in ensuring that Section 3 residents benefit from long-term employment opportunities generated by federal financial assistance for housing and community development. ■

²⁹HUD Letter, *supra* note 1, at 3 and 11.

³⁰*Id.* at 11.

³¹*Id.* at 13.

³²*Id.* at 13; 24 C.F.R. § 135.1(a) (2003).

³³HUD Letter, *supra* note 1, at 13. *See also* 24 C.F.R. pt 135 app. (2003).

³⁴HUD Letter, *supra* note 1, at 13.

³⁵*Id.* at 14.

³⁶HUD noted that the city operates a voucher program for approximately 5,500 families and the Carmelitos public housing development has 565 family units. HUD Letter, *supra* note 1, at 13.

³⁷24 C.F.R. § 135.30(c) (2003).

No Trespass Policies — Hicks and Its Aftermath

Part One: The Virginia Supreme Court's Ruling on Remand

On April 23, 2004, the Virginia Supreme Court rendered a final decision in the case of *Virginia v. Hicks*,¹ on remand from the United States Supreme Court. Although the Virginia Supreme Court agreed to hear three issues on remand, violation of defendant's first amendment right of association, a claim of vagueness and a challenge based on the right to intimate association, the court, by agreement of the parties, ruled only on the last two, rejecting the appellee's arguments regarding unconstitutional vagueness and violation of freedom of intimate association.² The Virginia Supreme Court's ruling appears to be in line with a series of cases in which criminal defendants unsuccessfully, and often without the backing of the residents, challenge their criminal trespass convictions and thus the underlying no trespass policies which gave rise to those criminal charges. While unfavorable, the ruling is quite limited and ought to have little direct effect on the rights of public housing residents.

Hicks centered around a no trespass policy of the Richmond Redevelopment and Housing Authority which banned certain persons from coming onto housing authority property and subjected them to arrest for violation of the criminal trespass statute if they intentionally returned to the property once notice of barment had been given. In 2003, the United States Supreme Court, using an overbreadth analysis, ruled against Mr. Hicks in his First Amendment challenge of the policy and the arrest under such policy primarily based upon Hicks' failure to satisfy the requirements of his overbreadth challenge or to carry his burden of proof.³

This two-part series of articles is a discussion of the *Hicks* decision and "no trespass" policies in general. Part One addresses the Virginia Supreme Court's most recent decision. Part Two will survey recent trends in the use of no trespass policies by public housing authorities and examine various legal claims—contractual, statutory and constitutional—that may be brought by public housing residents and others to challenge these policies. The *Hicks* decisions have also been the subject of a number of articles in previous issues of the *Housing Law Bulletin*.⁴

¹Commonwealth v. Hicks, 2004 WL 868770 (Va. Sup. Ct. Apr. 23, 2004).

²*Id.* at *1.

³*Virginia v. Hicks*, 123 S. Ct. 2191 (2003).

⁴NHLP, *Virginia Court Reverses Conviction for Trespass on Privatized Streets Surrounding Public Housing*, 31 HOUS. L. BULL. 157, 182 (July-Aug. 2001); NHLP, *Supreme Court to Review PHA's Trespass Policy*, 32 HOUS. L. BULL. 31, 37 (Feb. 2002); *State Courts Revisit Public Housing Trespass Policies*,

Background of Hicks

On June 16, 2003, the United States Supreme Court ruled that Kevin Hicks, a criminal defendant convicted of trespassing on a public housing property, failed to show that the Richmond Redevelopment and Housing Authority (RRHA) no trespass policy violated his First Amendment right of free speech.⁵ In doing so, the United States Supreme Court questioned the Virginia Supreme Court's decision to declare RRHA's "entire" no trespass policy (both written and unwritten) facially overbroad and void on First Amendment grounds based solely on that court's objection to the "unwritten" aspect of the policy.⁶ The distinction addressed by the United States Supreme Court between *written* and *unwritten* policies is an important one for civil legal services advocates because the basis for legal challenge will be different depending upon whether the policy sought to be challenged has been put into writing and whether or not the state and federal requirements for implementing such policies in subsidized housing have been met. This distinction will be addressed in Part Two of this article.

The facts in *Hicks* are fairly straightforward. In January 1999, Kevin Hicks, a non-resident of public housing, was arrested and charged with trespassing while walking along a sidewalk abutting Whitcomb Court, a low-income housing development owned by RRHA.⁷ The sidewalk on which Mr. Hicks was arrested, and streets adjacent to the property, had previously been public in nature and had been conveyed to RRHA by the City of Richmond only a

32 HOUS. L. BULL. 169, 169 (Aug. 2002); NHLP, *Supreme Court Reverses Virginia Supreme Court's Decision Based on First Amendment Overbreadth*, 33 HOUS. L. BULL. 339, 344 (July 2003).

⁵*Virginia v. Hicks*, 123 S. Ct. 2191 (2003).

⁶*See generally id.*

⁷*Id.* at 2195.

NHLP Welcomes Summer Staff

NHLP would like to extend a warm welcome to its summer 2004 staff: Jennifer ("Jenn") Moreno, James ("Jim") Nickovich, and Jennifer ("J.T.") Taylor. All three students attend the University of California at Berkeley. Jenn and Jim recently completed their first year at Boalt Hall and join us as law clerks. J.T. will enter her third and final year this fall as a dual degree candidate in the School of Public Health and the Goldman School of Public Policy and joins us as a policy intern. As a national legal and policy center focused on advancing housing justice for low-income people, NHLP is committed to nurturing law and policy students who are making their own contributions to the public interest field. We are pleased to have Jenn, Jim and J.T. with us for the summer.

year earlier in 1997 in an attempt to privatize them. Mr. Hicks' arrest followed a written notice from RRHA barring his return and his subsequent re-entry onto the property.⁸ Although Mr. Hicks was not a resident of public housing, his mother, his child and the mother of his child lived in the development and he asserted that he was on his way to deliver diapers to his child. Mr. Hicks had a long history of run-ins with this housing authority and on two prior occasions had been convicted of trespassing on the property and charged on a third occasion with destruction of property.⁹ Although Mr. Hicks had tried to informally appeal his barment from the property several times, he was denied each time by the Whitcomb resident manager.¹⁰ Following these appeals and his subsequent disregard of the barment notice and re-entry onto the property, Mr. Hicks was arrested and, on April 12, 1999, was convicted of trespassing in the Richmond General District Court.

Following his conviction, Mr. Hicks appealed to the Richmond Circuit Court for a trial *de novo*, where he again was convicted of trespassing. Mr. Hicks then appealed his case to the Virginia Appellate Court challenging the validity of the no trespass policy along with his conviction. A panel of the Virginia Court of Appeals affirmed his conviction.¹¹ However, on rehearing, *en banc*, the Court of Appeals reversed the conviction based upon their determination that the streets, in spite of RRHA's best efforts to privatize them, remained a "traditional public forum." Applying a strict scrutiny test, the *en banc* Court held that the no trespass policy was not narrowly tailored to serve the city's compelling interest in preventing criminal activity at the housing project and that efforts to regulate speech in that public forum violated the First Amendment.¹² The Virginia Supreme Court affirmed the *en banc* decision on different First Amendment grounds without addressing the privatization issue.¹³ Instead, the Virginia Supreme Court determined that a facial challenge to the policy (typically, a challenge to the language of the written policy itself) was permissible even though it was, in fact, the "unwritten" aspect of the policy that was being challenged.¹⁴ Upon ruling that a facial challenge of an

unwritten policy was permissible, the court then found that the policy was overbroad and prohibited speech and conduct that were clearly protected by the First Amendment.¹⁵ In so ruling, the court opined that the unwritten aspects of the policy gave too much unfettered discretion to the resident manager to determine who would be permitted access to the property, thereby allowing her to restrict both speech and literature that she found to be personally offensive or distasteful in violation of the First Amendment.¹⁶

In its review of the Virginia Supreme Court's decision on certiorari, the United States Supreme Court identified two aspects of the RRHA policy, one written and one unwritten.

The United States Supreme Court's Ruling

In its review of the Virginia Supreme Court's decision on certiorari, the United States Supreme Court identified two aspects of the RRHA policy, one *written* and one *unwritten*. The written aspect of the policy, according to the Court, followed the privatization of the public streets and involved the posting of "No Trespassing" signs and authorizing the Richmond police to serve oral or written notice to any person found on RRHA property when such person was not a resident or employee or could not demonstrate a legitimate business or social purpose for being there.¹⁷ The written aspect of the policy further permitted the Richmond police to arrest any persons for trespassing if they returned to the property after being notified that they were barred¹⁸ (thereby regulating conduct).

The second aspect of the policy, the *unwritten* one, vested discretion in the resident manager to determine whether someone's presence on the property was authorized, thereby allowing her, through the barment of unauthorized individuals, to prohibit speech that she found too distasteful or offensive, including speech that could be protected under the First Amendment. This second, unwritten aspect is what the Virginia Supreme Court had focused on in its ruling.¹⁹

The Court's analysis has been discussed in previous *Housing Law Bulletin* articles.²⁰ Ultimately, the Court

⁸*Id.* at 2191.

⁹*Id.* at 2195.

¹⁰*Id.*

¹¹*Virginia v. Hicks*, 33 Va. App. 561 (2000), *reh'g granted*, 36 Va. App. 49 (2001) (en banc), *aff'd in part*, 264 Va. 48 (2002), *rev'd and remanded*, 123 S. Ct. 2191 (2003).

¹²*Virginia v. Hicks*, 36 Va. App. 49 (2001) (en banc), *aff'd in part*, 264 Va. 48 (2002), *rev'd and remanded*, 123 S. Ct. 2191 (2003). See also NHLP, *Virginia Court Reverses Conviction for Trespass on Privatized Streets Surrounding Public Housing*, 31 HOUS. L. BULL. 157, 182 (July-Aug. 2001).

¹³See NHLP, *Supreme Court to Review PHA's Trespass Policy*, 32 HOUS. L. BULL. 31, 37 (Feb. 2002); NHLP, *State Courts Revisit Public Housing Trespass Policies*, 32 HOUS. L. BULL. 169, 169 (Aug. 2002).

¹⁴*Virginia v. Hicks*, 264 Va. 48 (2002), *rev'd and remanded*, 123 S. Ct. 2191 (2003).

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.* at 2195 and 2198.

¹⁸*Id.*

¹⁹*Id.* at 2198.

²⁰NHLP, *Supreme Court to Review PHA's Trespass Policy*, 32 HOUS. L. BULL. 31, 37 (Feb. 2002); NHLP, *Supreme Court Reverses Virginia Supreme Court's Decision Based on First Amendment Overbreadth*, 33 HOUS. L. BULL. 339, 344 (July 2003).

concluded that Mr. Hicks had failed to make a sufficient showing regarding overbreadth. The Court examined the two aspects of the policy in turn and concluded that Mr. Hicks failed to satisfy his burden with regard to either one. Regarding the unwritten aspect, the Court stated: "Consider the 'no-return' notice served on nonresidents who have 'no legitimate business or social purpose' in Whitcomb Court: Hicks has failed to demonstrate that this notice would even be given to anyone engaged in constitutionally protected speech."²¹ With regard to the written aspect of the policy permitting police arrest following written notice of barment and subsequent return to the property, the Court concluded that such a policy did not violate the First Amendment rights of those, like Mr. Hicks, whose entry onto the property following notice of barment was not for the purpose of engaging in constitutionally protected speech.²² The Court used an analogy of a person banned from a public park after vandalizing it who then ignores the ban to participate in a political demonstration held in the park. Punishment for the violation of such a ban, the Court explained, does not implicate the First Amendment. One simply has nothing to do with the other.²³

The United States Court reversed judgment and remanded the case to the Virginia Supreme Court for further proceedings.²⁴ In its final admonition to the Court below, the Supreme Court stated "the Virginia Supreme Court should not have used the 'strong medicine' of overbreadth to invalidate the entire RRHA trespass policy" and noted that "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)."²⁵

Although the United States Supreme Court's ruling in *Hicks* might initially be taken as a broad endorsement of no trespass policies like RRHA's, the decision is in fact quite narrow and turned largely on the technical mechanics of the overbreadth test applied by the Virginia Supreme Court.

Notably, the opinion by the United States Supreme Court addressed little else and left open the possibility that Mr. Hicks could challenge his conviction based on other grounds, if properly raised below. Issues left open by the Court included the status of the development as a public forum, the right to travel, due process rights, the right to intimate association and the void for vagueness doctrine under the First Amendment.²⁶

Issues on Remand

On November 12, 2003, the Virginia Supreme Court agreed to hear argument and receive briefs on the following three issues: first, whether the housing authority's no trespass policy violated Mr. Hicks' right of association in violation of the First Amendment; second, whether the housing authority's no trespass policy was unconstitutionally vague on its face or as applied to Mr. Hicks; and finally, whether the housing authority's no trespass policy violated Mr. Hicks' freedom of intimate association in violation of the Fourteenth Amendment.²⁷ In a unanimous decision by the Virginia Supreme Court issued on April 23, 2004, the Court ruled against Mr. Hicks on his claims of vagueness and intimate association, thereby affirming Mr. Hicks' conviction in the Richmond Circuit Court for criminal trespass. The court noted, by agreement of the parties, that the associational claim need not be addressed in light of the Supreme Court's clear ruling that the policy did not affect Mr. Hicks' First Amendment right to expressive association.

Unconstitutional Vagueness

On remand, Mr. Hicks argued that the housing authority's trespass policy was vague in violation of the Fourteenth Amendment in that "the Housing Authority's trespass policy grants its employees and police officers 'sweeping powers to define as criminal the innocent conduct of using streets and sidewalks near public housing.'"²⁸ In examining this argument, the Virginia Supreme Court noted the following elements as established by the United States Supreme Court in *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*²⁹ necessary to prove such a claim:

In a facial challenge to the overbreadth and vagueness of a law, the court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as

²¹*Id.*

²²*Id.*

²³*Id.* at 2199.

²⁴*Id.*

²⁵*Id.*

²⁶*Id.* at 2195.

²⁷NHLP, the Northwest Justice Project and the Public Justice Center filed an amici curiae brief with the Virginia Supreme Court on behalf of the Richmond Tenants Organization, the Charlottesville Public Housing Association of Residents and Everywhere and Now Public Housing Residents Organizing Nationally Together (ENPHRONT), a copy of which is on file in the Washington, D.C. office of NHLP.

²⁸*Commonwealth v. Hicks*, 2004 WL 868770, at *4 (Va. Sup. Ct. Apr. 23, 2004).

²⁹*Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S. Ct. 1186, 71 L.Ed.2d 362 (1982).

applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.³⁰

The court noted that the United States Supreme Court has further held that a person to whose conduct at issue a statute clearly applies may not successfully challenge it for vagueness.³¹ Based on this authority, the Virginia Supreme Court rejected Mr. Hicks' argument regarding the vagueness of the housing authority policy. It concluded that "it is clear that Hicks, who was engaged in conduct prohibited by the housing authority's trespass policy, may not complain that the policy is purportedly vague."³²

The Virginia court noted that the United States Supreme Court has held that a person to whose conduct at issue a statute clearly applies may not successfully challenge it for vagueness.

The Virginia Supreme Court then addressed Mr. Hicks' argument that the no trespass policy is similar to an anti-loitering ordinance that was invalidated by the United States Supreme Court in *Chicago v. Morales* on vagueness grounds.³³ In *Morales*, a criminal defendant challenged his conviction under a local ordinance making it a crime for known gang members to loiter in a public place and refuse to disperse after being told by a police officer to do so.³⁴

The Virginia Supreme Court drew several distinctions between *Hicks* and *Morales*. For example, the Virginia Supreme Court noted that ordinance in *Morales* involved no *mens rea* requirement.³⁵ The Virginia Supreme Court noted that, in contrast, "Hicks was convicted of violation of a criminal trespass statute, Code 18.2-119, which has an intent requirement."³⁶ And unlike *Morales*, the housing authority's trespass policy was neither penal in nature nor applied to individuals whose actions did not constitute intentional criminal trespass upon the housing authority's privately owned property.³⁷

³⁰Commonwealth v. Hicks, 2004 WL 868770, at *5 (Va. Sup. Ct. Apr. 23, 2004).

³¹*Id.* at *5 (citing *Parker v. Levy*, 417 U.S. 733, 756 (1974)).

³²*Id.*

³³*Chicago v. Morales*, 527 U.S. 41 (1999).

³⁴*Id.* at 45-47.

³⁵Commonwealth v. Hicks, 2004 WL 868770, at *5 (Va. Sup. Ct. Apr. 23, 2004) (citing *Colautti v. Franklin*, 439 U.S. 379, 395, 99 S. Ct. 675, 58 L. Ed.2d 596 (1979), the court noted the particular susceptibility of laws that impose criminal liability without *mens rea* to vagueness challenges).

³⁶*Id.* at *6.

³⁷*Id.*

Further in contrast to *Morales*, the Virginia Supreme Court appeared to conclude that the streets at issue in *Hicks* were privately owned. In discussing the policy, the Virginia Supreme Court stated:

The Housing Authority's policy is intended to regulate the behavior of people who appear on *private property* owned by the Housing Authority, which provides safe and affordable housing for low and moderate income individuals. The Housing Authority's trespass policy is not a penal ordinance and, indeed, one could be arrested and convicted for trespass on the Housing Authority's *privately-owned property* even if the trespass policy did not exist.³⁸

Morales, on the other hand, involved an ordinance that constricted a person's right to remain in a public place.³⁹ The Virginia Supreme Court's implicit holding that property owned by a public housing authority is *private* in nature may have additional significance in future cases.

The Virginia Supreme Court also noted that other facts of *Hicks*, in particular those regarding notice of the no trespass policy, were significantly different from those in *Morales*:

Prior to the conviction that is involved in this proceeding, Hicks had been convicted of two other charges of criminal trespass on the Housing Authority's property in violation of Code 18.2-119. Hicks had also received a hand-delivered letter, which he signed and acknowledged, that directed him not to return to the Housing Authority's property. That letter also informed Hicks that if he returned to the Housing Authority's property, he would be prosecuted for trespass.⁴⁰

Based upon these facts, the court stated that "Hicks cannot now complain that the Housing Authority's policy is somehow vague. Certainly, as to him, the Housing Authority's trespass policy could not have been clearer."⁴¹

Thus, the Virginia Supreme Court in *Hicks* found the analysis in *Morales* to be inapplicable in this case based upon the differences in the statutes (one containing a *mens rea* element and one without), nature of the property upon which the individuals were standing (public versus private), and other specific facts (notice of the policy).

³⁸*Id.*

³⁹*Morales*, 527 U.S. at 54 ("Freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process clause of the Fourteenth Amendment.").

⁴⁰Commonwealth v. Hicks, 2004 WL 868770, at *5 (Va. Sup. Ct. Apr. 23, 2004).

⁴¹*Id.*

Freedom of Intimate Association

Mr. Hicks also argued on remand that the housing authority's trespass policy violated his right to freedom of intimate association guaranteed by the Fourteenth Amendment.⁴² Mr. Hicks argued that he was permanently prohibited from visiting his mother and his children in their homes [in Whitcomb Court] simply because a government official decided, without providing [him] any procedural protections or even an explanation, that [he] did not have a "legitimate purpose" to be on the streets and sidewalks near the Whitcomb Court housing project.⁴³

He pointed out that "[a]ll of the evidence presented at trial demonstrates that visiting family was Hicks' one and only reason for returning to Whitcomb Court, and there is no evidence in this record that suggests Hicks had any other motive for visiting Whitcomb Court."⁴⁴ Mr. Hicks argued that "[t]he [arresting] officer testified that Hicks told him he was 'getting pampers for his baby' at the time he was arrested, and that Hicks pointed to a woman standing nearby at the time of his arrest and explained that he was visiting her."⁴⁵ Mr. Hicks argued that the constitution protects certain personal relationships, such as those that relate to marriage, childbirth, the raising and education of children, and co-habitation with one's relatives.⁴⁶

While the Virginia Supreme Court did acknowledge that "[t]he right to create and maintain certain intimate or private relationships is guaranteed under the substantive due process component of the Fourteenth Amendment of the United States Constitution,"⁴⁷ it ruled that Mr. Hicks' delivery of "diapers to the mother of his child at a specific location, [did] not establish the existence of an intimate relationship between Hicks and his child or Hicks and his mother."⁴⁸ It stated that "[t]he record simply does not support such conclusion."⁴⁹ Further, the Virginia Supreme Court held that even if Mr. Hicks had established the existence of an intimate relationship, "this right of intimate association is not without limitations. Certainly, Hicks does not have the constitutional right to visit either his mother or his child at the Housing Authority's private property where he has been barred because of his prior criminal conduct."⁵⁰

⁴²*Id.*

⁴³*Id.*

⁴⁴Brief of Appellee on Remand from the United States Supreme Court at 37, *Commonwealth v. Hicks*, 2004 WL 868770 (Va. Sup. Ct. Apr. 23, 2004) (No. 011728).

⁴⁵*Id.* at 37-38.

⁴⁶*Id.* at 36.

⁴⁷*Commonwealth v. Hicks*, 2004 WL 868770, at *6 (Va. Sup. Ct. Apr. 23, 2004).

⁴⁸*Id.* at *7.

⁴⁹*Id.*

⁵⁰*Id.*

The Virginia Supreme Court concluded that the housing authority's trespass policy did not impair Mr. Hicks' right to intimate association, and that "Hicks remains free to exercise whatever rights of intimate association he may possess with his mother and his child; he simply may not do so on property owned by the Housing Authority."⁵¹

Having rejected Mr. Hicks' arguments on remand, the Virginia Supreme Court reversed the judgment of the court of appeals and affirmed the trespass conviction entered by the circuit court.⁵²

Conclusion

While the Virginia Supreme Court's ruling in *Commonwealth v. Hicks* is unfavorable, it is not as bad as it might seem. Advocates should be mindful that the posture of the individual challenging the policy can make a significant difference in the outcome of the case. The appellee in *Hicks* was not a public housing resident. Public housing residents have additional contractual, statutory and other rights that have not been addressed in the *Hicks* decisions. These additional rights provide a number of bases for challenges to unfair or unreasonable no trespass policies imposed by public housing authorities. Thus, residents may often stand in a much stronger position than non-residents seeking to challenge such policies.

For example, in *Walker v. Georgetown Housing Authority*, a subsidized housing resident successfully challenged his housing authority's policy to limit door-to-door solicitations on First Amendment grounds.⁵³ The housing authority that operated the resident's development had implemented its policy out of concerns about safety, privacy, and peace and quiet.⁵⁴ The Supreme Judicial Court of Massachusetts, held that the "[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that . . . it must be fully preserved."⁵⁵ The court further stated that for centuries, visits by those seeking to communicate political, religious and other ideas have been permitted and "depend upon the will of the individual master of each household, and not upon the determination of the community."⁵⁶

Part Two of this series will analyze various legal theories that may be used to challenge no trespass policies, including those raised in *Walker*, with particular emphasis on challenges by residents. ■

⁵¹*Id.*

⁵²*Id.*

⁵³*Walker v. Georgetown Housing Authority*, 677 N.E. 2d 1125 (Mass. 1997).

⁵⁴*Id.* at 1126.

⁵⁵*Id.* at 1127 (citing *Martin v. Struthers*, 319 U.S. 141, 146-147 (1943)).

⁵⁶*Id.*

HUD Notes

Negotiated Rulemaking on New Public Housing Cost Formula

On May 11 and 12, what was set to be the final meeting of the public housing operating subsidy negotiated rulemaking committee took place in Atlanta, Georgia. This two-day session was intended to conclude a series of meetings between HUD, public housing authorities (PHAs), PHA trade groups, other interested parties and two public housing resident representatives to finalize recommendations to HUD in devising a new formula for

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NHLP Training Schedule, July-September 2004

- Predatory Lending, Connecticut — July 6-7
- NLADA Substantive Law Conference, Los Angeles — July 21-24
- Predatory Lending, Louisiana — Date TBA
- Section 8 Homeownership, Richmond, California — Date TBA

calculating public housing operating subsidies¹ that local PHAs receive. However, the committee was unable to finish its work and must now schedule another meeting to conclude the discussion. Time is running out as HUD must issue a final rule and report to Congress no later than July 1, 2004.²

The current negotiated rulemaking committee was formed at the direction of Congress under the Consolidated Appropriations Act, 2004³ to meet and discuss a new formula for calculating operating subsidies to PHAs. A prior committee was created in 1999. In order to assist the prior committee in its work, HUD was directed to set aside \$3 million in public housing capital fund technical assistance funds in 1999 for a cost study to be performed by the Harvard University Graduate School of Design (GSD).⁴

The Harvard GSD cost study, which was supposed to measure the costs of operating "well-run public housing,"⁵ fell short of its mark. Instead of studying public housing directly, the study analyzed FHA-insured properties and likened such properties to public housing while failing to include the additional costs that PHAs incur in, among other things, staff time to address the myriad of social, interpersonal, economic, educational and other issues faced by low-income residents in public housing. A particularly troubling aspect of the study is Appendix H, which suggests the simplification or outright elimination of many regulatory protections and benefits currently enjoyed by residents.⁶ In particular, the study asserts that there is no need to have a grievance procedure outside of the court process, that pet rules should be made locally, that Section 3 requirements should be a goal not a quota, that instead of an Annual Plan PHAs should prepare an annual operating budget, there should be no mandatory Resident Advisory Board, and that fourteen-day non-payment of rent notices

¹Operating subsidies have typically been provided to housing authorities to cover the costs of managing and operating their public housing. These funds, often used for administration, security, maintenance and the provision of tenant services including service coordinators for the elderly and disabled, computer centers in public housing and funding for resident participation, come directly to the housing agencies and are then used under a centralized management system. HUD currently uses a formula approach called the Operating Fund Formula to distribute operating subsidies to public housing agencies. An interim rule published in 2001 established the formula currently in effect. 66 Fed. Reg. 17,276 (Mar. 29, 2001) (interim rule codified at 24 C.F.R. pt. 990).

²In the Consolidated Appropriations Act, 2004, Congress directed the Secretary of HUD to conduct negotiated rulemaking and publish a final rule by July 1, 2004. Pub. L. No. 108-199, div. G, tit. II, § 222, 118 Stat. 3, 398 (2004).

³Pub. L. No. 108-199, 118 Stat. 3 (2004).

⁴H.R. Rep. No. 106-379, at 91 (1999) (accompanying Pub. L. No. 106-74, 113 Stat. 1047 (1999)). See also Harvard University Graduate School of Design, Public Housing Operating Cost Study: Final Report (2003) [hereinafter *Harvard Cost Study*], available at http://www.gsd.harvard.edu/research/research_centers/phocs/documents.html.

⁵HARVARD COST STUDY, *supra* note 4.

⁶*Id.* at app. H, 1-8.

should be shortened to ten.⁷ The study asserts that public housing is essentially real estate and that there should be no allowance in operating subsidy for the extra social benefits addressed by most PHAs or extra time spent by PHAs in complying with the complicated federal regulations that govern the program.⁸ According to the study, which is flawed in many other ways, activities such as resident services are not a vital part of housing operations and monies should be reduced for these efforts.⁹ The report states that “PHAs that feel they need more funding for social services can work with local service providers to get more services, or engage in activities that generate funds to subsidize services, or save monies in their operating budget through economies of operation.”¹⁰ Unfortunately, HUD entered the committee negotiations having already decided to adopt the cost study findings.

One of the major changes proposed by HUD, and supported by the recommendations of the Harvard GSD study, is a complete shift from an “agency-centric” system to a “project-based” management and accounting system.¹¹ HUD supports this property-focused and asset-based approach as it will make public housing more like private sector housing and has proposed a new formula for funding based upon PHAs transitioning to a “project-based” management and accounting system, although it has failed to define what it means by “project-based.” In an earlier round of negotiations, Assistant Secretary Michael Liu said that HUD’s goal was to “decouple” the amount of operating subsidy provided by HUD from the level of rental income received at the project level. The full extent and impact of this statement is still unclear. But this, together with another proposal to “incentivize” PHAs to increase their rental income by allowing them to keep the difference above what was collected in FY 2004, worries advocates and residents because such incentives will likely encourage PHAs to serve higher-income families rather than lower-income families.

The proposed changes to the operating subsidy formula would signal a dramatic change in the way in which HUD both calculates and distributes these funds. HUD has not spelled out how current policies such as income targeting and poverty deconcentration would be applied in a “project-based” model approach. Instead, HUD proposes to give itself absolute discretion to examine each project’s budget, including an examination of project rental income, and tell the PHA what changes it must make.

⁷*Id.*

⁸*Id.* at v.

⁹*Id.* at iv-v.

¹⁰*Id.*

¹¹*Id.*

Residents and advocates are also concerned that a cost model that operates under the assumption that PHAs’ operating budgets should not include the cost of providing additional services to their residents may ultimately result in the loss of funding for many of the supportive services and a devolution of tenant protections that are so essential to residents’ well-being. While the committee did vote in favor of maintaining resident participation funding as an add-on to the operating subsidy formula, there was no parallel commitment from HUD to request full funding from Congress for this add-on or anything else negotiated by HUD thus far.

A further meeting of the negotiated rulemaking committee was held on June 8 and 9 in Potomac, Maryland. ■

A High-Cost Challenge— Section 8 Homeownership in California

California is notorious for being home to some of the nation’s most expensive owned housing markets. In an effort to meet some of the state’s need for affordable homeownership options, twenty-nine California public housing authorities (PHAs) have adopted a Section 8 Homeownership program¹ in their administrative plans.² Another nine PHAs are in the process of adopting a program.³

Many threads of the California experience follow national trends. Despite their own press releases to the

¹On September 12, 2000, HUD issued a final rule implementing the Section 8 Homeownership program, which permits voucher-holders to use their voucher for mortgage payments if the local PHA has adopted the program or as a reasonable accommodation, whether the PHA has adopted a program or not. NHLP, *HUD Issues Final Rule Implementing the Section 8 Homeownership Program*, 30 HOUS. L. BULL. 127, 127 (2000). Program regulations are located at 24 C.F.R. §§ 982.625 et seq.

²These are: Benicia, Berkeley, Contra Costa County, El Dorado County, Fairfield, Glendale, Inglewood, Kern County, Long Beach, the City of Los Angeles, Marin County, Merced County, Oakland, the City of Oceanside, Oxnard, Pasadena, Redding, San Bernardino County, San Diego County, San Francisco, San Joaquin County, San Juan Bautista, Santa Ana, Santa Barbara, Santa Clara County, Solano County, Vacaville, Vallejo and Ventura County. Information for this article is based on the results of a survey by our office, phone interviews of selected housing authority staff, and other research conducted by the National Housing Law Project.

³These are: Mariposa County, Orange County, Pasadena, Richmond, San Diego, San Pablo, Santa Rosa, Sonoma County and Sutter County.

contrary, it appears that national lenders in particular have been slow to warm to the program, and their participation varies from region to region, state to state.⁴ Vigorous outreach and education by community advocates, nonprofits, housing authorities and the secondary market has resulted only in slow, incremental change with national banks, and only at the level of individual, local offices—not on a national scale. In response to this problem, most housing authorities have decided to try to establish a relationship with one or more lenders even before implementing the program, which has led to considerable additional set-up time.⁵

Insufficient housing authority staffing and lack of familiarity with the homeownership process are also impediments in programs across the country. Set-up for the program is time consuming, as staff become familiar with regulations and administrative plans are developed. Having sample plans as templates to work from is helpful, but does not entirely shortcut the set-up process.

What Makes California Different

Two elements of the California experience differ from the national picture. First, only a few of California's housing authorities have described participants' credit as an impediment to implementation of a Section 8 Homeownership program. This raises the (unanswerable) question of whether the credit of participants is, indeed, significantly better than that of participants elsewhere in the country. To the extent that it may be better, possible explanations include:

- California Section 8 Homeownership participants may have higher incomes than participants in most other states, and a higher income relative to other Section 8 participants in their region. In many localities, only participants who are close to the 80 percent of area median income eligibility limit have sufficient funds to utilize the homeownership program. This relatively higher income may enable them to take care of credit problems (e.g., pay off past-due debt, manage revolving debt carefully).
- There are a considerable number and type of non-profit credit counseling agencies in California that are available to counsel and assist participants on ways to improve their credit, particularly in the state's urban centers.

⁴In response to NHLP's national survey, conducted in 2002, 7% of PHAs listed lack of lender interest as an impediment to program implementation. NHLP interpreted that response as indicating that lender resistance was declining. However, over the ensuing two years, NHLP has learned, informally, that PHAs continue to have difficulty attracting lenders, particularly national chains.

⁵PHAs have seen far more success in soliciting a lending relationship with smaller, local banks and with credit unions.

Secondly, the high cost of homeownership in California represents a significant challenge. The majority of California PHAs with a homeownership program have indicated that rising real estate values is the primary barrier to implementation. From the nineteen California PHAs surveyed by NHLP in spring of 2004, NHLP learned that:

- the average number of mortgages closed per PHA is two;
- 73% of PHAs cite insufficient subsidies to meet high housing costs as the primary barrier to program implementation; and
- 90% of dwellings purchased have been condominiums.

The median price of a single-family home in California as of February 2004 was \$394,300. The range varies considerably across the state, from the lower end of the spectrum of \$256,810 in San Bernardino and Riverside Counties to the higher end of \$566,200 in Santa Clara County.⁶ As a result, many of the twenty-nine housing authorities that have adopted a Section 8 Homeownership program have not yet implemented it or have found implementation almost impossible, as discussed in the selected examples below.⁷

Berkeley, which adopted a program two years ago, had its first closing at the end of this past year only because the participant was able to access an affordable unit through the Northern California Land Trust (NCLT). NCLT, however, is not a large-scale developer and will have few units to offer in the future. In fact, almost no affordable homeownership housing development is taking place in Berkeley, making prospects for the Section 8 Homeownership program grim. The nonprofit that subcontracts with the PHA to run the homeownership program continues to work with the city and local agencies on strategies to create or free up more affordable housing for homeownership.

In nearby Solano County, housing authorities expect to rely extensively on the HOPE VI public housing redevelopment program as a source of units for their home-ownership programs. The Solano County Housing Authority and its partner housing authorities—Vacaville, Fairfield, Benicia and Vallejo—are projecting that HOPE VI will be their primary source of affordable homeownership units over

⁶Press Release, California Association of Realtors, Median price of a home in California increases 20.7 percent in February, sales up 3.9 percent, C.A.R. reports (Mar. 25, 2004), at <http://www.car.org/index.php?id=MzM0Mzc=>.

⁷Besides those discussed in this article, other PHAs that have had at least one closing include Oakland, Marin County, San Bernardino County and San Joaquin County.

the next five years.⁸ As the Richmond Housing Authority works towards adoption of a Section 8 Homeownership program, it is looking to the HOPE VI-funded redevelopment of its Easter Hill public housing site for affordable homeownership units.⁹

In Los Angeles, participants in the Section 8 Homeownership program are having to look to condominiums or rehabilitated single-family homes as their source of housing. The Housing Authority of the City of Los Angeles (HACLA) saw its first purchase in 2002, and the home purchased was one rehabilitated by Enterprise Home Ownership Partners (EHOP). The Los Angeles Unified School District (LAUSD) offers a Section 8 voucher as an option to families who are displaced by LAUSD development, and it was one of those families who became the city's first homeowner under the program. EHOP is an independent nonprofit that rehabilitates single-family homes for sale to low-income families. The yield of homes available for purchase annually is small, and the fact that homes may be purchased by any qualifying low-income individual or family means an even smaller pool of homes is available to Section 8 Homeownership participants.¹⁰ Thus, the homeownership program in Los Angeles will proceed at a snail's pace due to the lack of affordable homes.

Even in the more rural Kern County area, home prices have increased to such a degree that implementing a homeownership program is very difficult. The Kern County Housing Authority adopted its Homeownership program two years ago but implemented the program only one year ago. Program eligibility includes mandatory participation in its Family Self Sufficiency (FSS) program, and the program is managed by the FSS coordinator. The PHA has only recently seen its first two closings, both involving detached, single-family homes.¹¹

⁸Benecia has also experienced success through its Hearthstone Village project—a 12-unit, self-help, planned unit development dedicated to Section 8 Homeownership. The California Housing Finance Agency offered a low-interest development loan as well as a below-market fixed interest rate of 5% for the individual mortgages.

⁹The HOPE VI program does not have a successful track record of meeting the affordable housing needs of very low-income families. See NHLP, ET AL., FALSE HOPE: A CRITICAL ASSESSMENT OF THE HOPE VI PUBLIC HOUSING REDEVELOPMENT PROGRAM (2002), available at <http://www.nhlp.org/html/pubhsg/FalseHOPE.pdf>. Thus, it is not clear whether the combination of HOPE VI and Section 8 Homeownership efforts will produce positive results.

¹⁰HACLA has numerous partners for its Section 8 Homeownership program, including LAUSD, the Los Angeles Housing Department, Fannie Mae, Citibank and EHOP. Counseling partners include: Access Community Housing, Inglewood Neighborhood Housing Services, Century Housing, Concerned Citizens of South Central Los Angeles, Consumer Credit Counseling Services, Dunbar Economic Development Corporation, Los Angeles Neighborhood Housing Services, and New Economics for Women.

¹¹Citibank is the lender on these two purchases. Down payment funds are coming from the participants' own resources. The PHA is working on adding a local credit union as a lending resource for the future.

In Inglewood, a city adjacent to Los Angeles, condominiums have been and will continue to be the primary source of homeownership housing for participants. Two of Inglewood's three closings were condominiums, and the third was a detached, single-family home. The PHA currently has 50 participants attending homeowner counseling courses.¹²

Ultimately, it will take a combination of factors to implement the Section 8 Homeownership program successfully in a high-cost state like California, including:

- deep subsidies in the form of downpayment assistance, mortgage certificate or closing cost assistance programs, Family Self-Sufficiency or Individual Development Account programs;
- the development of more affordable homeownership housing, either new construction or rehabilitated homes, including condominiums or self-help housing;
- the improvement of the state's economy so that residents are able to access steady jobs with decent salaries; and
- financial literacy and credit counseling for all Section 8 participants, not just those who have a homeownership voucher, so that they can plan appropriately for becoming more successful financially.

Residents of areas in the Central Valley, north of the Bay Area and selected portions of southern California where home prices have not yet peaked are the ones most likely to benefit from the homeownership program. This includes PHAs in the San Bernardino and Riverside County area, and in Sacramento, which have both had the highest number of closings in the state. In addition, to the extent that the homeownership program inspires PHAs to encourage participants to save money and improve their financial knowledge and skills, the program has some value in this state. Overall, however, homeownership through the voucher program will be a virtual impossibility in the highest-cost areas of California until such time as housing costs decline. ■

¹²Participants must provide a 3% down payment, 1% of which must come from personal finances. The Inglewood PHA currently works in conjunction with Inglewood Neighborhood Housing Services and Los Angeles Neighborhood Housing Services for help in locating housing and facilitating purchases.

New Report to Congress Assessing Welfare to Work Voucher Program Released

On April 23, 2004, HUD issued a report to Congress presenting the interim findings of a study conducted on the Welfare to Work Voucher Program (WTWVP) which was first initiated in Fiscal Year (FY) 1999.¹ Under the WTWVP, Congress appropriated \$283 million for the issuance of 50,000 new rental assistance vouchers² for families receiving or eligible to receive welfare, and for whom the receipt of housing assistance was deemed critical to obtaining and keeping employment.³

The goal of this study was to determine if adding housing subsidies for families receiving welfare benefits (which already include work requirements) would promote self-sufficiency for those families by enabling them to improve and stabilize their living arrangements, thus retaining employment and reducing dependency on welfare.⁴ The four categories the study sought to analyze were (1) housing assistance and services; (2) housing mobility and neighborhood environment; (3) employment and earnings; and (4) other income and services.⁵

The program itself was based on a six-site⁶ research sample of 8,732 families who were randomly assigned to one of two groups: a treatment group and a control group.⁷ All groups had to demonstrate program eligibility for the housing choice voucher program.⁸ Applicants were selected randomly to either receive an immediate voucher and accompanying supportive services as part of the treatment group or have their names placed on the normal PHA waiting list for the Section 8 Housing Choice Voucher Program as part of the control group.⁹

From the beginning, the study appears to have been plagued with ineffective guidance from HUD, as well as monitoring and model deficiencies. To start with, Congress based its appropriation of funds on two seemingly flawed assumptions. First, that adults in families receiving

vouchers are more likely to obtain and retain employment and have higher incomes than those in families that do not.¹⁰ Second, Congress assumed that families that receive vouchers are more likely to move to neighborhoods close to existing or prospective employment, employment training services or public transportation than those without voucher assistance.¹¹

Congress envisioned a two-part effort¹² in line with these assumptions. First, the WTWVP would target vouchers only to those families who could demonstrate that housing was a critical and missing component in their ability to achieve self-sufficiency.¹³ Second, the program, in addition to providing a voucher, would also provide housing and employment related services to enhance the voucher's effectiveness in allowing families to find employment.¹⁴

The goal of the study was to determine if adding housing subsidies for families receiving welfare benefits would promote self-sufficiency for those families.

Congress anticipated that both of the above components would involve developing new partnerships with welfare agencies and housing and employment related programs and services.¹⁵ Unfortunately, these cooperative relationships were never fully realized.¹⁶ Instead, because HUD required participating public housing agencies to lease up their vouchers within one year of the start of the program, most sites focused their energy on identifying eligible families and issuing vouchers as quickly as possible to the exclusion of developing such partnerships.¹⁷ The treatment group therefore received no additional services other than those traditionally offered to other Section 8 recipients.¹⁸ Furthermore, even though the subsidy was only to be provided to applicants for whom housing stood as a barrier to sustained employment, nearly all the housing authorities, except for Atlanta, simply asserted

¹RHIANNON PATTERSON ET AL., QED GROUP, LLC., EVALUATION OF THE WELFARE TO WORK VOUCHER PROGRAM, REPORT TO CONGRESS (2004), formerly available at <http://www.huduser.org/publications/pubasst/welfrwrk.html>. The report appears to have been removed from the www.huduser.org Web site. The site provides no explanation.

²*Id.* at 1.

³*Id.* at 6.

⁴*Id.* at i.

⁵*Id.* at 3.

⁶The six sites evaluated in this study were Atlanta and Augusta, GA, Los Angeles and Fresno, CA, Houston, TX and Spokane, WA. *Id.* at 5.

⁷*Id.* at i.

⁸*Id.* at 6.

⁹*Id.* at i.

¹⁰*Id.* at 4.

¹¹*Id.*

¹²*Id.* at 2.

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.* at 2, 3.

¹⁶*Id.* at 3.

¹⁷*Id.*

¹⁸*Id.*

that all applicants, by definition of their low-income status, automatically had critical needs for stable and affordable housing in order to obtain employment.¹⁹ Therefore, without the proper evaluation, coordination and additional services, all that this study could possibly reveal was a snapshot of a family's income, employment, living environment and receipt of public welfare while using a Section 8 voucher.

Not surprisingly, the interim results of the study found no evidence that the WTWVP decreased the use of federal Temporary Assistance to Needy Families (TANF) benefits or nutritional assistance.²⁰ To the contrary, the amount of TANF and nutritional assistance received by the treatment group was significantly higher than that of the control group.²¹ The study indicated that the WTWVP created both positive and negative incentives to work.²² The negative incentives, according to the interim report, occur when the subsidy results in increases of unearned income, reducing the need to work to maintain the same level of consumption as existed without the subsidy.²³ Further, because the subsidy amount declines as a resident's income increases, the incentive to work and earn greater income is reduced.²⁴ Positive effects were found among those who use the vouchers to relocate closer to jobs and in better-served neighborhoods.²⁵

The short-term results demonstrate that the participants in the WTWVP experienced reduced employment rates and earnings compared to the control group.²⁶ The study concludes that the study results are not inconsistent with expectations, given that more than half of the treatment group remained within their baseline Census tract.²⁷ The study further states that long-term economic and social benefits derived from "stability and locational advantage" may take time to emerge.²⁸ ■

¹⁹*Id.* at 7.

²⁰*Id.* at vii.

²¹*Id.*

²²*Id.* at vi.

²³*Id.*

²⁴*Id.*

²⁵*Id.*

²⁶*Id.*

²⁷*Id.*

²⁸*Id.* at vii.

Housing Organizations Urge RHS to Republish Proposed Preservation Regulations

In an April 2004 letter to now former Rural Housing Service (RHS) Administrator Art Garcia, twelve low income housing organizations requested that RHS refrain from publishing final regulations governing the prepayment and transfer of RHS multifamily housing until the public has had an opportunity to review and comment upon RHS's detailed revisions to the regulations. The letter noted that the proposed regulations, published in the *Federal Register* in June 2003, 68 Fed. Reg. 32,872 (June 2, 2003), fail to reflect many of the preservation practices that are currently being followed by RHS field offices, some of which have been described in several Administrative Notices. The organizations urged the Administrator to issue regulations that fully reflect these practices.

However, the organizations expressed their concern that if RHS were to publish final regulations that are substantially different from the proposed regulations, the final regulations would not have undergone the review and comment process that final regulations typically undergo. Additionally, the organizations expressed concern that the final regulations properly and adequately achieve and further the purposes of the Emergency Low Income Housing Preservation Act of 1987, 42 U.S.C.A. § 1472(c) et seq. (West 2003), which placed mortgage prepayment restrictions on RHS multifamily housing.

The organizations asked the Administrator to republish the prepayment and transfer of physical asset regulations in proposed form once they have been rewritten. In the alternative, they asked that RHS publish the proposed regulations as interim final regulations with a request for additional comments.

The organizations that signed the letter were: California Housing Partnership, Community Stabilization Project, Housing Assistance Council, HOME-Line, Housing Preservation Project, Local Initiatives Support Corporation, Mercy Housing, Minnesota Housing Partnership, National Housing Trust, National Low Income Housing Coalition, Ohio State Legal Services Association, and the National Housing Law Project.

Persistent Tenants Win Challenge to Wrongful Mortgage Prepayment

The United States District Court for the District of Massachusetts has issued a decision invalidating Department of Housing and Urban Development's (HUD) approval of a mortgage prepayment in 1986 as contrary to Section 250 of the National Housing Act.¹ Granting summary judgment in favor of the tenants on the illegal prepayment claim, the court also awarded financial restitution under the Administrative Procedure Act to those tenants who were harmed more than fifteen years later by the higher rents charged in the absence of the prepaid mortgage's regulatory restrictions. However, the court also granted summary judgment in favor of HUD on the tenants' disability discrimination claim. This decision marks the first reported decision against HUD for a violation of Section 250 and will prove useful to tenant advocates elsewhere harmed by such illegal prepayments.

Factual Background

The case arose about four years ago from the owner's threatened eviction of some of the property's elderly tenants for nonpayment of rent. Upon further investigation of the situation by the tenants and their counsel at Greater Boston Legal Services, it was discovered that the tenants' hardship was the result of a chain of unlawful actions stretching back many years. This chain involved the 1995 termination of a project-based Section 8 contract and the substitution of tenant-based Section 8 vouchers that were inadequate to cover the full cost of the unregulated rent increases. This project-based Section 8 termination was in turn made possible by the owner's earlier prepayment of a HUD-held mortgage and release from the regulatory agreement, which by its terms had required the owner to accept HUD's offer of renewal for the property's project-based Section 8 contract. As a result, the tenants in the eviction suit brought third-party claims against HUD for its wrongful approval of the mortgage prepayment, and HUD removed the case to federal court.

HUD had acquired the Brighton Village property through foreclosure or deed-in-lieu of foreclosure after a prior owner's default in 1976. HUD then sold the property to the current owners in 1980 with a forty-year HUD-held purchase money mortgage set to mature in 2020. As with most HUD purchase money mortgages issued in that period, the mortgage note prohibited prepayment

without HUD approval. As was also common at that time, the owner signed a separate fifteen-year project-based Section 8 rent subsidy contract, with the first contract term set to expire in 1995. Under that contract, tenants paid 30% of their adjusted incomes for rent and HUD paid the balance as housing assistance payments based on the HUD-approved rent levels for the project. Significantly, the mortgage was also accompanied by a regulatory agreement between HUD and the owner stipulating that, so long as the mortgage was held by HUD, the owner was required to accept any offer by HUD to renew the Section 8 contract or to provide any other rental assistance.

In 1986, without following any established procedure or applying any substantive standards, HUD approved the owner's request to prepay the mortgage, terminating the regulatory agreement. The tenants received no notice of the prepayment request or the fact that the mortgage was prepaid. The project-based Section 8 contract did not terminate upon prepayment and remained in effect until 1995. In August 1994, the owner effectively rejected HUD's offer to renew the Section 8 contract. At that point, there was nothing explicitly requiring the owner to accept HUD's renewal offer because the regulatory agreement had been terminated years ago by the prepayment. One year later, in August 1995, the Section 8 contract expired and, under laws then in effect, the tenants received regular, non-enhanced tenant-based Section 8 vouchers. Authority for the issuance of enhanced vouchers for tenants affected by Section 8 opt-outs was not created until 1999.

This is the first reported decision against HUD for a violation of Section 250 and will prove useful to tenant advocates elsewhere harmed by such illegal prepayments.

Without the affordability protections of the project-based Section 8 contract, the owner began raising the rent in October 1996 and proceeded to raise it annually thereafter. The rent increases raised the rent above the maximum level the tenant-based vouchers would cover, forcing the tenants to cover the difference—and thus pay more than the 30% of their incomes that would have been required under the project-based Section 8 contract—or face eviction for nonpayment.

The tenants sought relief from HUD, requesting that HUD increase the voucher payment level as a reasonable accommodation based on their individual disabilities under Section 504 of the Rehabilitation Act of 1973² and

¹*Brighton Village Nominee Trust v. Malyshev*, No. 00-CV-12311-GAO, 2004 WL 594974 (D. Mass. Mar. 23, 2004). Section 250 is codified at 12 U.S.C.A. § 1715z-15 (West 2001).

²29 U.S.C.A. § 794 (West, WESTLAW current through P.L. 108-228, approved May 18, 2004).

the Fair Housing Act.³ HUD approved an increase in the voucher payments in January of 2000, but not to the full extent requested, requiring the tenants to continue paying rent in excess of 30% of their incomes. In October 2000, the owner began the eviction process when several tenants could not pay the latest rent increase. The tenants filed a counterclaim against the owner and a third-party claim against HUD. During the pending action, through new legislation, the tenants were provided with “enhanced vouchers,” which paid increased subsidy levels,⁴ allowing them to remain in their homes while only paying 30% of their incomes in rent. This new subsidy, however, failed to address the rent increases that had burdened the tenants in previous years. Because the owner apparently ceased pursuit of its eviction actions, the tenants also ceased pursuit of their counterclaim against the owner, leaving intact their claims against HUD, which HUD has removed to federal district court.

The tenants’ third-party claims against HUD alleged violation of Section 250(a) of the National Housing Act⁵ in allowing prepayment of the mortgage in 1986 and a violation of Section 8 of the United States Housing Act⁶ for the failure to require the owner to renew the Section 8 contract upon expiration in 1995. The tenants also claimed that HUD discriminated against them and failed reasonably to accommodate their disabilities⁷ by failing to provide adequate housing assistance after the Section 8 contract expired. The tenants sought reimbursement for the excess rent paid between 1995 and 2000 beyond 30% of their adjusted incomes, as well as protection from future adverse housing actions. Apparently because of the passage of time and the difficulties in obtaining such relief, they did not seek restoration of the mortgage and regulatory agreement, or the project-based Section 8 contract.

The District Court’s Decision

In its March 23 decision, the district court granted summary judgment in favor of the tenants on their claims of statutory violations related to the mortgage prepayment and the failure of the owner to renew the Section 8

contract. Regarding the discrimination claim, the court granted summary judgment in favor of HUD.

The court concluded that HUD violated Section 250 when it allowed the owner to prepay the mortgage, rejecting HUD’s justifications for the violation. Congress passed Section 250 in 1983 in response to HUD’s standardless approval of prepayments for several properties where HUD approval was required. Section 250 states that, when an owner is required to obtain approval from HUD for prepayment, as is required for hundreds of HUD-insured and HUD-held mortgages,⁸ HUD cannot approve prepayment unless:

- the project is no longer meeting a need for low-income housing,
- tenants have been notified and their comments considered, and
- there is a plan for relocation assistance for tenants displaced by the prepayment.

In its response to the tenants’ request for admissions, HUD admitted that it did not comply with these statutory requirements prior to approving the prepayment. The court rejected HUD’s defense that the statute did not apply to the Brighton Village property because it only applied to subsidized properties, and Brighton was characterized as “unsubsidized.” The court ruled that by its unambiguous terms, the statute applied to “multifamily rental housing projects” and provided no express exceptions. It refused to consider HUD’s arguments regarding the statute’s legislative history or to defer to HUD’s administrative interpretation set forth in unpublished memoranda. The court also rejected HUD’s argument that, because the statute did not completely prohibit prepayment, had HUD complied with it, the outcome may have been the same and the loan could have been prepaid. It described this as an “unattractive invitation to speculate in favor of the party that defaulted on its obligation to follow what the statute mandated.”⁹

The court also noted that the illegal prepayment subsequently permitted the owner’s 1995 non-renewal of the Section 8 contract, contrary to the provisions of the long-gone regulatory agreement and the requirements of the then-extant version of 42 U.S.C. § 1437f(c)(9). The regulatory agreement had contained the owner’s agreement to accept any HUD offer to renew the Section 8 contract, or provide any other rental assistance. In 1994, HUD had offered to renew the contract for a four-year term, but apparently

³42 U.S.C.A. § 3601 (West, WESTLAW current through P.L. 108-228, approved May 18, 2004).

⁴Congress first authorized enhanced vouchers for certain prepayments in 1996 and extended their availability to eligible following the termination of project-based Section 8 contracts in 1999. Enhanced vouchers, unlike regular vouchers, have payment levels that cover reasonable market rents as long as the tenant remains in the same development. 42 U.S.C.A. § 1437f(t) (West 2003).

⁵12 U.S.C.A. § 1715z-15(a) (West 2001).

⁶42 U.S.C.A. § 1437f(c)(9) (West 2003)

⁷The tenants brought discrimination and reasonable accommodation claims under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Fair Housing Act as amended, 42 U.S.C. § 3601, and Executive Order 11063, and also alleged that HUD had failed to affirmatively further fair housing, as required by the Fair Housing Act, 42 U.S.C. § 3608(e)(5), and Executive Order 11063.

⁸Those mortgages requiring HUD approval for prepayment are typically those on properties that still are or were originally owned by nonprofit owners, still have a Rent Supplement contract, or received Flexible Subsidy funds after 1979 (many of these properties have executed Flexible Subsidy agreements restricting unilateral prepayment).

⁹*Brighton Village Nominee Trust v. Malyshev*, No. 00-CV-12311-GAO, slip op. at 6.

failed to reach an agreement with the owner regarding rent levels. The court held that but for HUD's failure to follow the prepayment approval statute, the owner could have been compelled to renew the Section 8 contract for four years, in accordance with the regulatory agreement.

Under 42 U.S.C. § 1437f(c)(9) as in effect in 1994, upon receiving notification of an owner's intent to terminate a Section 8 contract, HUD was required to evaluate the legal sufficiency of the owner's stated reasons and to determine if there were actions that could prevent the termination, such as a rent adjustment. HUD was also required to issue a written finding of the reasons for the termination and their legality, as well as the actions taken or considered to avoid the termination. The court first held that although the statute was not enacted until 1988, eight years after the contract was executed, HUD was nevertheless bound by the statute's requirements. The court found that HUD failed to comply with the statute by not issuing the required written finding. However, the court stated that it was unnecessary to decide whether HUD had complied with the statutory evaluation mandates, it having already concluded that HUD improperly permitted the termination by illegally approving the prepayment.

Here too HUD argued that, under the regulatory agreement, it could have offered the owner a different assistance contract, presumably vouchers, rather than renewing the contract. The court rejected this defense, stating once again that speculation of what may have happened had HUD followed its obligations was no excuse for non-compliance.

On the tenants' disability discrimination claim, however, the court granted summary judgment to HUD because a request for increased economic assistance did not qualify as a reasonable accommodation under applicable laws and cases. HUD had refused the tenants' request to waive its policies for determining the subsidy level provided by the vouchers. After reviewing similar cases, the court held that this request was not an accommodation of their specific disabilities, but rather a remedy to their economic condition and not actionable.

Turning to the remedy for HUD's violations, the court ruled that, under the Administrative Procedure Act (APA),¹⁰ the tenants were entitled to restitution for the excess rents paid between 1995 and 1999 because HUD was legally obligated to make these payments. HUD first attacked the tenants' ability to obtain any monetary relief under the APA, because the APA's waiver of sovereign immunity is limited to providing "relief other than monetary damages."¹¹ Because the tenants were not seeking to set aside the prepayment or order HUD to execute a

new project-based contract, HUD claimed that they were entitled to no relief whatsoever. Refusing thus to absolve HUD, the court cited both authority for its discretion to tailor an equitable remedy¹² and other APA cases providing financial restitution of legally mandated payments.¹³

However, the court refused to grant injunctive relief after 1999 to provide further protection against "adverse housing actions"—actions permissible under the enhanced voucher program but which would have been impermissible under a renewed project-based contract, finding that the tenants' request rested on the premise that HUD would have been required to offer contract renewal until the mortgage matured in 2020. In contrast, the court's view of the facts was that the contract should have been renewed only through September 1999, and renewal for any subsequent period was speculative. Unfortunately, the court engaged in considerable speculation about what could have happened after 1999, hypothesizing that HUD might have approved a prepayment under Section 250 or provided some other housing assistance, with no analysis of how that would have been possible under the facts and applicable laws and appropriations.

Since the decision, the tenants have filed a motion to reconsider the court's denial of post-1999 relief, arguing that HUD would have been obligated to renew Section 8 contracts for the duration of the mortgage because of the continuing need for affordable housing. Because the current Section 8 enhanced vouchers do not offer the same protections against adverse housing actions, the tenants' motion alternatively requests dismissal of the tenants' claim for prospective relief without prejudice so that if harm does occur later, the tenants can then seek appropriate relief.

Conclusion

Brighton Village represents the first time a court has held HUD accountable for approving prepayments in violation of Section 250 and the financial injuries it causes to tenants. It also demonstrates the importance of persistent and thorough legal representation in what at first glance appeared to be a garden-variety eviction for nonpayment of rent case. Detailed research uncovered the twisted history of the prepayment and nonrenewal, and the statutory violations giving rise to defeating the evictions and obtaining a monetary remedy—a worthy result from exemplary advocacy. ■

¹⁰ 5 U.S.C.A. §§ 701 et seq. (West, WESTLAW Current through P.L. 108-228 (End) approved May 18, 2004).

¹¹ *Id.* § 702 (West, WESTLAW Current through P.L. 108-228 (End) approved May 18, 2004).

¹² *Brighton Village*, slip op. at 13 (citing *NAACP v. Secretary of HUD*, 817 F.2d 149, 160-61 (1st Cir. 1987)).

¹³ *Id.* (citing *Zellous v. Broadhead Assocs.*, 906 F.2d 94, 98-99 (3d Cir. 1990) (reimbursement for Section 8 utility payments where HUD failed to implement timely adjustments in allowances); *Bowen v. Massachusetts*, 487 U.S. 879, 900-01 (1988)).

Recent Housing 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.

Bankruptcy — Stay of Proceedings

In re Valentin, 309 B.R. 715 (Bankr. E.D. Pa. 2004). Following *In re Bacon*, 212 B.R. 66, 69 (Bankr. E.D. Pa.1997), the bankruptcy court concluded that 11 U.S.C. § 525(a) does not prohibit Movant public housing authority from pursuing an eviction against Debtor public housing resident for pre-petition non-payment of rent. The court thus granted Movant's motion for relief from an automatic stay of its eviction action against Debtor.

Fair Housing — Disability; Eviction — Affirmative Defenses

Douglas v. Kriegsfeld Corp., 2004 WL 1065488 (D.C. May 13, 2004) (not yet released). Plaintiff-appellee landlord brought an eviction action against Defendant-Appellant subsidized tenant⁴ for failure to maintain Defendant-Appellant's apartment in "clean and sanitary condition." On appeal in a very lengthy opinion, the District of Columbia Court of Appeals ruled that, under the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*, and comparable District of Columbia law, Defendant-Appellant should have been permitted to raise Plaintiff-Appellee's alleged failure to provide reasonable accommodation of Defendant-Appellant's alcohol-related "mental impairment" as an affirmative defense. The court of appeals reversed and remanded for a new trial. A detailed written dissent accompanies the opinion.

Fair Housing — Disability; Public Housing — Grievance Hearings

Whitfield v. Pub. Hous. Agency of the City of St. Paul, 2004 WL 1212082 (D. Minn. May 19, 2004). Plaintiff public

housing resident filed suit against Defendant public housing authority based on, *inter alia*, failure to provide reasonable accommodation of disability in violation of the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*, and Section 504 of the Rehabilitation Act, 5 U.S.C. § 794, and failure to provide Plaintiff a grievance hearing in violation of 24 C.F.R. § 966.53(a). Acting through counsel, Plaintiff and Defendant had previously executed a settlement agreement related to Plaintiff's noncompliance with housekeeping standards. Defendant later contended that Plaintiff failed to comply with the terms of the agreement. In her federal suit, Plaintiff contended that she was unable to comply with the terms of the agreement because Defendant had failed to provide reasonable accommodation of her psychiatric disability. Defendant moved to dismiss for failure to state a claim under Rule 12(b)(6), Federal Rules of Civil Procedure. Granting the motion in part, the district court dismissed Plaintiff's reasonable accommodation claim, noting that Plaintiff was represented by counsel in the negotiation of the settlement agreement. However, the court denied the motion as to Plaintiff's § 966.53(a) claim, concluding that, under the regulation, Plaintiff was entitled to a further grievance hearing on Defendant's decision to reinstate termination of Plaintiff's tenancy for noncompliance with housekeeping standards.

Fair Housing — Generally; Fair Housing — Intimidation, Threats and Harassment

Lawrence v. Courtyards at Deerwood Assoc., Inc., 2004 WL 1146256 (S.D. Fla. May 11, 2004). Plaintiff condominium purchasers filed suit against Defendant homeowners' association and neighbor for violation of the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*, and the Civil Rights Act, 42 U.S.C. § 1982. Plaintiffs' claims against Defendant association relate to Defendant association's failure to prevent racial harassment by Defendant neighbor. Defendant association moved for summary judgment. In granting the motion, the district court concluded that Defendant's failure to prevent harassment was not actionable under the Fair Housing Act. The court also rejected Plaintiffs' § 1982 claim, noting, *inter alia*, that the harassment had occurred after Plaintiffs' purchase of their home.

Fair Housing — Organizational Standing

North Dakota Fair Housing Council, Inc. v. Allen, 2004 WL 1173076 (D.N.D. May 27, 2004). Plaintiffs fair housing organization and tenants filed suit against Defendants realtor and realty company alleging discrimination on various bases in violation of the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* Defendant moved, *inter alia*, to dismiss Plaintiff organization's claims under Rule 12(b)(1), Federal Rules of Civil Procedure, for lack of standing.

¹<http://www.westlaw.com>.

²<http://www.lexis.com>.

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

⁴The exact program under which Defendant-Appellant was assisted is not clear from the opinion.

Distinguishing *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) and related authorities, the district court granted Defendants' motion to dismiss. The court stated that Plaintiff organization had "not persuaded the Court it would have never engaged in such efforts had it not been for the actions of the Defendants."

Fair Housing — Zoning

Westhab v. City of New Rochelle, 2004 WL 1171400 (S.D.N.Y. May 3, 2004). Plaintiff housing and services provider filed suit against Defendant city and city officials under state and federal constitutional due process provisions and state and federal civil rights statutes for denial of Plaintiff's zoning application for the development of a residential facility for unrelated homeless youths. The parties each filed motions for summary judgment. In granting summary judgment in favor of Defendants, the district court noted, *inter alia*, the long-established rights of municipal governments to establish zoning restrictions. It rejected Plaintiffs' argument regarding *Lawrence v. Texas*, 539 U.S. 558 (2003). The court also noted Plaintiffs' failure to apply for a zoning variance. The court rejected Plaintiffs' claim under the Fair Housing Act because no parent or guardian would be "domiciled with" the youths to be served at the planned facility within the meaning of 42 U.S.C. § 3602(k). The court declined to exercise supplemental jurisdiction over Plaintiffs' state law claims and dismissed those claims without prejudice.

Federal Courts — Private Right of Action; Lead Paint — Municipal Liability

Johnson v. City of Detroit, 2004 WL 1194728 (E.D. Mich. May 24, 2004). Plaintiff mother filed suit against Defendant city and officials for lead paint injuries suffered by Plaintiff's son while residing in public housing operated by Defendants. Plaintiff's federal claims under the United States Housing Act, 42 U.S.C. §§ 1437 *et seq.*, and the Lead-Based Paint Poisoning Prevention Act (LBPPPA), 42 U.S.C. § 4822 and implementing regulations, 24 C.F.R. pts. 35 and 882, were asserted via the Civil Rights Act, 42 U.S.C. § 1983. Defendants moved to dismiss pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. In a lengthy opinion granting the motion, the district court concluded, *inter alia*, that the United States Housing Act, LBPPPA and LBPPPA regulations did not create federal rights enforceable under § 1983. The court declined to exercise supplemental jurisdiction over Plaintiff's state law claims.

Housing Choice Voucher Program — Admissions; One-Strike and Related Policies

Ouellette v. Hous. Auth. of the City of Old Town, 2004 WL 842412 (Me. Super Ct. Mar. 12, 2004). Petitioner husband and wife

appealed Respondent public housing authority's decision to deny their application for a Housing Choice Voucher based on Petitioner husband's conviction for aggravated felonious sexual assault in 1990. Petitioners appealed to the superior court. The court ruled that Respondent's "zero tolerance" admissions policy violated federal voucher regulations. The court granted the petition, vacated the denial of Petitioners' application and remanded the matter to Respondent for further consideration.

HUD-Held Mortgages — Foreclosure

Guity v. Martinez, 2004 WL 1145832 (S.D.N.Y. May 20, 2004). Plaintiff residents of a HUD-held mortgage multifamily property filed suit against Defendant HUD secretary under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, for violation of the Multifamily Housing Property Disposition Reform Act, 12 U.S.C. §§ 1701z-11 *et seq.*, related to Defendant's auctioning of the property on foreclosure. Defendant moved to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure. In granting Defendant's motion, the district court concluded, *inter alia*, that Defendant had the option of proceeding either under § 1701z-11 or under the Multifamily Mortgage Foreclosure Act (MMFA), 12 U.S.C. §§ 3701 *et seq.*, and Defendant had validly chosen the MMFA. The court further rejected Plaintiffs' state law contracts and federal fair housing claims.

Relocation — State Law

Miah v. Ahmed, 846 A.2d 1244 (N.J. Sup. Ct. 2004). Plaintiff-Appellee landlord filed an eviction action against Defendant-Appellant tenant after zoning enforcement action against Plaintiff-Appellee for letting an illegal apartment. On appeal, the Supreme Court of New Jersey held that relocation assistance payable to displaced tenants of illegal apartments under state statute, N.J.S. § 2A:18-61.1h, may not be reduced or set off by unpaid rent or other charges. ■

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 May of 2004. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

Copies of the cited documents may be secured from various sources, including (1) the Government Printing Office's Web site on the World Wide Web,¹ (2) bound volumes of the *Federal Register*, (3) HUD Clips,² (4) HUD,³ and (5) USDA's Rural Development Web page.⁴ Citations are included with each document to help you secure copies.

HUD Federal Register Proposed Rules

69 Fed. Reg. 24,228 (May 3, 2004)

HUD's Proposed Housing Goals for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) for the Years 2005–2008 and Amendments to HUD's Regulation of Fannie Mae and Freddie Mac

Summary: The Department of Housing and Urban Development is proposing new housing goal levels for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Government Sponsored Enterprises, or GSEs) for calendar years 2005 through 2008. The new housing goal levels are proposed in accordance with the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (FHEFSSA) and govern the purchase by Fannie Mae and Freddie Mac of mortgages financing low- and moderate-income housing, special affordable housing, and housing in central cities, rural areas and other underserved areas.

Dates: Comments must be submitted on or before July 2, 2004.

69 Fed. Reg. 24,547 (May 4, 2004)

Negotiated Rulemaking Advisory Committee on the Operating Fund; Notice of Meeting

Summary: This is an announcement of a meeting of HUD's Negotiated Rulemaking Advisory Committee on

the Operating Fund. The purpose of the committee is to provide advice and recommendations on developing a rule for effectuating changes to the Public Housing Operating Fund Program in response to the Harvard University Graduate School of Design's "Public Housing Operating Cost Study."

Dates: The committee meeting was held on Tuesday and Wednesday, May 11 and 12, 2004.

69 Fed. Reg. 25,340 (May 6, 2004)

Native American Housing Assistance and Self-Determination Negotiated Rulemaking Committee

Summary: This is an announcement of a meeting of a one-day session of the Native American Housing Assistance and Self-Determination Negotiated Rulemaking Committee (Committee). The Committee has concluded its negotiations regarding the development of a proposed rule that will 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 session was held on Tuesday, May 18, 2004.

HUD Federal Register Notices

Notice of HUD's Fiscal Year (FY) 2004, Notice of Funding Availability (NOFA), Policy Requirements and General Section to the SuperNOFA for HUD's Discretionary Programs

Summary: This notice provides information regarding the Department of Housing and Urban Development's (HUD's) FY 2004 policy requirements applicable to all of HUD's federal financial assistance programs announced through NOFAs published along with this notice and any subsequent NOFAs published for FY 2004.

69 Fed. Reg. 27,976 (May 17, 2004)

Funding for Fiscal Year 2003: Capacity Building for Community Development and Affordable Housing

Summary: The Consolidated Appropriations Resolution, 2003, makes available approximately \$34.3 million in Fiscal Year (FY) 2003 funds for capacity building activities authorized in Section 4 of the HUD Demonstration Act of 1993. Section 4 authorizes the Secretary to establish by notice such requirements as may be necessary to carry out its provisions. This notice establishes the requirements for use of the FY 2003 funds.

Effective date: May 17, 2004.

69 Fed. Reg. 30,714 (May 28, 2004)

Order of Succession

Summary: In this notice, the General Counsel for the Department of Housing and Urban Development designates the Order of Succession for the Office of General Counsel for the Department. This Order of Succession

¹At http://www.access.gpo.gov/su_docs.

²At <http://www.hudclips.org/cgi/index.cgi>.

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

⁴At <http://www.rdinit.usda.gov/regs>.

supersedes the Order of Succession for the General Counsel, published on August 22, 2000.

Effective date: May 21, 2004.

HUD PIH Notices

Notice PIH 2004-08 (TDHEs) (May 7, 2004)

Extension—Notice PIH 2003-15 (TDHEs), Performing Reporting Requirements and Grant Close-Out Procedures for the Indian Housing Drug Elimination Program (IHDEP)

Summary: This notice extends Notice PIH 2003-15 (TDHEs), same subject, which expires May 31, 2004, for another year until May 31, 2005.

Expires: May 31, 2005.

Notice PIH 2004-09 (HA) (May 25, 2004)

Operating Fund—Final Proration Factor for Federal Fiscal Year (FFY) 2003 and Processing Notes for FFY 2004

Summary: This notice provides Public Housing Agencies (PHAs) with the final proration factor for FFY 2003. It also identifies and clarifies some miscellaneous processing issues for FFY 2004, such as initial funding level, obligating documents for the Operating Fund, requirements pertaining to the Elderly/Disabled Service Coordinator Program, the disablement of the Line of Credit Control System (LOCCS) Voice Response System (VRS), treatment of utility and other non-processed adjustments, and processing for new and deprogrammed units.

Expires: May 31, 2005. ■

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