

Housing Law Bulletin

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614 Grand Avenue, Suite 320, Oakland CA 94610
Telephone (510) 251-9400 • Fax (510) 451-2300

727 Fifteenth Street, N.W., 6th Fl. • Washington, D.C. 20005

www.nhlp.org • nhlp@nhlp.org

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Cover: Wolf Waters Place, a 218-unit family development in LaQuinta, California, owned and managed by the Coachella Valley Housing Coalition. Financed under the LIHTC program with assistance from the LaQuinta Redevelopment Agency, the development serves households with incomes that are 30% to 50% of AMI.

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Inquiries or comments should be directed to Eva Guralnick, Editor, *Housing Law Bulletin*, at the National Housing Law Project, 614 Grand Avenue, Suite 320, Oakland, CA 94610, Tel: (510) 251-9400 or via e-mail to nhlp@nhlp.org

House Considers Long-Awaited Multifamily Preservation Legislation*

Introduced by House Financial Services Committee Chairman Barney Frank (D-MA) in March, H.R. 4868, the Housing Preservation and Tenant Protection Act of 2010,¹ contains many important provisions to remedy more than 15 years of incoherent federal affordable housing preservation policy.² The bill has been heard by the House Financial Services Committee and awaits a markup and further action. If passed, the proposed Act would be a positive step toward restoring the consistent tools, including both incentives and protections, necessary to reposition this essential housing resource to meet the needs of tenants and communities in the 21st century.

Representing the first major authorizing effort addressing the privately owned, federally assisted housing portfolio in almost a decade, H.R. 4868's many provisions cover a tremendous amount of ground. The following article reviews only the most significant provisions.³

Preserving and Improving Troubled Properties

Many federally supported affordable housing properties risk losing their continued affordability for various reasons. In some cases, these risks arise from poor performance by a small subset of owners or the lack of capital available for rehabilitation or subsidies to maintain affordable rents under any new debt service. Properties in poor condition are at risk of suspension and termination of any Section 8 assistance, and default and foreclosure of any underlying HUD-insured mortgage.

The proposed Act would seek to preserve and improve troubled properties by reversing some of the neglect wrought by prior legislation, such as the "flexible authority" statute and the Deficit Reduction Act,⁴ and

*The author of this article is Summer Volkmer, a J.D. candidate at the University of California at Berkeley and a summer intern at the National Housing Law Project.

¹H.R. 4868, 111th Cong. (2010), available at <http://nhlp.org/files/HR%204868.pdf>.

²During the last 15 years, both Congress and several Administrations acted with astonishing inconsistency, defunding programs to preserve HUD and RD properties in favor of expensive vouchers and deregulating federal preservation policies for troubled properties, while almost simultaneously enacting well-conceived programs to preserve properties with expiring Section 8 contracts.

³A section-by-section summary of the entire bill is available from the House Financial Services Committee's website. See Housing_Preservation_and_Tenant_Protection/HR4868_Housing_Preservation_and_Tenant_Protection.html.

⁴When privately owned HUD-insured or assisted properties become severely deteriorated or financially mismanaged, HUD, as the responsible regulatory agency, must take corrective action, often as the actual note holder following default and assignment. In enacting the Multifamily Housing Property Disposition Reform Act of 1994 (Pub. L. No.

reestablishing a federal responsibility to plan for and preserve federal housing assets where feasible. Beyond legislative reform, improved administrative collaboration with tenants and communities can prevent some properties from falling into serious disrepair or further deteriorating, thus stabilizing both affordable homes and surrounding neighborhoods.

Under current law, HUD has a tremendous amount of discretion to choose among a variety of disposition tools after an owner's default and assignment of the mortgage to HUD, with no presumption that a troubled property will be preserved and improved. HUD may work out the loan delinquency and keep the existing ownership in place, may sell the property to a third party at foreclosure (in some cases without equivalent affordability restrictions), or may acquire the property by bidding its debt or by accepting a deed in lieu of foreclosure, before re-selling the property. However, to preserve the affordability of properties with project-based Section 8 contracts facing foreclosure or other disposition sale, since FY 2006 Congress has mandated HUD to generally maintain that assistance via the Schumer Amendment in annual Appropriations Acts.⁵

Because HUD has sometimes avoided this mandate by terminating Section 8 contracts prior to foreclosing, Section 405 of the proposed Act would solidify the requirement by making the provision permanent. It would also clarify that the requirement applies to all project-based contracts, not just the payments under such contracts and not just those contracts on properties with underlying HUD financing. The proposed Act also enacts

portions of Representative Velázquez's H.R. 44, introduced in the prior Congress, which would repeal HUD's "flexible authority" (Section 109(b)), require HUD to maintain rental assistance to buildings undergoing rehabilitation as part of a preservation transfer (Section 401), and extend HUD's non-judicial foreclosure authority to local government units acquiring HUD-held mortgages (Section 402).

Title IV of the proposed Act also includes many necessary reforms (also included in Representative Velázquez's earlier bill) to ensure that local governments can purchase these troubled properties and loans at prices that permit preservation of affordable housing. Section 403 would require HUD to include repair or rehabilitation costs in determining an appropriate sales price for HUD-owned buildings and HUD-held loans, so that preservation purchasers need not pay twice for the same thing. Section 404 of the bill would also remove a restriction imposed by the Deficit Reduction Act of 2005, so that HUD can determine appropriate sales prices for these assets and provide grants and loans from the insurance fund for the necessary cost of rehabilitation of these properties, without further appropriations. Yet another provision of the bill (Section 202) would promote responsible preservation by requiring any purchaser of a HUD-supported property to demonstrate a track record of compliance with state and local housing and health codes. These provisions of the bill would ensure that all buyers of both troubled *and* non-troubled properties are in compliance with housing and health codes.

Section 109 of the proposed bill would also require HUD to use all available enforcement and intervention tools, including mortgagee-in-possession and contract rights, to stabilize properties in distress. This section would promote preservation and improvement goals in the face of agency indifference, regardless of the Administration in charge.

Where a project is not restorable, Section 201 would provide HUD with authority to transfer project-based assistance to a new development, as authorized by recent Appropriations Acts⁶ and other laws (42 U.S.C. § 1437f(bb)), with appropriate protections to prevent abuse.

Finally, Section 203 of the bill would mandate that HUD take steps to use existing funds resulting from prepaid or terminated Section 236 interest reduction subsidies to support a program for rehabilitating multifamily properties. Section 531 of the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRAA)⁷ directed these funds to be used for this purpose, but accumulated funds have often been rescinded. To effectuate this mandate, Congress should make a corresponding appropriation of these available funds.

103-233, codified at 12 U.S.C. § 1701z-11), Congress revised HUD's statutory obligations with respect to properties being sold at foreclosure or from the HUD-owned inventory, reducing the agency's preservation duties but still requiring some minimum standards and procedures. Starting in 1995, in large part to save budget authority, the 104th Congress provided even greater "flexible authority" (12 U.S.C. § 1715z-11a(a)) for HUD's foreclosure and disposition activities, later adding authority for HUD to provide "up-front" repair grants from the insurance fund to purchasers of HUD-owned properties. In 2000, Congress first explicitly required renewal of Section 8 contracts at a foreclosure or disposition sale for projects primarily occupied by the elderly and disabled, unless "infeasible" (Pub. L. No. 106-377, § 233 (Oct. 27, 2000)). Congress renewed that mandate for several years until it was broadened to cover all properties through the bipartisan efforts of Senators Schumer and Bond, and since renewed annually thereafter. Pub. L. No. 109-115, 119 Stat. 2936, § 311 (Nov. 30, 2005) (for fiscal year (FY) 2006); Pub. L. No. 111-117, div. A, § 217, 123 Stat. 3100 (Dec. 16, 2009) (for FY 2010). Also in 2000, Congress extended indefinitely HUD's authority to make up-front grants for rehabilitation. Pub. L. No. 106-377, § 204. Congress later amended the "flexible authority" statute to require transfer of HUD-owned properties to state or local government where the project is unoccupied, or there are more than 25% severely defective units. Pub. L. No. 106-554, App. G, § 141, 114 Stat. 2763, 2763A-614-617 (Dec. 21, 2000). However, in 2006, Congress also effectively blocked both up-front grants and negotiated sales by enacting the Deficit Reduction Act, which required specific appropriations for any up-front grants or for any discounted sales price. Pub. L. No. 109-171, §§ 2001-2003, 120 Stat. 9 (Feb. 8, 2006).

⁵Pub. L. No. 111-117, div. A, tit. II, § 217, 123 Stat. 3100 (Dec. 16, 2009).

⁶See, e.g., Pub. L. No. 111-117, div. A, tit. II, § 212, 123 Stat. 3098 (Dec. 16, 2009).

⁷Pub. L. No. 105-65, § 531 (1997).

Creating Preservation Purchase Opportunities

Since 1995, under policies that have authorized owner choice and offered only incentives when use restrictions or contracts expire or can be terminated, the nation has unnecessarily lost hundreds of thousands of affordable units. Unfortunately, in many cases, fair incentives prove insufficient to entice owners of units facing the threat of market-rate conversion (opt-out, prepayment or mortgage maturity)⁸ to continue their participation. In such cases, to guarantee the preservation of affordable housing, owners should be bought out at market value, through mandatory transfers to tenant-endorsed preservation purchasers. However, H.R. 4868 contains no such purchase right, instead proposing a “right of first refusal” upon any proposed sale and voluntary incentives for preservation transfers.

Section 107 would create a “right of first refusal,” requiring owners to provide a bona fide offer of sale to specified preservation purchasers, whenever the existing owner proposes a sale to another party. Although this provision would represent an important recognition of the importance of preservation, an owner could easily avoid its mandate by converting a given property via prepayment or nonrenewal of an expiring subsidy contract *prior* to any proposed sale, which would then be unregulated.

In contrast, a right of purchase at market value, triggered by an owner’s intention to terminate the existing subsidy or affordability arrangements, would preserve housing affordability where owners are unwilling to do so. Such a provision was included in last year’s Discussion Draft of the bill and has been required under federal law since 1988 for USDA Rural Development (RD) properties facing prepayment (42 U.S.C. §1472(c)), and has been enacted by a few states and localities (Illinois, Rhode Island and New York City). Although a right to purchase was not included in H.R. 4868, Representative Gutierrez, joined by 11 other members of the Committee, voiced support for this policy,⁹ which balances the need for fair compensation to owners with the tenants’ needs for preserving the affordability of their homes.

The voluntary preservation exchange program proposed in Section 106 of the bill would encourage transfers to preservation purchasers by streamlining the approval and transfer process and providing resources for predevelopment, acquisition and capital improvement. Although welcome, these incentives alone are insufficient to preserve properties with unwilling owners who seek to convert to market-rate use.

⁸“Opt-out” refers to an owner’s decision not to renew a project-based Section 8 contract. “Prepayment” refers to an early payoff of the mortgage before expiration of its term. “Mortgage maturity” is the retirement of the mortgage at its maturity date (for FHA(HUD)-insured loans, usually 40 years).

⁹Letter from Rep. Gutierrez to Chairman Frank and Subcommittee Chairwoman Waters (Feb. 22, 2010).

Protecting State and Local Authority from Preemption Claims

Facing uncertainty concerning the federal government’s preservation policies, state and local governments have often filled the void by utilizing a variety of notice, purchase opportunity, relocation and other laws to preserve affordable housing and protect tenants.¹⁰ When these laws are enforced, many owners have raised judicial claims that this longstanding state and local authority has been vitiated because it has been expressly or impliedly preempted by federal law. Because of the vagueness of preemption doctrine, federal and state courts faced with these claims have issued inconsistent rulings.¹¹ Section 108 of the bill would clarify the preemption issue, allowing states and localities to enact preservation programs and tenant protections suited to local conditions.

Specifically, Section 108 would clarify that the preemption provision of the Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPHA) does not apply to properties that never executed a preservation plan under that program and that other provisions of federal law do not impliedly preempt state or local authority to preserve properties or protect tenants. This clarification would prevent LIHPHA’s express preemption provision and unfounded application of the conflict preemption doctrine from continuing to jeopardize prepayment notice, purchase opportunity and tenant protection laws in 12 states¹² and the District of Columbia, and an additional nine cities.¹³

Protecting Tenants When Properties Are Converted

To protect tenants facing displacement from market-rate conversions, in 1999, Congress passed unified authority requiring HUD to provide “enhanced vouchers” (with market-rate subsidy payments and the tenant’s right to remain) for tenants facing most housing conversion actions, including owner opt-outs and prepayments.¹⁴

¹⁰Summaries and text of these laws have been compiled on NHLP’s website. See <http://nhlp.org/resourcecenter?tid=129>.

¹¹*Compare* Forest Park II v. Hadley, 336 F.3d 724 (8th Cir. 2003) and *Mother Zion Tenant Ass’n v. Donovan*, No. 402239 (N.Y. Sup. Ct. Apr. 11, 2007), *aff’d*, 865 N.Y.S.2d 64 (N.Y. App. Div. 2008), *with* *Kenneth Arms Tenants’ Ass’n v. Martinez*, 2001 U.S. Dist. LEXIS 11470 (E.D. Cal. July 3, 2001) and *College Gardens Preservation Comm. v. Eugene Burger Mgmt. Corp.*, No. 03 AS02608 (Cal. Super. Ct., motion to dissolve injunction denied Nov. 19, 2003).

¹²The 12 affected states are California, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, Minnesota, Ohio, Texas, Rhode Island and Washington.

¹³The nine affected cities are Denver, Colorado; New York City, New York; Chicago, Illinois; Portland, Oregon; San Francisco, Sacramento and Santa Cruz, California; Seattle, Washington; and Stamford, Connecticut.

¹⁴Pub. L. No. 106-74, § 538, establishing a new Section 8(t) of the United States Housing Act, 42 U.S.C. §1437f(t).

Unfortunately, the law, as written and as implemented by HUD, fails to clearly protect tenants, as Congress intended. Two of the most common problems have included whether the owner must accept the voucher and terminate the tenancy only for tenant misconduct,¹⁵ and whether the PHA can rescreen these previously assisted tenants. Section 102(b) of the proposed Act would address both of these issues.

Section 102(b) of H.R. 4868 would clarify the enhanced voucher statute to specifically require owners to accept the voucher and to terminate the tenancy “only for serious or repeated violations of the terms and conditions of the lease or for violation of applicable law.” The bill also requires HUD to issue implementing regulations, including required lease addenda. This language is also included in the Section 8 Voucher Reform Act (H.R. 1851), now awaiting House floor action.

Another gap in these tenant protections concerns the current HUD policy permitting PHAs to rescreen tenants facing housing conversion actions seeking enhanced vouchers, as if they were brand new Section 8 applicants, under different criteria than those used to determine continued occupancy under their project-based lease. This rescreening can deny tenant protection vouchers to tenants in good standing under their leases. There is no sound reason to allow a change in the form of subsidy to trigger a reevaluation of a previous recipient’s suitability for continued assistance. Accordingly, both Section 102(b) of the bill and SEVRA would make clear that a family who receives an enhanced voucher is not required to requalify under the housing agency’s selection standards.

Preserving Housing and Protecting Tenants When Mortgages Expire

Mortgage maturity is a growing problem¹⁶ that occurs when the federal occupancy, rent and affordability restrictions accompanying the mortgage regulatory agreement expire by their own terms when the mortgage is retired. Many 40-year mortgages executed between the late 1960s and late 1970s, if not already prepaid, will

¹⁵See, e.g., *Park Vill. Tenants Ass’n v. Mortimer Howard Trust*, 2010 WL 431458 (N.D. Cal. Feb. 1, 2010); *Barrientos v. 1801-1825 Morton, LLC*, No. 06-6437 (C.D. Cal. Sept. 11, 2007, and Oct. 24, 2007), *aff’d on other grounds*, 583 F.3d 1197 (9th Cir. 2009); *Feemster v. BSA Ltd. P’ship*, 471 F. Supp. 2d 87 (D.D.C. 2007), *aff’d in part, rev’d in part and remanded*, 548 F.3d 1063 (D.C. Cir. 2008) (requiring acceptance of enhanced vouchers); *Estevez v. Cosmopolitan Assocs.*, 2005 WL 3164146 (E.D.N.Y. Nov. 28, 2005) (enjoining evictions for nonpayment of rent based on owner’s refusal to renew voucher assistance); *Jeanty v. Shore Terrace Realty*, 2004 WL 1794496 (S.D.N.Y. Aug. 10, 2004) (enjoining owner from refusing to accept enhanced voucher).

¹⁶The General Accounting Office issued a report on the problem in 2004, finding that mortgage maturity could put hundreds of thousands of units and tenants at risk. U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE COMMITTEE ON FINANCIAL SERVICES, HOUSE OF REPRESENTATIVES, MULTIFAMILY HOUSING 04-20 (2004).

mature soon.¹⁷ For some properties, mortgage maturity dates have already arrived, with no means for protecting tenants or preserving affordability. When mortgages mature and affordability restrictions terminate, Section 102 of the bill would seek to preserve affordability by authorizing preservation incentives and to protect tenants by authorizing enhanced vouchers for qualified tenants.

Section 102 would authorize HUD to offer financial incentives to preserve and improve properties where owners want to extend their participation in affordable housing programs or are willing to sell to a preservation purchaser with a long-term use restriction. Significantly, wherever an owner extends or sells under a preservation plan, the bill authorizes additional project-based Section 8 rental assistance where needed to cover rent increases for currently unassisted residents of a HUD-supported property.

Where owners are unwilling to extend their participation, and instead seek to convert to market rate, Section 102 would also authorize enhanced vouchers for tenants. These vouchers would cover the new higher rents, and owners would be obligated to accept them.

Despite these proposed provisions, thousands of tenants are likely to be harmed by expiring restrictions before the bill’s final enactment. To protect these tenants, some tenant protections must be adopted sooner, through another legislative vehicle such as the fiscal year 2011 appropriations bill.

Rural Development Properties

The Rural Rental Housing stock financed under the USDA’s Rural Development (RD) Section 515 program is aging and in need of physical preservation. Many of these developments are more than 30 years old. The stock is generally deteriorating because of inadequate reserves or other financing with which to undertake physical revitalization. For the past four years, the Rural Housing Service (RHS) has operated a demonstration revitalization program to identify the tools for revitalizing and preserving the Section 515 stock and to protect rural renters, as well as the Section 514 and 516 stock for farmworkers. Title VIII would make permanent the demonstration program while also adopting tenant protections, including for residents of properties that are prepaid, through the extension of RD Rental Assistance or Voucher Assistance.

¹⁷Among these are properties that were preserved from prepayment and conversion by the Emergency Low-Income Housing Preservation Act (ELIHPA), enacted in 1988, but only for the remaining term of their mortgage. Others may be properties originally developed by nonprofits, which were subject to a use restriction for the full mortgage term, in contrast to those owned by for-profit or limited dividend sponsors that usually had only a 20-year lock-in. Still others have never consummated prepayment, even if eligible, either due to weak market conditions or indecision.

Title VIII would authorize RHS to offer financial incentives to owners of Section 515 housing who wish to revitalize their properties. These incentives include:

- reduction or elimination of interest on the existing Section 515 loan;
- partial or full deferral of payments;
- outright loan forgiveness;
- subordination of the Section 515 loan to third-party financing;
- reamortization and extension of the loan;
- grants (subject to appropriations);
- payment of the costs associated with the development of a long-term viability plan; and
- additional direct or guaranteed subsidized loans that are not limited by the value of the project.¹⁸

To secure any of these incentives, an owner would have to file a request with RHS, and the agency would have to develop a long-term project viability plan that includes two elements. The first is a physical needs assessment that identifies the repairs, improvements and other changes required to preserve the development together with the cost of those repairs and changes. The second is a financial plan that reviews the financial stability of the project, takes into account the loan restructuring elements needed to preserve the project (including rent increases), provides the owner with a rate of return comparable to that received by owners under the tax credit program, takes into account the required repairs and the costs of relocating residents during the repairs, and ensures that the rents in the development, after revitalization, are affordable to the residents.¹⁹ These provisions help ensure long-term affordability and viability for tenants and the project. Before RHS could offer the incentives to a project owner, it would have to give the owner an opportunity to review the viability plan and to discuss it with someone from the agency. In addition, the bill would ensure tenant participation by requiring RHS to provide a copy of the viability plan to the residents, with 30 days to comment. RHS would be required to respond in writing to the resident comments.²⁰

Beyond the long-term viability plan and necessary incentives, the bill sets forth additional provisions to ensure affordability and protect tenants. First, RHS and the owner would enter into a long-term use agreement, which would obligate the owner to maintain the housing as affordable for 30 years or the remaining term of the project loan, whichever is longer. Most importantly, the

use agreement would set the maximum household contribution to monthly rent and utilities at 30% of the family's adjusted income. In virtually all cases, this would necessarily require rental assistance, even if other funding sources are utilized for recapitalization. The agreement would also obligate the owner to warrant the provision of safe, healthy and clean buildings, and set out the project rent terms and any voucher assistance that might be provided to the owner. The use agreement could be terminated only if some material preservation incentives extended to the owner are no longer available, and RHS determines that their unavailability was not due to the owner's fault.²¹

To ensure that residents would not pay more than 30% of their income toward rent, unassisted tenants may be provided project-based rental assistance ("rural preservation assistance"), which may take the form of vouchers or an RD Rental Assistance subsidy.²² For approved prepayments or foreclosures, the bill also authorizes tenant-based vouchers ("rural tenant protection vouchers"), which are not project-based and thus do nothing to preserve affordability for future tenants.²³

RHS would be able to deny revitalization or restructuring assistance to any owner who has a history of poor management or maintenance, is in default on a Section 515 loan, does not enter into a long-term Use Agreement within a reasonable amount of time, is suspended or debarred from a government contracting program, or for other good cause as determined by RHS.²⁴

To further the preservation of the Section 514 and 515 stock and protect residents from displacement, Title VIII should include five additional provisions:

- Section 502(c)(5)(G) of the Housing Act of 1949 should be amended to authorize RHS to extend the same incentives to developments that are transferred from a current owner to a nonprofit or public entity as it currently provides to nonprofit or public entities that purchase such properties after the current owner has filed a request to prepay the loan and must offer the development for sale for the required six-month period.²⁵
- Section 502(c)(5)(C)(i) of the Housing Act of 1949 should be amended to authorize RHS to make predevelopment grants to limited partnerships or limited liability corporations whenever such entities are managed by a nonprofit general partner.²⁶

²¹§ 802.

²²§ 803.

²³§ 803.

²⁴§ 802(a).

²⁵Such an amendment would facilitate more preservation transfers by expediting the preservation process since owners will not have to go through the prepayment process to assure nonprofit or public agencies the forms of assistance necessary for feasible operation of the transferred development.

²⁶Currently, only nonprofit and public agencies are authorized to receive predevelopment grants. Limited partnerships and LLCs, which

¹⁸H.R. 4868, § 802(a) (establishing a new § 545 of the Housing Act of 1949, 42 U.S.C. §1471 *et seq.*).

¹⁹§ 802.

²⁰§ 802.

- Owners' capacity to circumvent the current prepayment restrictions through defaults and RHS' ability to foreclose on or dispose of property that is not decent, safe and sanitary should be proscribed.²⁷
- RHS should be required to report on its plans to revitalize and restructure that portion of the Section 514 and 515 inventory whose owners are not applying to RHS to preserve or restructure their properties or who have not qualified for such assistance.²⁸
- RHS and owners of Section 514 and 515 developments who have applied to prepay their loans should be required to send notices to residents that are in plain English and, when appropriate, are translated for residents who have limited English proficiency.²⁹

Protecting Affordability When Properties are Rehabilitated

Like the RD properties just reviewed, the privately owned, HUD-supported stock faces substantial challenges to address physical improvements through recapitalization, while simultaneously preserving affordability for current and future very low-income residents.³⁰ Beyond those segments of the HUD inventory whose recapitalization needs were discussed previously, others are addressed by additional provisions in H.R. 4868 or by existing law.

are formed by nonprofit entities to qualify for Low-Income Housing Tax Credit financing, are not eligible to receive these grants even though they have comparable needs for such assistance. The extension of the grant provisions to limited partnerships and LLCs managed by nonprofit corporations will facilitate the preservation of the Section 514 and 515 housing stock because it will increase the capacity of these organizations to undertake the necessary due diligence prior to the purchase of a prepaying development.

²⁷Accordingly, the bill should amend Section 515 of the Housing Act of 1949 to preclude RHS from accepting a loan prepayment in response to an acceleration unless the borrower or successor in interest is obliged, through a regulatory agreement, to maintain the property as affordable housing. Similarly, RHS should be precluded from releasing its security interest at a foreclosure sale unless the purchaser agrees to continue to operate the development as affordable housing in accordance with any restrictions that were in effect prior to the foreclosure. The same restrictions should also be made applicable to any sale by RHS of inventory multifamily property. The only time such restrictions should not apply is when RHS determines that the property no longer meets decent, safe and sanitary standards, in which event appropriate use restrictions should be placed on the property that obligate the purchaser to bring the development to habitable standards before the property is occupied by residents.

²⁸Such a report should include suggestions for new authorities needed by RHS to ensure that the entire Section 514 and 515 housing stock is preserved in decent, safe and sanitary condition.

²⁹Currently, prepayment notices are replete with legal terms not understandable to residents.

³⁰See NHLP, *Recapitalizing the HUD-Assisted Housing Stock: Part One*, 40 HOUS. L. BULL. 1, 6 (Jan. 2010); NHLP, *Recapitalizing the HUD-Assisted Housing Stock: Part Two*, 40 HOUS. L. BULL. 43, 55 (Feb. 2010).

For properties under the HUD Section 202 Program for the elderly, H.R. 4868 includes a separate title (Title VII) intended to preserve housing affordability and protect current and future tenants when properties require recapitalization. Title VII would permit Section 202 properties to be refinanced to permit new debt for rehabilitation, so long as specific standards are satisfied, including the provision of additional project-based assistance to protect currently unassisted residents from unaffordable rent increases.

Section 102 covers rehabilitation of HUD and RD properties experiencing mortgage maturity. Rehabilitation of those with project-based Section 8 assistance for all units is covered by the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRAA) for mark to market, mark up to market or mark up to budget. Troubled HUD properties may also receive preservation recapitalizations under existing law³¹ once the impediments of flexible authority and the Deficit Reduction Act are removed by Section 109 and Titles II and IV, and the language of the Schumer provision is strengthened by Section 405.

For HUD-supported properties that do not have rental assistance for all units, Section 204 would also authorize budget-based rent increases to cover the costs of necessary rehabilitation, so long as rental assistance is provided to offset the resulting rent increases. This provision should be improved by extending the length of the affordability commitment by participating owners beyond the end of the mortgage term, which is fast approaching. Section 504 would revise the standards under which HUD can approve a prepayment and refinancing of a HUD-financed property that cannot be unilaterally prepaid.³² It would require that the proceeds be reinvested in the property or tenant services, with only limited rent increases for unassisted tenants and extended use restrictions for at least 20 additional years.

Empowering Tenants as Partners

Tenants are essential partners in ensuring high-quality, affordable rental housing for the long-term. Congress has previously established tenants' security of tenure through good cause eviction protections, the right to organize, and tenant participation rights on major issues affecting their homes, while supporting outreach and education for tenants through Section 514 of MAHRAA. Section 514 of the bill would encourage tenant participation by improving MAHRAA and increasing information access and enforcement options for tenants.

³¹As explained *supra*, the existing framework includes the 1994 Multifamily Housing Property Disposition Reform Act, 12 U.S.C. § 1701z-11, as well as the Schumer Amendment's requirement to maintain Section 8, Pub. L. No. 111-117, div. A, § 217, 123 Stat. 3100 (Dec. 16, 2009).

³²These standards are set forth in Section 250 of the National Housing Act, 12 U.S.C. § 1715z-15.

Advocates Continue to Seek Funding for National Housing Trust Fund

When properties undergo major events like rehabilitation or preservation incentive programs or threatened conversion to market-rate operations, tenants need basic financial and physical condition information about their homes to explore preservation options and ensure proper expenditure of scarce subsidies. Title III of the bill would guarantee access to project information, subject to certain legitimate privacy concerns (Section 304), by establishing a tenant's right to withhold rent in limited circumstances to encourage owner compliance (Section 302) and by permitting tenants to enforce project agreements where HUD fails to do so (Section 303).

Other Provisions of the Bill

H.R. 4868 contains numerous other substantial and positive provisions. Title V of the bill contains several sections that extend and improve the Mark to Market restructuring program established by MAHRAA. These provisions would allow more owners to utilize the restructuring program, encourage transfers of restructured properties to qualified nonprofits, and authorize more properties to be preserved with exception rents in weaker markets. Another important provision, Section 601, would require HUD to establish a preservation database that would make it easier for state, local and community-based participants to obtain accurate and up-to-date information about at-risk properties.

Next Steps

The House Financial Services Committee will likely mark up and vote on the proposed Act by early summer. If passed, it will go the House floor for subsequent action. The introduction of a similar bill in the Senate is likely within the next month.

To implement many of the bill's authorities to preserve and improve properties and to protect tenants, Congress will have to provide additional appropriations each year. Securing these necessary resources will require increased and sustained collaboration between federal agencies, advocates, and congressional policymakers and appropriators.

The *Bulletin* will closely follow the future progress of both H.R. 4868 and the necessary funding. ■

The National Housing Trust Fund, authorized by the Housing and Economic Recovery Act of 2008 (HERA),¹ is the culmination of a decade of work by the National Low Income Housing Coalition and its allies. It is the first new subsidized housing program in over 35 years targeted to housing for extremely low-income (ELI) families.²

The Trust Fund will assist low-income workers, the elderly, people with disabilities and people who are homeless. According to the Coalition, "today in the United States, there are 9 million extremely low income renter households and only 6.2 million homes with rents these families can afford. Consequently, 71% of extremely low income renters spend more than half of their income for housing, leaving them without enough money for other essentials and at high risk of losing their homes and joining the ranks of the homeless."³ The 2010 edition of the Coalition's annual report "Out of Reach" states that "[i]f a household earns the equivalent of one job paying the minimum wage, it can afford to spend as much as \$377 in monthly rent [and the wage earner] must work 102 hours [per week] to afford a two-bedroom rental unit at the Fair Market Rent."⁴

The goal of the Trust Fund is to produce, preserve or rehabilitate 1.5 million homes in 10 years. Other eligible activities include down payment assistance, closing cost assistance, and assistance for interest rate buy-downs for prospective owner-occupants who have, before purchase, completed a program of independent financial education and counseling from an eligible organization.⁵

Distribution of Funds

Funds from the Trust will be distributed through grants to the states. The states "may designate a State housing finance agency, housing and community development entity, tribally designated housing entity⁶...or any other

¹Pub. L. No. 110-289, tit. I, sub.tit. A, § 1131, 122 Stat. 2654, 2712 (July 30, 2008). http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ289.110.pdf. HERA created the Trust Fund by amending the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. §§ 1301, 1338 *et seq.*).

²"Extremely low-income" means households with incomes at or below 30% of Area Median Income.

³Press Release, Sheila Crowley, President, National Low Income Housing Coalition (Sept. 30, 2008).

⁴Keith E. Wardrip et al., National Low Income Housing Coalition, *Out of Reach 2010* (2010), U.S. Summary Statistics, http://www.nlihc.org/oor/oor2010/OOR_US-Fact-Sheet.pdf.

⁵Pub. L. No. 110-289, tit. I, sub.tit. A, § 1131, 122 Stat. 2654, 2716 (July 30, 2008).

⁶As such term is defined in Section 4 of the Native American Housing Assistance and Self-Determination Act of 1997 (25 U.S.C. § 4103).