

NATIONAL
HOUSING LAW
PROJECT

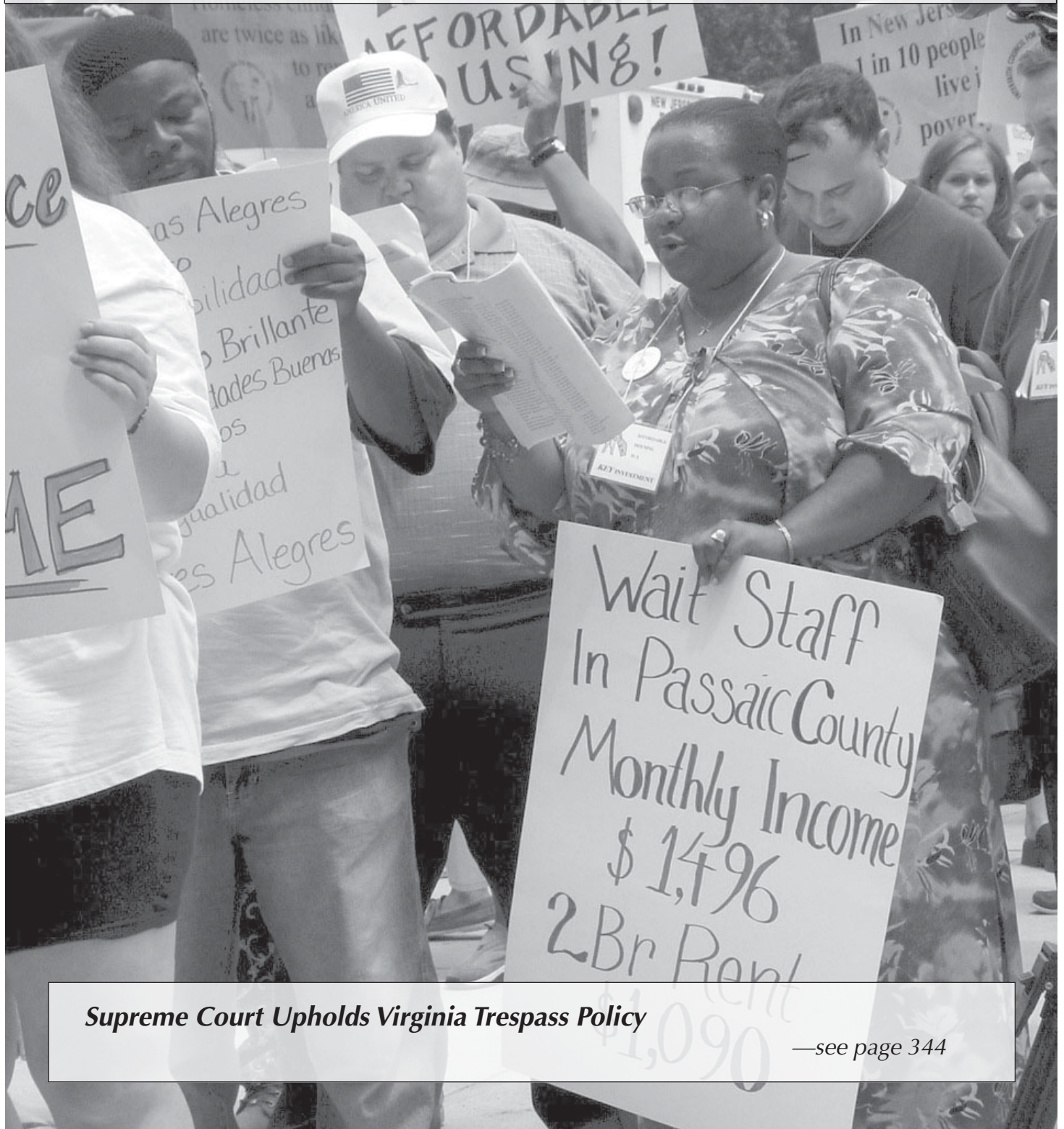


advancing housing justice

Housing Law Bulletin

Volume 33 • July 2003

Published by the National Housing Law Project



Supreme Court Upholds Virginia Trespass Policy

—see page 344

Housing Law Bulletin

Volume 33 • July 2003

Published by the National Housing Law Project
614 Grand Avenue, Suite 320, Oakland CA 94610
Telephone (510) 251-9400 • Fax (510) 451-2300
www.nhlp.org • nhlp@nhlp.org

Table of Contents

	Page
Public Housing Mandatory Community Service and Self-Sufficiency Requirements Reinstated	339
Deregulation of Small Public Housing Agencies and Streamlined HUD Review of All PHA Plans ..	341
Supreme Court Reverses Virginia Supreme Court's Decision Based on First Amendment Overbreadth .	344
HUD Issues New Occupancy Handbook for Subsidized Multifamily Programs	347
Recent Takings Decisions on Preservation Laws Could Subject Feds to Big Liability	350
Owner Must Comply with ELIHPA When Prepaying Section 515 Loan	354
Business Owned by Low-Income Individuals Entitled to Damages for Violation of Section 3	356
Recent Cases	357
Recent Housing-Related Regulations and Notices ..	357
Announcements	
NHLP and the NCLC Fight Predatory Lending	343
HUD Publishes New Public Housing Occupancy Guidebook	345
Publication List/Order Form	363

Cover: The Housing and Community Development Network of New Jersey (HCDNNJ) held a rally at the New Jersey State House in June to protest the governor's proposed \$25 million cut in the state's Housing Mortgage Finance Agency. The cut would have eliminated financing for 1,000 affordable housing units. The rally and HDCNNJ advocacy were successful and the funds were preserved. Photo by Nadia Janjua. Photo courtesy of HCDNNJ.

The *Housing Law Bulletin* is published 10-12 times per year by the National Housing Law Project, a California nonprofit corporation. Opinions expressed in the *Bulletin* are those of the authors and should not be construed as representing the opinions or policy of any funding source.

A one-year subscription to the *Bulletin* is \$150.

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

Public Housing Mandatory Community Service and Self-Sufficiency Requirements Reinstated

On June 20, 2003, the United States Department of Housing and Urban Development (HUD) Office of Public and Indian Housing issued a notice to all Public Housing Authorities (PHAs) advising them of the reinstatement of the mandatory community service requirements originally enacted under Section 512 of the *Quality Housing and Work Responsibility Act of 1998* (QHWRA).¹ According to the notice, the community service requirements must be implemented by October 31, 2003.²

Under Section 512, all adult residents of public housing must perform eight hours of community service per month or participate in economic self-sufficiency activities for an equal amount of time unless exempt.³ The Fiscal Year (FY) 2002 *HUD Appropriations Act* had suspended this requirement (except for HOPE VI residents); however, the FY 2003 *HUD/VA Appropriations Act*, signed on February 21, 2003, did not extend the suspension.

Under the HUD notice, all PHAs are required to notify residents in writing by July 31, 2003, of the reinstatement of the community service requirement. The notice must include a statement on whether the resident is exempt and what he or she must do to comply with the requirement. PHAs must assure that all residents are performing their community service or comparable requirements by October 31, 2003.

Residents Delinquent in Community Service or Self-Sufficiency Hours Under Prior Leases

Residents who were delinquent in community service or self-sufficiency hours under a prior lease that was in effect at the time the community service requirement was suspended

¹Notice PIH 2003-17 Reinstatement of the Community Service and Self-Sufficiency Requirement (June 20, 2003). For background see *Public Housing Community Service Requirement Suspended*, 32 HOUS. L. BULL. 12 (Jan. 2002); see also, *Public Housing Community Service Policies: Requirements and Advocacy Tips*, 31 HOUS. L. BULL. 135 (June 2001).

²When HUD originally published PIH 2003-17, the notice stated that the community service requirement would be applicable retroactively to all leases entered into on or after October 1, 2002. Notice PIH 2003-17, ¶ D (Original notice). However, without prior notice or explanation, HUD deleted that notice from its Web site and published a new notice that deleted the sentence that made the requirements retroactive. When dealing with a local PHA, advocates should make sure that the PHA is relying upon the latest version of the HUD notice, which is available at www.hudclips.org.

³42 U.S.C.A. § 1437j(c)(West Supp. 2003). The following are generally exempt: elderly, blind and disabled persons and their caretakers (even if the person for whom they are caring is not a public housing resident), persons engaged in work, persons exempt from state welfare work requirements, and members of a family that receives Temporary Assistance for Needy Families (TANF) and have not been found to be in noncompliance with the TANF work requirements.

are obligated to fulfill their FY 2001 community service and self-sufficiency requirements in addition to any new requirements, provided that the resident was given “notice” of noncompliance prior to the expiration of the lease in effect at that time. A copy of that noncompliance notice must be included in the new notice sent to residents. Failure to comply with these community service or self-sufficiency requirements may result in a non-renewal of the resident’s lease at the end of the 12-month period.⁴ However, a PHA may not terminate a resident’s lease without first notifying the resident of the non-compliance, and of his or her right to an administrative grievance of such determination. The notice must further provide the resident with an opportunity to cure the non-compliance by entering into an agreement to make up delinquent hours over the 12-month period of the new lease. If the resident is still non-compliant at the end of the new lease period, the law requires that the household’s lease not be renewed and that the entire family vacate the unit unless the non-compliant member agrees to move out. All such actions are subject to the grievance process.

monthly monitoring but only requires PHAs to review the resident’s file and make annual determinations of compliance 30 days prior to the expiration of the 12-month lease term.⁷ The opportunity to cure agreement, which permits additional community service or self-sufficiency hours over a 12-month period in order to remain as a tenant, is also inconsistent with the prohibition against doubling up on hours since the agreement, by necessity, requires a doubling up in order to cure a prior default.⁸

Must PHAs Amend Their Annual Plan?

PHAs that have already submitted their annual plan for 2003 are not required to amend that plan. However, they must inform their Resident Advisory Boards (RABs) of any significant changes to their prior policies on community service and must submit an attachment with next year’s annual plan. All PHAs that have not yet submitted their annual plan to HUD must include a description of their community service policy in the plan. High-performing and small PHAs are not bound by this requirement but must still implement and have the policy available as a supporting document to their annual plan.

These implementation provisions circumvent the annual plan process, which normally requires a 45-day notice to tenants and an opportunity for the public to comment prior to the PHA making any changes to the plan.⁹ It also circumvents PHAs’ obligation to consider RAB comments on the plan. It demonstrates HUD’s lack of consideration of the role that tenants and their respective RABs fulfill in providing input into and influencing their PHAs’ policymaking.

It is clear that the inconsistencies between the statutory provisions, the federal regulations, the Public Housing Occupancy Guidebook and the PIH 2003-17 Notice will make it difficult for PHAs to implement the community service and self-sufficiency requirements without additional guidance and that clarification will be needed. NHLP has been informed that HUD is likely to issue a supplemental notice to clarify certain discrepancies contained in the recently published notice. A more detailed analysis of these issues will be published in next month’s *Bulletin*. ■

Failure to comply with community service or self-sufficiency requirements may result in a non-renewal of the resident’s lease at the end of the 12-month period. However, a PHA may not terminate a resident’s lease without first notifying the resident of the non-compliance and of the right to an administrative grievance.

Timeframe for Completing the Community Service or Self-Sufficiency Requirements

While there is no statutory or regulatory provision stating when the community service or self-sufficiency work must be performed as long as it is completed within the year, the *Public Housing Occupancy Guidebook* and Appendix VI to that guidebook, titled *Sample Community Service Policy*, published in June of this year, provide that “[a]n individual may not skip a month and then double up the following month, unless special circumstances warrant it.”⁵ This appears to be inconsistent with a prior HUD position urging PHAs to allow tenants who cannot perform the service monthly to complete the requirement within a reasonable time frame.⁶ It also is inconsistent with the statute, which does not require

⁴24 C.F.R. §960.607 (2003).

⁵*Public Housing Occupancy Guidebook*, Chapter 15, Section 15.6 (June, 2003).

⁶5 Fed. Reg. 16,692, 16,710 (Mar. 29, 2000).

⁷42 U.S.C.A. §1437j(c)(3)(A) (West 2003).

⁸24 C.F.R. §960.607(c)(1) (2003).

⁹*Id.* §§903.13, 24 C.F.R. §903.17.

Deregulation of Small Public Housing Agencies and Streamlined HUD Review of All PHA Plans

On June, 24, 2003, the Department of Housing and Urban Development (HUD) issued a final rule that streamlines and simplifies HUD's Annual Plan requirements for small public housing agencies (PHAs) that administer the public housing and voucher assistance programs.¹ It also streamlined HUD's review of all PHA plans.

Deregulation of PHA Plan Process for Small PHAs

For purposes of the PHA plan process, the rule defines a small PHA as one that administers less than 250 public housing units. Significantly, the definition does not consider the size of the PHA's voucher program. Thus a PHA that administers only a few public housing units but also hundreds or thousands of voucher units is considered a small PHA that may take advantage of the newly streamlined and simplified small PHA plan regulations.²

The new regulation allows small PHAs to file a larger but less than full "annual" PHA plan once every five years. This plan is due in the same year that the PHA's five-year plan is due. In that year a small PHA would file both a five-year and an annual plan. In the interim years, small PHAs are now required to file a very streamlined plan that is described in more detail below.

The statute governing the overall PHA plan process lists 18 items to be included in a full annual PHA plan. The new regulation exempts small PHAs from having to include nine of those items from their five-year and accompanying annual plans.³ The following is a list of excluded items:

- a statement of the PHA's operation and management (§ 903.7(e));⁴
- a statement of the PHA's grievance procedures (§ 903.7(f));
- a statement of the public housing developments designated as housing for elderly families or families with disabilities or elderly families and families with disabilities (§ 903.7(i));

- a statement of the conversion of public housing to tenant-based assistance (§ 903.7(j));
- a statement of the PHA's community service and self-sufficiency programs (§ 903.7(l));
- a statement of the PHA's safety and crime prevention measures (§ 903.7(m));
- a statement of the PHA's policies and rules regarding ownership of pets in public housing (§ 903.7(n));
- recent results of the PHA's fiscal year audit (§ 903.7(p)); and
- a statement of asset management (§ 903.7(q)).

It is not clear why some of these items were excluded, as there is no apparent common theme to them. Moreover, if a PHA actually adopts any of these policies, it is not clear from the regulations if the PHA must make the policy available to the public for review as part of the PHA plan adoption process. The current *Template for Small PHA Plan Update*,⁵ which is also a streamlined form, lists as "Supporting Documents Available for Review" all the significant policy documents that are related to all 18 PHA Plan elements, including those nine elements which have been excluded by the regulations. Presumably, these supporting documents must still be made available to the public each year⁶ and they may be reviewed and commented on by the Resident Advisory Boards (RABs), residents and the public. Presumably, PHA boards are also obligated to consider the comments and reconsider and revise the policies. The regulations do make clear, however, that policy changes in the excluded subject areas would not have to be submitted to HUD.

Significantly, if a small PHA seeks to convert conventional public housing to elderly or disabled use or seeks to convert public housing units to vouchers, these policy determinations require a separate HUD approval process.⁷ Also, it is also important to note that the Small PHA Plan Template's list of Supporting Documents Available for Review includes a number of important documents that are not listed as required Supporting Documents to the standard PHA Plan Template, which is applicable to all PHAs, including those that are not small.⁸ These supporting documents include:

⁵HUD form 50075-Small PHA (03/2003).

⁶The Template for Small PHAs (03/2003) currently states that of the listed Supporting Documents, "[a]ll listed documents must be on display if applicable to the program activities conducted by the PHA."

⁷24 C.F.R. § 945.201 (2002) (designated public housing); 42 U.S.C.A. § 1437t(e) (West Supp. 2002) (conversion to vouchers).

⁸The PHA's deconcentration and income-mixing documentation is no longer included in the list of supporting documents for small PHAs. This is the only supporting document that has been removed from the list. There does not appear to be any reasonable explanation for why this has been removed, as PHAs with up to 250 units of public housing are not automatically excluded from the deconcentration and income-mixing requirements. However, PHAs with only 100 units of public housing are excluded from the deconcentration regulation requirements. 24 C.F.R. § 903.2(b)(2) (2002).

¹68 Fed. Reg. 37,664 (June 24, 2003).

²In contrast, in HUD's simplification of the SEMAP regulations, a small PHA is defined as one with 250 or fewer voucher units. See *Id.* at 37,672 (§ 985.105).

³The statute permits HUD to streamline the PHA plan process for PHAs that are high performing, manage less than 250 public housing units, and/or administer only voucher assistance. 42 U.S.C.A. § 1437c-1(k) (West Supp. 2002).

⁴All references are to the subsections of 24 C.F.R. § 903 (2002) that sets out the requirement.

- any policy governing occupancy of police officers in public housing;
- Section 3 documentation required by 24 C.F.R. Part 135, Subpart E;
- a list of Public Housing Drug Elimination Program (PHDEP) related documentation;⁹
- pet policy;¹⁰
- results of latest binding Public Housing Assessment System (PHAS) Assessment;
- follow-up Plan to Results of the PHAS Resident Satisfaction Survey;¹¹
- results of latest Section 8 Management Assessment System (SEMAP);
- any required policies governing any Section 8 special housing types; and
- self-evaluation, needs assessment and transition plan required by regulations implementing Section 504 of the *Rehabilitation Act* and the *Americans with Disabilities Act* (see PIH 99-52 (HA)).¹²

The most significant of these additionally required documents are the ones related to Section 3, Section 504 assessment, and the PHAS and SEMAP assessments.

For small PHAs, the five-year and accompanying annual plan must include the following nine elements:

- a statement of housing needs (§ 903.7(a));
- a statement of the PHA's deconcentration and other policies that govern eligibility, selection and admissions (§ 903.7(b));
- a statement of financial resources (§ 903.7(c));
- a statement of the PHA's rent determination policies (§ 903.7(d));
- a statement of capital improvements needed (§ 903.7(g));
- a statement of any demolition and/or disposition (§ 903.7(h));
- a statement of homeownership programs administered by the PHA (§ 903.7(k));

⁹Presumably this documentation is no longer relevant as Congress eliminated special funding for PHDEP in 2001.

¹⁰This is a required attachment to all PHA plans, Public Housing Agency (PHA) Plan, Desk Guide (Sept 21, 2001), ¶ 3.15.1.

¹¹This is required by 24 C.F.R. § 902.50(b) (2002).

¹²HUD Notice 99-52 has been updated and amended by Notice PIH 2000-45 (HA) September 20, 2000 (Correction to Notice PIH 99-52 (HA), Section 504 of the *Rehabilitation Act of 1973*; the *Americans with Disabilities Act of 1990*; the *Architectural Barriers Act of 1968* and the *Fair Housing Act of 1988*) and Notice PIH 2002-01 (HA) (January 22, 2002) (Accessibility Notice: Section 504 of the *Rehabilitation Act of 1973*; the *Americans with Disabilities Act of 1990*; the *Architectural Barriers Act of 1968* and the *Fair Housing Act of 1988*).

- civil rights certification (§ 903.7(o)); and
- additional information to be provided, including progress in meeting the five-year goals and criteria for amendments to the plan (§ 903.7(r)).

For the years between the five-year periods for which the annual and five-year plans must now be submitted, a small PHA is required to submit to HUD only two of the items that are required to be submitted with the five-year and accompanying annual plans.

Other information that HUD currently requests all PHAs, including small PHAs, to submit includes a list of RAB members, a list of resident members on the PHA Board, comments of the RAB to the PHA plan, and an explanation of the PHA's response.¹³

For the years between the five-year periods for which the annual and five-year plans must now be submitted, a small PHA is required to submit to HUD only two of the nine items that are required to be submitted with the five-year and accompanying annual plans. These are a statement of capital improvements needed and the civil rights certification. For the remaining seven policies, small PHAs need only certify a list of those elements that have changed and provide assurances that the changes were presented to the RAB for review and comment and that the changes were approved by the PHA's board. However, if a small PHA adopts site-based waiting lists, a Section 8 voucher homeownership program, or a project-based voucher program, information regarding each of these choices must be included in the PHA plan. HUD justified this additional requirement because there is no other mechanism for obtaining HUD approval for these discretionary policies and programs.¹⁴

HUD Review of All PHA Plans by Small and Large PHAs

The final rule also streamlines HUD's review of annual plans submitted by small and large PHAs.¹⁵ Certain plan elements are now exempt from routine HUD review and approval. Specifically, the final rule provides that HUD's review of annual plans will generally be limited to PHA policies concerning deconcentration (§ 903.7(b)), capital improvements (§ 903.7(g)), demolition and disposition (§ 903.7(h)),

¹³See Public Housing Agency Plan, Desk Guide (Sept 21, 2001), ¶ 3.19.2.

¹⁴68 Fed. Reg. 37,664 (June 24, 2003).

¹⁵*Id.* § 903.23(b).

NHLP and the National Consumer Law Center Fight Predatory Lending!

The National Housing Law Project (NHLP) and the National Consumer Law Center (NCLC) have teamed up on a national project to combat predatory lending practices. Funded by the Ford Foundation, this project has grown out of NHLP's work on Section 8 homeownership and NCLC's long-established work in the arena of consumers' rights.

More than ever before, public attention and outrage is focused on the national epidemic of predatory mortgage lending. Peddling high-cost loans their customers cannot afford, unscrupulous lenders have taken advantage of desperate consumers with high-pressure sales tactics and promises of easy credit. In communities across America, the stories of victimized homeowners sound distressingly similar as more people lose hard-earned equity and sink deeper into financial trouble. The impact of predatory mortgages spreads throughout entire communities (low-income and minority neighborhoods have been especially hard hit), which suffer from the loss of precious wealth. Seniors and people of color are targeted in particular by lenders to be the objects of abusive tactics.

NHLP and NCLC believe that among the various strategies available to address the problem, having both attorney and non-attorney trained advocates is essential. Over the course of 2003 and 2004, NHLP and NCLC will select eight locations across the country to provide such training with an eye to increasing the number of attorneys who are qualified to litigate predatory lending cases and increasing the knowledge base of non-attorney advocates, specifically housing authority staff and housing counselors.

In March of 2003, we conducted our first training in Oakland, California, with almost 75 attorneys and other advocates in attendance. Staff of 10 different housing authorities numbered among that 75. Over the course of a day and a half, participants learned the economics of predatory lending, how to spot predatory practices, and some of the most essential federal and state claims available as tools to defend consumers who have fallen prey. May's training in Richmond, Virginia, was co-sponsored by the Virginia Poverty Law Center. With approximately 60 participants, the training was well received, and for many present, represented the first time they had received basic training in this subject area.

If you are interested in bringing such training to your area, please contact Maeve Elise Brown at NHLP or Elizabeth Renuart at NCLC. In addition to providing training, Ms. Brown and Ms. Renuart are available to assist with regulatory questions, strategizing on cases, and, on some occasions, co-counseling, particularly on the appellate level. Elizabeth Renuart has been a staff attorney with NCLC since 1996, specializing in predatory lending and other consumer credit issues affecting low-income Americans. She has co-authored a number of model laws that address predatory practices, including AARP's Home Loan Protection Act, which formed the basis for the anti-predatory lending law passed in Georgia. Prior to coming to NCLC, Ms. Renuart was the managing attorney of a legal services program in Baltimore, Maryland, that provided legal representation to homeowners in danger of losing their homes. She has been a legal services attorney for 20 years.

Maeve Elise is a staff attorney with NHLP and is responsible for NHLP's Section 8 Homeownership and Predatory Lending Initiatives, as well as working on a wide variety of other federal housing issues, including Section 8 voucher, public housing and housing discrimination issues. Prior to joining NHLP, Ms. Brown was the director of the Housing and Economic Development units of the East Bay Community Law Center (EBCLC) in Berkeley, California, which is a clinical legal services program affiliated with Boalt Hall School of Law at the University of California at Berkeley. At EBCLC, Ms. Brown was instrumental in forming a community development credit union of which she is the board chair. Ms. Brown has been a public interest attorney for 15 years. ■

and the civil rights certification (§ 903.7(o)). HUD will also review other plan elements that have been challenged, for example, by a RAB or members of the public.

By streamlining the review, HUD should have time to review more critically the four listed items for each PHA. Whether such intensive review occurs will have to await an evaluation of the HUD review process. The statute and regulation also highlight the burden on local advocates, resident councils and RAB members to review and bring to HUD's attention other plan elements for which there are problems. As noted above, HUD is committed to review any other plan element that has been challenged.¹⁶

In the proposed regulations, HUD justified the biannual reviews on the ground that the "limited number of units serviced by small PHAs makes it unlikely that there will be significant variations in performance from year to year and the risk of conducting [the SEMAP and/or PHAS] assessments once every other fiscal year is minimal."

Biannual PHAS and SEMAP Review for Small PHAs

The final rule is designed to deregulate small PHAs further by allowing for biannual SEMAP and PHAS assessments for, respectively, small PHAs with a voucher program and small PHAs managing public housing units. The deregulation applies to any PHA with 250 or fewer units of public housing and/or 250 or fewer vouchers. A troubled PHA is not exempt from either assessment and a PHA may elect to have its performance assessed on an annual basis. In the proposed regulations, HUD justified the biannual reviews on the ground that the "limited number of units serviced by small PHAs makes it unlikely that there will be significant variations in performance from year to year and the risk of conducting [the SEMAP and/or PHAS] assessments once every other fiscal year is minimal."¹⁷ ■

¹⁶42 U.S.C.A. § 1437c-1 (i)(2) (West Supp. 2002).

¹⁷67 Fed. Reg. 53,276, 53,277 (Aug. 14, 2002).

Supreme Court Reverses Virginia Supreme Court's Decision Based on First Amendment Overbreadth

Remands for Consideration of Other Possible Causes of Action

In *Virginia v. Hicks*,¹ the United States Supreme Court recently held that a public housing authority's (PHA) policy of limiting access to a public housing development to residents, employees and others who have "a legitimate business or social purpose" does not violate the First Amendment's overbreadth doctrine. In so doing, the unanimous Supreme Court reversed the Virginia Supreme Court and remanded the case to that court for further proceedings. While significant, the *Hicks* decision is technically very narrow and should not be seen as a categorical endorsement of trespass or banning policies.

The PHA's Trespass Policy²

The Richmond, Virginia, city council, in an effort to combat illegal drug activity in Whitcomb Court, a 441-unit public housing development owned by the Richmond Redevelopment and Housing Authority (RRHA), deeded the public streets and sidewalks within the development to the RRHA. Thereafter, the RRHA began to regulate which individuals could enter the premises. Under the RRHA's trespass policy, the PHA and the police are given complete discretion to decide whether to ban an individual from the development when that individual is not a resident, employee, or deemed by the resident manager or police to have a legitimate business or social purpose.³ Once the resident manager or a police officer decides that in his or her opinion an individual does not belong on the premises, the individual is given either an oral or written warning at the time of entry. This "barment notice" indicates that the individual is banned from and may not reenter the premises, or else he or she will be arrested for trespassing.⁴ There is no grievance procedure that allows those given the notice to protest it. Further, it is not clear who decides to allow individuals into the development in cases where an individual seeks to disseminate materials or

¹*Virginia v. Hicks*, 123 S.Ct. 2191 (2003).

²For a detailed discussion of the RRHA's trespass policy, see *Supreme Court to Review PHA's Trespass Policy*, 33 HOUS. L. BULL. 37 (Jan. 2003).

³Although the Court refers to an "unwritten policy" giving the resident manager the discretion to decide which individuals may enter the development, there is no such "policy" in the record. The Court's characterization of the term "unwritten policy" makes the reader believe that there is a policy other than complete discretion.

⁴*Commonwealth v. Hicks*, 563 S.E.2d 674, 678 (Va. 2002).

⁵*Hicks v. Commonwealth*, 548 S.E.2d 249, 252 (Va. App. 2001).

participate in an activity. The PHA has no policies or procedures that govern decisions regarding who may distribute materials or participate in activities on the premises.

Facts and Procedural History of the Case

Respondent, Kevin Hicks, is not a resident of Whitcomb Court, although his mother, his baby and his baby's mother all lived in the development. Mr. Hicks was twice convicted for trespassing at Whitcomb Court and, thereafter, was issued a notice barring him from the development.⁵ On two later occasions he sought permission to reenter the development, which were denied by Mrs. Gloria Rogers, the resident manager.⁶ When he entered the development again he was again arrested and convicted for trespass. On appeal of his conviction, a three-judge Virginia appellate court panel rejected Hicks' argument that RRHA's policy limiting access to Whitcomb Court was both unconstitutionally overbroad and void for vagueness.⁷ *En banc*, the Court of Appeals reversed, holding that the streets of Whitcomb Court were a "traditional public forum." It vacated Hicks' conviction because the RRHA policy violated the First Amendment.⁸ The Virginia Supreme Court affirmed the *en banc* decision on different grounds and did not decide whether the streets of Whitcomb Court were a public forum.⁹ Instead, it found that although the RRHA policy was designed to punish activities not protected by the First Amendment, the trespass policy also prohibited speech and conduct clearly protected by the First Amendment. The court held that the policy was invalid because it placed too much discretion in Whitcomb's manager to determine whether an individual's presence at Whitcomb Court is authorized.¹⁰ More specifically, the discretion allowed the resident manager to base her decisions on whether she found the speech personally distasteful or offensive even though the First Amendment may protect such speech.

The United States Supreme Court Decision

The United States Supreme Court granted *certiorari* to review the Virginia Supreme Court's decision.¹¹ The Court held that Hicks did not meet his burden of proving that the RRHA trespass policy was *substantially* overbroad. Based on the Court's prior decision in *Broadrick v. Oklahoma*, it held that when the claimant seeks to overturn a statute, arguing that it is overbroad based on the statute's effect on that individual's *conduct*, the law's application to protected speech should be substantial. Substantiality must exist not only in the absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the "strong

medicine" of overbreadth invalidation.¹² In addition, the claimant bears the burden of proving that the entire trespass policy is substantially overbroad in relation to its legitimate applications.¹³

In *Broadrick*, the Court held that the overbreadth doctrine's function attenuates as the otherwise unprotected behavior it forbids the state to sanction moves from "pure speech" toward conduct.¹⁴ Further, the overbreadth doctrine's function is also lessened when the conduct, even if expressive, falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Thus, when the unprotected behavior at issue is conduct, the Court requires that "overbreadth of a [policy] must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."¹⁵

The *Hicks* Court held that Hicks did not demonstrate that the policy was substantially broad, even assuming the unlawfulness of the Whitcomb's manager's complete discretion over the entry of leafleters and demonstrators. Specifically,

homa, 413 U.S. 601 (1973).

¹³See *New York State Club Assn. Inc. v. City of New York*, 487 U.S. 1, 14 (1988).

¹⁴*Broadrick*, 413 U.S. at 615.

¹⁵*Id.*

HUD Publishes New Public Housing Occupancy Guidebook

In June of 2003, the Department of Housing and Urban Development (HUD) released a new version of the *Public Housing Occupancy Guidebook*. It is a complete revision of an earlier handbook first published more than 20 years ago. The guidebook is designed as a reference tool on public housing occupancy issues for public housing and HUD staff. Obviously it will also be a critical tool for advocates representing applicants and residents of public housing. The guidebook includes separate chapters on civil rights and nondiscrimination requirements, admission, waiting list administration, admission qualification and applicant selection criteria, occupancy guidelines, processing applications and unit assignment, verification standards, tenant selection and assignment, leasing, income and program rents, transfers, annual income recertification, interim rent adjustments, utilities, community service and economic self-sufficiency, pet policies, lease requirements, tenant grievance procedures, and domestic violence. In promoting the guidebook, HUD publicized the fact that it also includes new guidelines on earned income disallowance and imputed income from assets.

The Public Housing Occupancy Guidebook is available online at www.hud.gov/offices/pih/programs/ph/rhiip/phguidebook.pdf.

⁶*Id.*

⁷*Hicks*, 535 S.E.2d at 678.

⁸*Hicks*, 548 S.E.2d at 251.

⁹*Hicks*, 563 S.E.2d at 674.

¹⁰*Id.* at 681.

¹¹*Virginia v. Hicks*, No. 02-371 (U.S. Sup. Ct. review granted Jan 24, 2003).

¹²*Virginia v. Hicks*, 2003 WL 21372487 (June 16, 2003); see *Broadrick v. Okla-*

Hicks failed to show that the barment notice that he was given would be given to *anyone* engaged in constitutionally protected speech. The Court based its holding in part on Whitcomb's manager's testimony that leafleting and demonstrations are permitted at Whitcomb Court, so long as permission is obtained in advance, thereby including the entrance of those individuals in the "legitimate business and social purpose" category.¹⁶ The Court reasoned that Hicks failed to show that *any* First Amendment activity falls outside the legitimate business and social purposes because all that Hicks demonstrated was that until one receives a barment notice, entering for a First Amendment purpose is not a trespass.

The Court further held that Hicks did not meet his burden of showing that an arrest resulting from a post-barment entry for a constitutionally protected purpose violates the First Amendment. The Court reasoned that because the notice-barment rule subjects to arrest those who reenter after trespassing and after being warned not to return, even if they seek to engage in constitutionally protected speech, the arrest punishes the conduct of post-notice trespass and therefore does not implicate the First Amendment. Essentially, the Court found that it was Hick's post-notice trespass—not his speech—that triggered his arrest for trespass. Disturbingly, even if the conduct that led to the original barment were protected as First Amendment speech, the Court appears to suggest in this opinion that it would uphold an arrest based on the unlawful barment. Unfortunately, the Court's reasoning avoids the issue of whether the barment policy is problematic in and of itself and focuses solely on the subsequent violation of the barment notice.

What the Court emphasizes is the fact that the notice-barment rule and the "legitimate business or social purpose" rule apply to all persons who enter the streets of Whitcomb Court, noting that the rules do not just apply to those who seek to engage in free speech. The Court used examples such as strollers, drug dealers and roller skaters to show possible legitimate applications of the policy and then concluded that the many legitimate applications "seemingly far outnumber First Amendment speakers."

How Substantial Is Substantial for Overbreadth Purposes?

The substantially overbroad standard applied here leaves open exactly how substantial the overbreadth must be to meet this standard. For example, may the claimant show that a few classes of individuals who wish to engage in constitutionally protected speech will be denied entry or must the claimant show that most constitutionally protected individuals will be denied entry? Although the Court later defines

¹⁶Although the Court automatically assumes that leafletors and demonstrators can be grouped with those who have a "legitimate business or social purpose." The Court does so without proper substantiation. The fact that the leafletors and demonstrators are not specifically included in the statutory meaning of "legitimate business or social purpose" combined with the evidence that the resident manager has complete discretion to decide whether to permit entry of these individuals shows that leafletors and demonstrators are purposely not included in the policy's vague definition of "legitimate business or social purpose."

substantial as a group that would "seemingly far outnumber First Amendment speakers," the Court seems to alter the substantiality standard in the earlier part of its analysis where it holds that Hicks failed to demonstrate that barment notice would be given to *anyone* engaged in constitutionally protected speech. Here, in its application of substantial in the absolute sense, the Court impliedly lowers the threshold from "seemingly far outnumber" to a standard of substantial that can mean anything from at least one to several protected speakers.

Another question that remains is what evidence is required to substantiate the assertion that many constitutionally protected individuals will be denied entry under a similar policy. For example, here the Court relied on the Whitcomb resident manager's testimony to substantiate its holding that leafletors and demonstrators will not be denied entry to the Whitcomb Court. Should there have been a stronger showing than speculative testimony from a PHA employee to counter arguments that persons with First Amendment interests would be denied entry from the premises?

In *Broadrick*, the Court held that a statute that regulated political activities by state employees was not substantially overbroad because the statute regulated a substantial spectrum of conduct that is "manifestly subject to state regulation as the public peace or criminal trespass." Further, the Court specifically listed numerous applications in which the statute is valid. In contrast with the *Hicks* Court's general conjectural examples of individuals potentially affected by the policy, the *Broadrick* Court pointed to specific applications of conduct that the statute was intended to address as evidence of a substantial number of legitimate applications.¹⁷

The Court remanded the decision to the Virginia Supreme Court to decide whether Hicks may challenge his convictions on other grounds. The Court emphasized that future applications of the RRHA policy that violate the First Amendment can still be remedied through as-applied litigation and that the Virginia Supreme Court should not have used the "strong medicine" of the overbreadth doctrine to invalidate the *entire* RRHA trespass policy.¹⁸ Hicks and several *Amici* argued that other constitutional arguments invalidate RRHA's trespass policy. These arguments include: the trespass policy violates the First Amendment because the Whitcomb Court is a public forum (despite the deeding of the streets to RRHA); the trespass policy violates the Due Process Clause because the policy is void for vagueness and violates the right to travel freely on the public streets; and the trespass policy violates the Constitutional right to intimate association. These arguments remain open for future litigants to pursue.

¹⁷*Broadrick*, 413 U.S. at 616-17. The *Broadrick* Court held that "...there is no question that [the statute] is valid at least insofar as it forbids classified employees from: soliciting contributions for political candidates, political parties, or other partisan political purposes; becoming members of national, state or local committees of political parties, or officers or committee members in partisan political clubs, or candidates for any paid public office; taking part in the management or affairs of any political party's partisan political campaign . . .". The Court listed several other specific applications of the statute and cited to the statute, authoritative opinions, and regulations as the source of the proscriptions.

¹⁸*Hicks*, WL 21372487 at 9.

Conclusion

In light of the fact that Hicks did not claim to enter the RRHA property for First Amendment purposes, did not show that his barment was wrongful in that his prior entries were protected by the First Amendment and that a resident of Whitcomb Court did not challenge the basis for excluding Hicks from visiting or associating with that resident, and in light of the fact that the Court remanded the case for further consideration on other grounds, the *Hicks* decision is very narrow. It should not be interpreted as giving PHAs authority to ban all persons from their properties without consideration of either the First Amendment or due process rights of either visitors or of residents. ■

HUD Issues New Occupancy Handbook for Subsidized Multifamily Programs

In mid-June, HUD issued a revision of its Occupancy Handbook, its first complete revision in over 20 years.¹ This 850-page document serves as a subregulatory reference guide and manual for owners, tenants and HUD staff who participate in a variety of HUD's privately owned multifamily subsidized housing assistance programs, such as project-based Section 8 and Section 236. The revised Handbook contains significant statutory, regulatory and policy changes that occurred since its last modest revision in 1995.² In the last eight years much had changed, particularly in light of laws such as the *Quality Housing and Work Responsibility Act of 1998* and implementing regulations, and thus many sections were outdated or inaccurate.

The Handbook applies to most HUD privately owned multifamily rental housing programs, including various forms of project-based Section 8, Section 202/811, and subsidized mortgage insurance programs such as Section 221(d)(3) BMIR and Section 236. In May of 2002, HUD published a Federal Register notice of the pending revisions and briefly posted a draft of the revisions during a very short 10-day comment period.³ In July of 2002, HUD also issued a revised model lease,⁴ prior to completing these recent revisions to the overall Handbook.

Due to the enormous size of the Handbook, we have not yet been able to compare the new version with its predecessor.

¹Department of Housing and Urban Development, Handbook 4350.3 REV-1, "Occupancy Requirements of Subsidized Multifamily Housing Programs," (June 2003) (hereafter "HUD Handbook 4350.3").

²HUD Handbook 4350.3, Transmittal (June 2003).

³Notice of Availability of Revised HUD Occupancy Handbook and Request for Comments, 67 Fed. Reg. 35,700 (May 20, 2002).

⁴HUD Handbook 4350.3, CHG-30, App. 19a (July 2002); the model lease has now been established as App. 4A (June 2003).

sor. We did, however, review the new Handbook to see if HUD incorporated any of the recommendations submitted last year in response to its request by the National Alliance of HUD Tenants (NAHT) and the Housing Justice Network (HJN), as well as the comments of the Consortium for Citizens with Disabilities (CCD). Although incorporating several of NAHT/HJN's and CCD's specific suggestions, HUD repeatedly failed to address many other important issues, such as the need to emphasize penalties for owner violations, the importance of providing leases and notices in different languages for tenants for whom English is not a primary language, and tenants' access to information. As a result, HUD's revisions may impair its professed intent that the Handbook serve both owners and tenants.⁵

The Good News

In the revised Handbook, HUD has incorporated various helpful changes that make the document easier to navigate and to understand. It added visual aids, highlighting and simplifying important points sometimes obscured by text verbiage, thus making key information more accessible to those unfamiliar with HUD regulations. In addition, HUD devotes a full chapter to civil rights and non-discrimination compliance,⁶ hopefully demonstrating the importance of abiding by civil rights laws. An additional improvement is the clarification that the Model Lease provides a mandatory minimum or "floor" for tenants' rights, and that state and local law can raise but not lower the prescribed federal standard.⁷ Also, HUD addressed some of the CCD's comments regarding removal of inaccurate phrases,⁸ or the inclusion of more precise standards, such as the requirement that 5 percent of certain units be accessible to people with mobility impairments and 2 percent of certain units be accessible to people with hearing and vision impairments.⁹ In addition, HUD completely revised its section on "Eligibility Requirements for Admission to Elderly Projects Under Section 658," which CCD believed to be the core of HUD's mistaken policies that illegally discriminated against people with disabilities in this subset of elderly properties. These changes improve HUD's compliance with Title VI-D of the *Housing and Community Development Act of 1992*,¹⁰ among other statutes.

⁵HUD Handbook 4350.3, at p. 1-1 (June 2003).

⁶*Id.*, Chapter 2.

⁷*Id.* at 8-13.

⁸For example, CCD asked that HUD remove a statement in paragraph 2.5(b)(5) of Chapter 2 that suggested that owners need not change their screening or eligibility standards in order to fulfill their affirmative obligation to provide reasonable accommodations to people with disabilities. HUD reversed its stance and the sentence now reads: "... an owner may have to modify rules, policies, practices, procedures and/or services to afford a person with a disability an equal opportunity to use and enjoy the housing." *Id.* at 2-5.

⁹*Id.* at 2-18.

¹⁰*Housing and Community Development Act of 1992*, Pub. L. No. 102-550 (1992); Section 658 is codified at 42 U.S.C. § 13618 (2003).

Another improvement is that HUD also specifies that tenants who have been over-paying rent can receive retroactive reimbursements,¹¹ and that owners should distribute allowable income exclusion and deduction information so that tenants can determine if they are paying too much.¹² In addition, HUD now states that tenants need not report increases in monthly income until they reach \$200 per month. The prior \$40 increase reporting threshold was very cumbersome, for tenants and managers had to constantly report and process income and rent changes triggered by such a narrow wage range.¹³ All of these above changes to the Handbook improve its utility and promote smoother operations for multifamily housing.

HUD's revisions failed to incorporate many tenant recommendations, including those related to enforcement of various discrete rules, recommending that HUD specify the possible monetary and legal sanctions for owner violations.

What's Missing?

HUD's revisions failed to incorporate many tenant recommendations. One of the most important repeated suggestions made by NAHT/HJN concerned enforcement of various discrete rules, recommending that HUD specify the possible monetary and legal sanctions for owner violations. Although the Handbook includes various examples of tenant transgressions and owner remedies—such as eviction or termination of subsidies—it regularly avoids reciprocity concerning penalties for material owner non-compliance with HUD rules. Similarly, CCD had requested that HUD state in the Handbook that it will review owners' tenant selection plans and periodically monitor owner compliance pursuant to Title VI-D. HUD, however, declined to do so. In addition, tenants had requested that HUD specify that the penalty for illegal wait-list manipulation is a fine of up to \$30,000 for each violation, pursuant to 24 C.F.R. 30. HUD instead chose only to mention civil monetary penalties (one of the few methods of sanction available for ongoing regulatory violations) once in the first chapter, in noting that owners "failing to perform required functions," may be subject to "civil

¹¹HUD Handbook 4350.3, at 8-27 (June 2003).

¹²*Id.* at 5-79 through 5-82.

¹³Although HUD should be applauded for changing the threshold increase for reporting to \$200 monthly, it should be noted that despite NAHT/HJN requests, HUD did not clarify that tenants face no sanctions if they fail to report any *decrease* in income, regardless of amount, although it is to their benefit to do so.

money penalties" and administrative and criminal remedies.¹⁴ Thus owners will usually remain unaware of specific instances when their conduct is illegal, and unaware of their possible punishment, diluting any deterrent effect.

HUD also declined to include any directive that documents involving tenants be written in languages other than English where necessary, pursuant to Limited English Proficiency (LEP) guidelines.¹⁵ Unfortunately, tenants do not have a concrete statutory or regulatory right to have their leases translated into their native languages.¹⁶ However, a tenant's lack of English proficiency is obviously problematic when it comes to understanding requirements in a lease agreement, or identifying important provisions in an owner-issued notice. Misunderstanding either document has serious consequences—it could result in a suspension of a tenant's housing assistance or even eviction. Though tenant non-compliance resulting from language misunderstandings could be easily remedied with translated leases and notices, HUD makes no effort to require owners to provide translations or even suggest their use.

Apart from improving LEP compliance, HUD also failed to include various resources that would assist people with disabilities to use the multifamily rental programs. For example, CCD noted that the Office of Multifamily Housing had pledged to generate both a list of properties that accept and those that restrict occupancy of people with disabilities. CCD requested that the inventory of properties be completed, that the findings be posted on the Internet for the public's use, and that HUD include the internet address in the listing of additional program resources at the end of the first chapter. Although HUD did compile this listing,¹⁷ it neglected to mention its existence or include the URL address in the Handbook, making it more difficult to find the information on HUD's Web site. Persons with disabilities will therefore usually be unaware of possible housing that could accept or restrict their admission.

Another problematic area that could have benefited from greater direction from HUD concerns the common issue of additions to household composition, yet again HUD remains largely silent on specifics. While noting the obvious that owners must screen proposed additional household members, including live-in aides, for drug abuse and other criminal activity, and that owners may establish additional

¹⁴"The failure of owners to perform required functions as prescribed in this Handbook may result in civil money penalties as detailed in 24 C.F.R. part 30. Such action does not preclude the application of administrative, as well as criminal remedies where warranted." *Id.* at p. 1-3.

¹⁵Exec. Order No 13166, 65 Fed. Reg. 50,121 (Aug. 16, 2000).

¹⁶Although a landlord may be sued for refusing to translate a lease under a claim of national origin discrimination, there have been a few cases that suggest this cause of action is not likely to prevail. *See Veles v. Lindow*, 243 F.3d 552, 2000 WL 1807851 (9th Cir. 2000); *Vialez v NYCHA*, 783 F. Supp.109 (S.D.N.Y. 1991); *Sandoval v. Hagan*, 121 S.Ct. 1511 (2001) (no private right of action to enforce disparate-impact regulations promulgated under Title VI, but not precluding a tenant's right to sue for intentional discrimination, which may have manifested itself through non-LEP compliance).

¹⁷Multifamily Inventory of Units for the Elderly and Persons with Disabilities: www.hud.gov/offices/hsg/mfh/hto/inventorysurvey.cfm.

screening criteria for proposed additions,¹⁸ HUD fails to establish any clear standards or procedures to guide owners and tenants beyond a few basic rules. HUD does state that landlords cannot discriminate against “families that are planning to adopt, and families that have or are planning to have foster children or to become guardians of children,”¹⁹ but there is no discussion about the inclusion of adding other children, including adult children, or other relatives, partners or members to a household. Similarly, HUD does not discuss what happens when families break up, as in cases of divorce, separation, or related situations. Although the Handbook does address what should occur upon the death of a household member,²⁰ it does not cover common scenarios where the household head’s death leaves only minors in residence, with the possibility for a guardian or other adult joining the household as head.

Another serious omission involves the tenants’ right to organize and form associations to further their rights and interests. HUD recognizes this right insofar as it requires owners to state it in the lease, but does not elaborate upon it in the Handbook.

Another serious omission in HUD’s revised Handbook involves the tenants’ right to organize and form associations to further their rights and interests. HUD recognizes this right insofar as it requires owners to state it in the lease,²¹ but HUD does not elaborate upon this right or mention it within the text of the Handbook itself. The model lease states that the “Landlord agrees to allow tenant and tenant organizers to conduct on the property the activities related to the establishment or operation of a tenant organization set out in accordance with HUD requirements,”²² yet these “HUD requirements” are nowhere mentioned in the Handbook. Interestingly, in Chapter 3, HUD includes “legitimate tenant organization” as one of the key terms, but it is not mentioned within that Chapter or any other—only within the glossary of terms.²³

¹⁸HUD Handbook 4350.3 at p. 7-20.

¹⁹*Id.* at p. 2-3.

²⁰The remaining family member, based on the death of the family member, is eligible to remain in the unit but must pay rent based on income. In this case, eligibility of the remaining family member, as defined by the death of the family member, is not reviewed. *Id.* at p. 3-34.

²¹*Id.* at Appendix 4A.

²²*Id.*

²³The Handbook defines a Legitimate Tenant Organization as follows: “An organization established by the tenants of a multifamily housing project covered by this handbook, whose purpose includes addressing issues related to terms and conditions of their tenancy, and which meets regularly, operates democratically, is representative of all residents in the develop-

A prime example of HUD’s failure to integrate tenant organizations involves the development of house rules incorporated into the lease by reference. In stating that the creation of house rules is at the owner’s discretion,²⁴ the Handbook fails to guarantee tenant organizations any role in developing those rules, such as commenting upon any proposed new rules after notice. Without elaboration, HUD only generally requires that house rules be reasonable and not infringe on tenants’ civil rights. Additionally, HUD failed to address common house rule issues, such as allowing tenants to use their residences as home offices, and the distinction between permissible and impermissible lengths of stay for guests. This silence creates greater ambiguity and possibly conflict for tenants and landlords alike.

Another area where HUD’s revised Handbook falls short involves tenant access to their personal files and to other information, such as waiting lists. During the brief comment period on HUD’s proposed draft, NAHT/HJN noted that HUD neglected to mention that tenants must have access to their individual files upon request, particularly when adverse action is undertaken based upon the information within their files. In the final Handbook, however, HUD says nothing about a tenant’s right to view and copy his or her own file. Despite NAHT/HJN’s suggestion that tenants and legitimate tenant associations should be allowed access to waiting lists, HUD did not address these concerns. Nor did HUD incorporate CCD’s request to state that applicants have the right to review the owner’s tenant selection plan, to better inform applicants of an owner’s requirements and possibly expose selection criteria contrary to HUD policy or the other laws, especially civil rights laws.

Damage and repair charges and other fees remain a likely problem area. Although the Handbook now protects tenants from repair charges resulting from reasonable wear and tear,²⁵ it includes no language expressly prohibiting landlords from charging tenants for light bulb changes, repainting, or the repair of leaky plumbing. HUD also neglected to prohibit transfer fees when qualified tenants move into a larger or smaller unit due to change in household composition.²⁶ Tenants may thus be charged excessive or improper sums for items not their responsibility.

Although HUD devoted considerable staff hours to revising the Handbook, making some significant improvements, its potential to address many common problems between management and tenants remains largely unrealized. Tenants will continue to work with HUD for future revisions to resolve the most important of these issues. ■

ment, and is completely independent of owners, management, and their representatives.” *Id.* at Glossary p. 15.

²⁴The decision whether to develop house rules for a property rests solely with the owner, and HUD’s review or approval is not required. *Id.* at p. 6-15.

²⁵Tenants are responsible for damages that were caused by abuse, negligence, or carelessness, misuse, or neglect on the part of the tenant, household member, or visitor. HUD Handbook 4350.3 at p. 6-36.

²⁶This is an odd omission by HUD since it mentions the restriction on such fees in relation to Section 236 and BMIR Cooperatives, but not for any other type of program. *Id.* at p. 7-26.

Recent Takings Decisions on Preservation Laws Could Subject Feds to Big Liability

Background

A new chapter may have just opened in the long-running dispute concerning the legality and consequent liability of the federal government for regulating the proposed conversion of privately owned, federally subsidized multi-family properties. In two June decisions, reversing a lower court, the Court of Appeals for the Federal Circuit has held that low-income housing owners have a vested property interest in their loan prepayment options and that Congress' statutes restricting prepayment constituted a compensable taking under the Fifth Amendment,¹ potentially subjecting the government to damages. If not subsequently altered by further proceedings, other affected owners may pursue similar claims with damages running into hundreds of millions of dollars. In addition, the ruling may have substantial implications for other housing programs utilizing private ownership, as well as future political decision-making concerning antecedent contract rights.

These two decisions arose from lengthy procedural histories involving separate cases raising claims based on breach of contract, just compensation under the Takings Clause of the Fifth Amendment, and unlawful administrative actions.² Both cases involve numerous similarly situated plaintiffs; however, among these plaintiffs, only four "model plaintiffs" have completed an earlier damages trial based on their breach of contract claim (not the takings claim that is the subject of this appellate ruling) and have developed a factual record.³ The Federal Circuit's decision, and the following discussion, focuses on only the four "model plaintiffs" in *Cienega VII*, before briefly reviewing the implications for the remaining plaintiffs and other owners similarly situated.

The model plaintiff owners in *Cienega* are real estate developers who received HUD-insured and subsidized mortgages from private lenders in the early 1970s. The central component of the three-party transaction, governed in part by Sections 221(d)(3)⁴ and 236⁵ of the *National Housing Act*, was HUD's provision of mortgage insurance and interest subsidies on behalf of the owner, thus enabling lenders to extend a 40-year mortgage supported in part by the interest subsidies. In exchange, the owners agreed to construct and provide low-income housing with a variety of regulatory restrictions including tenant income levels, allowable rental rates, and a cap on the maximum rate of return.⁶ Per the terms of the regulatory agreement between HUD and the owner, the restrictions were to remain in place during the mortgage term. Moreover, HUD was permitted to amend the applicable regulations "at any time and from time to time, in whole or in part, but such amendments shall not adversely affect the interests of a mortgagee or lender..."⁷ Pursuant to HUD regulations, the owner-lender loan agreements included a provision that granted the owners the right to prepay their 40-year mortgages after 20 years,⁸ thus terminating the HUD restrictions.

As the owners' participation in the programs approached the 20-year mark, it became clear to Congress that large numbers of owners would prepay their mortgages and remove their properties from the federally assisted programs. To avert the potentially devastating impact this would have on the nation's low-income housing supply, Congress enacted the *Emergency Low Income Housing Preservation Act of 1987* ("ELIHPA") which placed a two-year moratorium on mortgage prepayments without HUD approval.⁹ Under the moratorium, HUD could only allow an owner to prepay their mortgage if it would not displace current tenants or otherwise materially increase the tenants' economic hardship.

Later, in 1990, Congress replaced ELIHPA with the *Low-Income Housing Preservation and Resident Homeownership Act* ("LIHPRHA") that extended indefinitely the restriction on prepayments, essentially revoking the owners' contract right to prepay their mortgages without HUD approval.¹⁰ Nowhere,

¹*Cienega Gardens v. U.S.*, No. 02-5050, 2003 WL 21356416 (Fed. Cir. June 12, 2003) ("*Cienega VII*"); *Chancellor Manor v. U.S.*, No. 05-5066, 2003 WL 21356428 (Fed. Cir. June 12, 2003). An owner's prepayment of the subsidized mortgage terminates the Department of Housing and Urban Development's (HUD) rent and affordability restrictions, converting the property to market-rate rental property or other uses. Under other federal laws, many affected tenants are eligible to receive "enhanced vouchers" to pay the higher rents, which owners must generally accept, if continuing to offer the property for rental use. 42 U.S.C.A. § 1437f(t) (West Supp. 2002).

²The administrative law claim was dismissed for lack of jurisdiction in *Cienega Gardens v. U.S.*, 33 Fed.Cl. 196 (9th Cir. 1995) (hereinafter "*Cienega I*"), and not included in the appeal.

³In *Cienega VII* there were a total of 42 plaintiffs; however, 38 had never been to trial and it was unclear if any discovery had occurred on their claims. In *Chancellor Manor*, the government was granted a summary judgment by the Court of Claims, thus precluding the plaintiff owners from a well-developed record in their breach of contract claim. Therefore, the cases involving the remaining plaintiffs have been remanded for further proceedings to determine whether their respective cases involve a compensable taking.

⁴*Housing Act of 1954*, Pub. L. No. 83-560, 68 Stat. 590, 597 (1954), amended by *Housing Act of 1961*, Pub. L. No. 97-70, 75 Stat. 149 (1961), codified as amended at 12 U.S.C. § 1715l(d)(3) (2000).

⁵*Housing and Urban Development Act of 1968*, Pub. L. No. 90-448, § 201(a), 82 Stat. 476, 498, 499 (1968), codified at 12 U.S.C. § 1715z-1(2000).

⁶The owners' annual return was capped at no more than 6 percent of their initial investment.

⁷*Cienega VII* at *3 n.12, citing 24 C.F.R. §236.249 (1970).

⁸Although HUD had no direct privity within the owner-lender loan or mortgage contracts, the mortgage or deed of trust notes provided that the owners could not prepay their mortgages (without HUD approval) during the first 20 years of the mortgage, but could do so "without such approval" after 20 years.

⁹Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988), codified at 12 U.S.C. § 1715l note (1988).

¹⁰Pub. L. No. 101-625, tit. VI, 104 Stat. 4249 (1990), codified at 12 U.S.C. §§ 4101 et seq.

however, does the court's opinion mention that under the preservation programs, Congress provided generous market-value based financial incentives in exchange for restricting the owners' prepayment rights.

Although the restrictions imposed under ELIHPA and LIHPRHA were effectively superceded by Congress' enactment of the *Housing Opportunity Program Extension Act of 1996*, *Cienega VII* raised the question of whether the owners have a sustainable cause of action for the temporary economic effects of ELIHPA and LIHPRHA during the eight-year period they were in effect.

Cienega VII raised the question of whether the owners have a sustainable cause of action for the temporary economic effects of ELIHPA and LIHPRHA during the eight-year period they were in effect.

Procedural History

In 1994, the first set of Model Plaintiffs filed suit against the government in the Court of Federal Claims.¹¹ The Model Plaintiffs alleged that the government's enactment of ELIHPA and LIHPRHA breached their contract with HUD by prohibiting prepayment of their mortgage loans after 20 years without HUD approval; alternatively they asserted that the federal enactments unconstitutionally deprived them of property (a "taking" under the Fifth Amendment). The government responded that there was no privity of contract between HUD and the Model Plaintiffs with respect to the prepayment because HUD was not a party to the deed of trust notes, which contained the prepayment provisions; therefore, the government could not be liable to the Model Plaintiffs for breach of contract.

The trial court initially determined that although HUD was not a named party to the deed of trust notes, except as an endorser with respect to insurance, this was not dispositive on the privity of contract issue. Consequently, the trial court concluded that the Model Plaintiffs had established privity of contract with the government through contemporaneously signed agreements, and the enactment of ELIHPA and LIHPRHA thus represented a breach of contract. Later, during a separate damages proceeding, the trial court concluded the aggregate loss to the Model Plaintiffs totaled \$3 million,¹² based solely on the breach of contract theory.

¹¹*Cienega I*.

¹²*Cienega Gardens v. U.S.*, 38 Fed.Cl. 64, 89 (1997) ("*Cienega III*").

In 1998, the Court of Appeals for the Federal Circuit vacated the breach of contract award due to a lack of privity between the Model Plaintiffs and HUD, and remanded the case to the Court of Claims for further proceedings.¹³ That court then determined that the regulatory takings claim was not ripe because the owners had failed to exhaust their administrative remedies.¹⁴ Then, in response to a second appeal, the Federal Circuit determined that the Model Plaintiffs' regulatory takings claim was ripe for adjudication (due to the "futility" exception to the exhaustion requirement) and again remanded the case to the trial court.¹⁵ Upon this second remand, the trial court ordered the parties to brief whether the holding in *Alexander Investment*,¹⁶ which had found no protectable property interests and no taking, required granting summary judgment in favor of the government. In response to the court's order, the owners conceded that, except for the question of economic impact, the legal conclusions reached in *Alexander Investment* would mandate summary judgment for the government. Consequently, the trial court *sua sponte* entered summary judgment for the government. The Model Plaintiffs then appealed for the third time, setting the stage for the most recent decision in *Cienega VII*.

Protected Property Interest

The threshold question in any takings analysis is whether the moving party has a protectable property interest. Here the Model Plaintiffs asserted property interests under two separate theories of real property and contract.

In the court's view, our legal system has long protected fee simple property interests, thus giving the owner an "inherent" set of rights, including the right to rent the property at any price someone will pay.¹⁷ The court found that Model Plaintiffs' fee simple interest in their respective apartment buildings provided a protected real property interest. Furthermore, the court concluded that this interest was not diminished through their regulatory relationship with HUD because "owners are not somehow deprived of their Fifth Amendment rights merely because they temporarily relinquished some of their rights of fee simple ownership."¹⁸

Next, turning to their contractual rights, the court stated that there is "ample precedent for acknowledging a property interest in contract rights under the Fifth Amendment."¹⁹

¹³*Cienega Gardens v. U.S.*, 194 F.3d. 1231 (Fed.Cir. 1998) ("*Cienega IV*").

¹⁴*Cienega Gardens v. U.S.*, 46 Fed. Cl. 506 (2000) ("*Cienega V*").

¹⁵*Cienega Gardens v. U.S.*, 265 F.3d. 1237 (Fed. Cir. 2001) ("*Cienega VI*"). The court there also held that the statutes were not a *per se* taking under the physical occupation doctrine.

¹⁶In *Alexander Investment v. U.S.*, 51 Fed.Cl. 102 (2001), a case with similarly situated plaintiffs, the same trial judge, Judge Hodges, had ruled that the plaintiffs had no property interests that could have been taken by the government because (1) the contractual prepayment rights in the mortgage were not vested at the time of the alleged taking, and (2) HUD had reserved the right to amend its regulations.

¹⁷*Cienega VII* at *5.

¹⁸*Id.* at *6.

¹⁹*Id.*

In the present case, the court concluded that the mortgage loan contract provided the owners with “unequivocal contractual rights after twenty years to prepay their mortgages; thus they had a property interest in those rights,”²⁰ unaffected by their existence within several different contracts executed by multiple parties. Furthermore, these contractual rights were vested when the contracts were signed because there were no explicit provisions to the contrary, nor were there any conditions precedent or subsequent.

The court likened Congress’ enactment of ELIHPA and LIHPRHA to a holdover tenant staying beyond the term of the contracted leasehold, thus constituting a physical invasion, although the same court had earlier rejected such a per se takings claim

For its part, the government had continued to assert its general contention, which had been previously accepted by most courts, that enforceable property rights cannot arise from contracts that are voluntarily entered into, especially when the government has expressly reserved the right to change the rules and thereby freely amend the contractual terms, thus making the entire agreement “subject to pervasive Government control.” The court flatly rejected this central argument, characterizing the government’s position as enabling absolute power to revise the terms of the agreements. For the court, accepting that position would “eviscerate century-old understandings of the stable and enduring nature of contract and real property rights.”²¹

Penn Central Takings Analysis

State and federal governments have the power of eminent domain to take private property for public use, so long as just compensation is paid. This is normally done through condemnation proceedings initiated by the government, where compensation is judicially determined. But over the years, courts have developed the doctrine of “inverse condemnation,” where the government’s regulatory enactment is of such a character that compensation is required. Thus, under either scenario, the Takings Clause of the Fifth Amendment requires that just compensation be paid.

The controversial issue is of course exactly when the regulation constitutes a taking requiring compensation. A government regulation is not a taking simply because it somewhat reduces the market value of an owner’s property,

²⁰*Id.*

²¹*Id.* at *7.

because as Justice Holmes explained: “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”²² Nevertheless, while this may be the general rule, “if regulation goes ‘too far’ it will be characterized as a taking.”²³

Today, courts use the following three-factor analysis (derived from *Penn Central*²⁴) to determine whether a regulatory enactment has gone “too far” and thus constitutes a compensable taking: (1) the character of the governmental action, (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation interfered with distinct investment-backed expectations.

Character of Governmental Action

The first phase of the *Penn Central* analysis often involves a balancing of interests, those of the private property owner as compared with the Government’s need to protect the general public, and generally a taking is more readily found upon the government’s physical invasion of private property.²⁵ In the present case, the owners claimed that the preservation laws limited their rights to exclude low-income tenants paying restricted rents and their rights to rent or sell to others. The court generally agreed, likening Congress’ enactment of ELIHPA and LIHPRHA to a holdover tenant staying beyond the term of the contracted leasehold, thus constituting a physical invasion,²⁶ although the same court had earlier rejected such a *per se* takings claim in *Cienega VI*. Therefore, although these actions clearly benefit the general public, they were considered “the kind of expense-shifting to a few persons that amounts to a taking,” especially when alternatively the taxpayers could have shouldered the burden.²⁷ Underlying the court’s analysis here was a mistaken assumption that the restrictions prevented the owner from receiving market-value rents.²⁸ This view is quite the opposite of what the federal preservation program actually provided, with the taxpayers “shouldering the burden” through increased financial incentives for owners to continue in the program or sell to others who would.

The government argued that the enactments did not amount to takings because they were not permanent in nature. However, the court rejected this contention by concluding, “a taking need not be permanent to be compensable....Another twenty years in the housing program, double the time agreed, may not have been permanent but it was substantial.”²⁹

²²*Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158,159 (1922).

²³*Pa. Coal*, 260 U.S. at 415, 43 S.Ct. at 160.

²⁴*Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646 (1978).

²⁵*Cienega VII* at *13.

²⁶*Id.*

²⁷*Id.*

²⁸*Id.* at *13 (“requiring the owners to continue to rent their properties at below-market rents to government-approved low-income tenants beyond 20 years...”).

²⁹*Id.* at *14.

Economic Impact

The second phase of the *Penn Central* analysis requires a finding of serious financial impact. This is intended to ensure that government regulation is not constantly subject to takings claims; however, there is no magic amount that will automatically guarantee compensation. In the present case, the Model Plaintiffs had previously established the economic impact of ELIHPA and LIHPRHA during the earlier trial on damages for their later-rejected contract claim, and the government had not challenged the appropriateness of those findings. Thus, the court concluded that it could proceed without resorting to another remand, and that those earlier findings were dispositive on the issue. Based on that prior information, the court determined that the impact of the prepayment restriction on the Model Plaintiffs amounted to a 96 percent³⁰ loss of return on equity, “even under the most conservative view, a serious financial loss.”³¹ On this point, the court nowhere mentions the additional financial benefits (higher market value, equity take-out loans, etc.) provided under LIHPRHA.

In dealing with the issue of economic impact, the court rejected a number of the government’s arguments, including the contention that the Supreme Court’s recent *Tahoe-Sierra*³² decision precludes a takings claim if the claimant’s property is only temporarily rendered “valueless”³³ under the government restriction. Contrary to the government’s reading, the court interpreted *Tahoe-Sierra* to require that anything less than a complete elimination of value requires the parties to employ a *Penn Central*-type analysis; therefore, *Tahoe-Sierra* does not preclude an owner’s recovery, it simply requires the owner to seek recovery under a more traditional *Penn Central* analysis.³⁴

Reasonable Investment-Backed Expectations

The final phase of the *Penn Central* analysis requires the claimant to demonstrate that “they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.”³⁵ Therefore, this final phase is

³⁰This amount was calculated from the Model Plaintiffs’ total annual HUD-restricted rental income (\$45,741) at the time of prepayment eligibility and the property’s unrestricted net fair market value at the time of eligibility (\$17,452,045), equating to a rate of return of 0.3 percent. Therefore, compared to the 8.5 percent rate of return then available through an average low-risk bond fund, the loss of return on equity equates to 96 percent. *Cienega VII* at *16.

³¹*Id.* Here, the court not only isolates the prepayment right as the property taken, but also apparently confuses a reduction in annual financial return on equity (albeit incorrectly analyzed without regard to the higher return provided under LIHPRHA’s provisions) with an equivalent diminution in value.

³²*Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465 (2002).

³³In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992), Justice Scalia, writing for the court, concluded that the legislature cannot enact a statute that renders an owners property “valueless” without just compensation, unless the legislative action has background principles based on nuisance and/or property law that prohibit the intended use in the circumstances in which the property is presently found.

³⁴*Cienega VII* at *18.

³⁵*Cienega VII* at *19.

often a “fact-specific inquiry into what, under all the circumstances, the owners should have anticipated.”³⁶ The trial court had found that, apparently despite the HUD regulation reserving the power to change the rules, the Model Plaintiffs’ business plans included a higher rate of return after the initial 20 years (*i.e.* upon entry into the commercial market or sale of their respective properties). Furthermore, the court observed that all four of the Model Plaintiff properties were “located in middle class neighborhoods and, in general, are equal to or surpass the quality of the neighboring properties in each area.”³⁷ Therefore, based on this evidence, the court concluded that the Model Plaintiffs intended, from the beginning, to prepay their mortgages and convert their properties to conventional rental units at the first opportunity.

The court rejected the government’s argument that the Supreme Court’s recent Tahoe-Sierra decision precludes a takings claim if the claimant’s property is only temporarily rendered “valueless.”

The government focused its argument on the notion that, due to the regulatory nature of the subsidized housing industry, including the reserved right to amend the rules, the Model Plaintiffs could not have *reasonably* expected to prepay their respective loans and terminate their relationship with HUD when the nation continued to face a shortage of low-income rental housing. However, the court dismissed this argument by concluding that while a claimant’s reasonable expectations may be reduced within a regulated industry, “this is not a blanket rule that disqualifies parties’ expectations without inquiry.”³⁸ Therefore, finding insufficient evidence that the housing programs were “highly regulated,” in spite of the regulatory reservation, the court found the Model Plaintiffs’ investment-backed expectations “reasonable” under the circumstances. The Federal Circuit’s attempt to distinguish the trial court’s reliance on the Eighth Circuit’s holding of no compensable taking in *Parkridge Investors*³⁹ is unconvincing, because LIHPRHA provided eventual compensation similar in kind to that for Rural Housing Services properties at issue there, after pursuing a federally required process.

³⁶*Id.*

³⁷*Id.* at *20.

³⁸*Id.* at *23.

³⁹*Parkridge Investors Ltd. Partnership v. Farmers Home Administration*, 13 F.3d 1192 (8th Cir. 1994).

Based on the court's finding that the Model Plaintiffs had a protectable property interest in their mortgage prepayment rights and they satisfied all three phases of the *Penn Central* analysis, their original damage award of \$3 million was reinstated. However, the claims of the remaining 38 plaintiffs under both *Cienega VII* and *Chancellor* were remanded for further proceedings because neither record was developed, specifically on the issues of the plaintiffs' investment-backed expectations for takings liability, and the actual damages. Furthermore, the court cautioned that other evidence on remand may negate the reasonableness of the owners' expectations.⁴⁰ Private placement memoranda emphasizing various fees and tax benefits might prove especially useful to counter likely self-serving testimony concerning long-term appreciation prospects usually offered by owners concerning their expectations almost 30 years ago.

Conclusion

There are several questionable aspects to the court's decision in *Cienega VII*. These include: (1) the rejection of the relevance of the government's regulatory reservation, (2) the failure to fully analyze the impact of LIHPRHA's generous financial benefits on the required elements for establishing the takings claim, and (3) the incorporation for takings analysis of the trial court's earlier 1997 findings on damages, which were made in the context of the rejected contract claim, including the implicit adoption of the trial court's finding that the City of Los Angeles' rent control law was pre-empted by federal law. Because of the precedential nature of the analysis and the enormous potential liability to the government, it would be surprising if the federal government failed to pursue a rehearing *en banc* before the entire Federal Circuit (within 45 days of entry of judgment) or other steps to obtain review, such as a filing petition for certiorari with the Supreme Court. Future issues of the *Bulletin* will report on major new developments in the proceedings. ■

Owner Must Comply with ELIHPA When Prepaying Section 515 Loan

A Missouri federal district court recently held that a housing authority that sought to prepay its Section 515 Rural Housing Service (RHS) loan in order to demolish a 50-unit development financed by that loan could not prepay its loan without first complying with the prepayment restrictions imposed by the *Emergency Low Income Housing Preservation Act of 1987* (ELIHPA).¹ In so holding, the court granted summary judgement in favor of the Rural Housing Service, which was a defendant in the case. Unfortunately, the court also ruled that residents of the development could not enforce ELIHPA directly or under Section 1983 against the owner, the Charleston Housing Authority.

The *Hines* case arose in 2000 when the Charleston Housing Authority (CHA), operating in Charleston, Missouri, began to vacate its Section 515 rural rental housing development by transferring its residents to public housing and threatening to evict those residents who did not want to move. After adopting a deconcentration policy, CHA filed a prepayment request with RHS in order to prepay the balance of its 50-year loan, which was not scheduled to be paid in full until 2031. In fact, CHA had prepaid principle on the loan periodically and only a small balance remained outstanding when CHA formally applied to prepay. RHS responded by advising CHA that it could not process the prepayment request until CHA submitted additional information. At the same time, it advised the residents of CHA's prepayment request. CHA did not respond to the request for additional information; instead, it transmitted to RHS the balance due on the loan, which RHS returned. RHS subsequently informed CHA that its prepayment would have an adverse impact on minority housing opportunities and that CHA would therefore be required to advertise the development for sale to a nonprofit or public agency. In response, CHA withdrew its prepayment request and initiated litigation against RHS, claiming that it had an absolute right to prepay the loan without regard to ELIHPA. Subsequently, several of the remaining residents initiated a separate action against RHS, CHA and HUD, which subsidized the development through a Section 8 contract. The residents' action sought declaratory relief against RHS, sought to enjoin CHA from prepaying the loan under ELIHPA and Section 1983, alleged that CHA violated the *Fair Housing Act* and sought to enjoin HUD from allowing CHA to terminate the Section 8 contract that was about to expire. The CHA action against RHS and the residents' actions were consolidated and the residents' motion for a preliminary injunction was rejected when CHA agreed to maintain the status quo by allowing the remaining residents to live at the development at their subsidized rents.

⁴⁰*Cienega VII* at *28.

¹*Hines v. Charleston Housing Authority*, No. 1:01CV70CDP (May 5, 2003).

Over a year later, CHA and the residents filed cross motions for summary judgment on several of their claims and RHS advised the court to consider its response to CHA's motion for summary judgment as a cross motion for summary judgment. Initially, the court refused to rule on the parties' cross motions, claiming that there were factual issues in dispute, but after the parties filed a joint stipulation of facts and asked the court to reconsider its denial of the motion for summary judgment, the court issued its order.

The overarching issue for the court was whether ELIHPA applied to the CHA prepayment request. Clearly, there was a conflict between CHA's loan documents and ELIHPA's implementing regulations, which required CHA to comply with the prepayment process before it could pay off the loan.

The overarching issue for the court was whether ELIHPA applied to the CHA prepayment request. Clearly, there was a conflict between CHA's loan documents, which were entered into prior to the passage of ELIHPA and included a right to prepay, and ELIHPA and its implementing regulations, which required CHA to comply with the prepayment process before it could pay off the loan. CHA argued that ELIHPA did not apply to its loan because its request to pay off the very small loan balance was not a prepayment but rather a regularly scheduled payment and because the government had contracted away its right to enact legislation or regulations that were inconsistent with the unconditional right to prepay that was incorporated in the promissory note.

The court rejected both of CHA's arguments. Applying *Parkridge Investment Ltd. v. Farmers Home Administration*,² in which the Eighth Circuit interpreted a loan agreement identical to that of the CHA, the court ruled that the government did not contract away its right to alter the loan agreement through subsequent legislation. Thus, it rejected CHA's argument that ELIHPA does not apply to the CHA contract and modifies the unconditional prepayment obligation.

The court also rejected CHA's effort to avoid ELIHPA's reach by characterizing the payment as a scheduled installment payment that would coincidentally pay off the loan. It found that there was no support for the distinction that CHA was trying to draw and that ELIHPA, although not defining the term "prepayment," was intended to prevent the satisfaction of loans prior to the loan's maturity date. Finding support for that interpretation in the RHS regulations, the

court held that a payment that prematurely satisfies the loan is a prepayment that is subject to ELIHPA. In so holding, the court rejected CHA's invitation to follow the dictum in the Ninth Circuit's opinion in *Kimberly Associates v. United States*, 261 F.3d 864 (9th Cir. 2001), which suggested that a Section 515 owner may be entitled to prepay a loan as part of a state quiet title action. Contrary to CHA's contention, the court concluded that *Kimberly* simply held that a Section 515 owner is not barred from proceeding against the government on a quiet title action when the government refused to accept the final payment under the loan. *Kimberly* did not decide whether ELIHPA applied to and modified an owner's right to prepay. Accordingly, the court ruled against CHA on all of its claims against RHS and held that before CHA can prepay its loan it is obligated to comply with ELIHPA, which it admitted not to have done.

Turning to the residents' claims against CHA, the court held that they were not entitled to enforce ELIHPA against the owner under Section 1983. Relying on the Supreme Court's decision in *Gonzaga University v. Doe*,³ it found that in order to enforce a statute under Section 1983, the statute must first grant the plaintiffs an enforceable private right and not merely benefits. In reviewing ELIHPA, the court concluded that it did not confer enforceable rights on the residents. In so finding, it distinguished *Wright v. Roanoke Redevelopment and Housing Authority*,⁴ a 1987 case that was cited affirmatively in *Gonzaga*, in which the Supreme Court found that public housing residents had a private right of action to enforce a violation of the Brooke Amendment, which was intended to restrict public housing residents' rents, including the cost of utilities, to 30 percent of income. The court distinguished *Wright* by pointing to the fact that the Supreme Court found a private right of action on the basis that the Brooke Amendment unambiguously conferred a mandatory benefit on public housing residents. It did not make all housing legislation privately enforceable.

The court also rejected the residents' claims that CHA had an obligation to rent up the facility on the ground that the residents had no private right of action to enforce either the RHS statutes or regulations that obligated CHA to rent up the development. Similarly, it rejected the residents' claim that they are third party beneficiaries under the contract between RHS and CHA.

The court refused to grant CHA's summary judgment on the residents' claim that CHA violated their Section 1983 rights when it terminated their Section 8 assistance without proper notice and without offering the residents enhanced vouchers. The resident had not sought summary judgment on that issue and the court could not tell on the record before it whether CHA was entitled to judgment as a matter of law.

The residents have several other claims that were not resolved in the court's order. Some of those claims are scheduled for trial in late July. The case is not expected to be finally resolved until late summer or early fall. ■

²13 F.3d 1192, 1198 (8th Cir. 1994).

³122 S.Ct. 2268 (2002).

⁴479 U.S. 418 (1987).

Business Owned by Low-Income Individuals Entitled to Damages for Violation of Section 3

In what appears to be a case of first impression, the U.S. Court of Appeals for the Third Circuit recently upheld the award of a substantial damage claim against a Pennsylvania township that failed to award a rehabilitation contract, funded with Department of Housing and Urban Development (HUD) money, to a very low income contractor that should have been given preference for the contract under Section 3 of the Housing and Urban Development Act of 1968.¹ That section requires HUD grantees to take affirmative steps to ensure that a percentage of the contracts funded with HUD grants are awarded to business concerns operated by low- and very low-income persons in the HUD grantee's geographic area.²

In 1999, the plaintiffs, very low-income individuals doing business as Southwestern Community Ventures, filed a Section 1983 action against a Pennsylvania township and the chair of its board of supervisors claiming a violation of Section 3 and seeking damages. The trial court held that plaintiffs are members of the class intended to benefit by Section 3, were qualified to be awarded the contract³ and were thus entitled to \$16,225 for loss of income.⁴ The defendants appealed.

On appeal the defendants argued that the plaintiffs were not residents of the township and hence not entitled to a preference for the contract.⁵ Alternatively, defendants argued that they solicited the plaintiffs to participate in the request for proposals (RFP) and awarded points in the evaluation process for being a Section 3 business and thereby satisfied the

obligations under Section 3.⁶ The United States Court of Appeals for the Third Circuit upheld the judgment against the defendants for a failure to comply with Section 3. The court reasoned that Section 3 requires to the "greatest extent feasible . . . contracts awarded for work to be performed in connection with a housing rehabilitation . . . are [to be] given to business concerns" operated by low and very low-income persons who reside within the non-metropolitan county in which the assistance is expended.⁷ The court also noted that the Section 3 regulations provide 22 "Examples of Efforts to Award Contracts to Section 3 Business Concerns" and that providing notice is only one of those concerns.⁸ Therefore, because the defendants offered no basis to conclude that their solicitation efforts, either standing alone or coupled with the award of points, satisfied the "greatest extent feasible" mandate, the district court's decision was affirmed.

The court reasoned that Section 3 requires to the "greatest extent feasible . . . contracts awarded for work to be performed in connection with a housing rehabilitation . . . are [to be] given to business concerns" operated by low and very low-income persons.

Although the decision is unpublished⁹ and brief, it is important to note that the court found that there is a class of Section 3 beneficiaries. In addition, implicit in the opinion is a finding that once a member of that class is found to be qualified to be awarded the contract, the entity subject to Section 3 cannot claim that merely notifying the Section 3 business of the RFP and providing points in the application process to the applicant Section 3 business is sufficient to achieve the Section 3 goals. If the Section 3 business concern is qualified, more is required of the recipient of housing and community development funds to meet the goals and priorities of Section 3. ■

¹*Mannarino v. Morgan*, 2003 WL 1972491 (3rd Cir., April 29, 2003)(unpublished). Plaintiffs also sued HUD, but HUD was dismissed from the action.

²12 U.S.C.A. § 1701u (West 2001) (Section 3).

³The appellate decision does not indicate what showing plaintiffs made regarding qualifications. However, the Section 3 rules allow a Section 3 business to submit evidence to demonstrate the ability to complete the contract. 24 C.F.R. § 135.36(c) (2002).

⁴Section 3 places different obligations on recipients of federal housing and community development funds depending upon whether the recipient is a PHA or other entity. It appears from the facts of this case that the defendant is not a PHA and is a recipient of other HUD covered programs. Each non-PHA recipient of federal housing and community development funds over certain threshold amounts should award to Section 3 businesses 10 percent of building trades work for housing rehabilitation and construction and at least 3 percent of all other Section 3 covered contracts. 24 C.F.R. § 135.30(c) (2002). In evaluating compliance with this provision, "a recipient that has not met the numerical goals . . . has the burden of demonstrating why it was not feasible to meet the numerical goals set forth in this section." *Id.* § 135.30(d).

⁵The preferences for Section 3 business concerns in contract opportunities under housing and community development programs include: category 1, those Section 3 business concerns that provide economic opportunities for Section 3 residents in the service area or neighborhood in which the Section 3 project is located; category 2, applicants selected to carry out HUD Youthbuild programs; and category 3, other Section 3 businesses. 24 C.F.R. § 135.36(a)(2) (2002); 12 U.S.C.A. § 1701u(d)(2)(B) (West 2001).

⁶24 C.F.R. § 135.5 (2002). A Section 3 business is defined as: a business owned by 51 percent or more Section 3 residents; a business in which at least 30 percent of permanent, full-time employees are persons who are currently Section 3 residents; or a business that provides evidence of a commitment to subcontract in excess of 25 percent of the dollar award of all subcontracts to be awarded to business concerns that meet the qualifications set forth above. A Section 3 resident is: a public housing resident, or an individual who resides in the metropolitan area or nonmetropolitan county in which the Section 3 covered assistance is expended, and who is defined as a low-income person (80 percent of the median income for the area) or a very low-income person (50 percent of the median income for the area).

⁷12 U.S.C.A. § 1701u(d)(2)(A) (West 2001).

⁸24 C.F.R. § 135, Appendix to 135 (2002).

⁹In the Third Circuit, citations to federal decisions that have not been formally reported are permissible if they identify the court, docket number and date, and refer to electronically transmitted decisions. 3rd Cir.LAR, Rule 28.0, 28.3(a) U.S.C.A.

Recent Cases

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

Chambers v. Habitat Company, 2003 WL 21377492 (7th Cir. June 5, 2003)(unpublished). Plaintiff-appellant, who was evicted from her federally subsidized apartment through a state court proceeding, sued her landlord in federal court under Section 1983, the *Fair Debt Collection Practices Act* (FDCPA), and the *Racketeer Influenced and Corrupt Organizations Act* (RICO). The plaintiff claimed she was wrongfully evicted because the rent that the landlord claimed she owed was not due because the landlord failed to lower the plaintiff's monthly payments, as required by federal law, to reflect a decrease in the plaintiff's income. The 7th Circuit affirmed the federal district court's dismissal of the plaintiff's suit, holding that the plaintiff's action was barred by the *Rooker-Feldman* doctrine (which precludes lower federal courts from reviewing claims that were raised in, and inextricably intertwined with, state-court decisions), as well as by collateral estoppel, on the grounds that the plaintiff failed to state a claim upon which relief could be granted. The plaintiff asserted that the defendants violated her due process rights by omitting from her lease and eviction notice language allegedly required by HUD, but the court dismissed the claim because it was "inextricably intertwined" with a prior state court decision, thus triggering the *Rooker-Feldman* doctrine. The plaintiff's FDCPA and RICO claims failed as well because there were no allegations of unlawful debt collection practices (a requirement for FDCPA claims), and because the plaintiff did not allege any predicate acts of fraud (a requirement for RICO claims).

McFadden v. Moll, 2003 WL 21341728 (Mass.Super. Ct., May 28, 2003). The plaintiff, a head of household seeking to rent an apartment, sued the defendant alleging three forms of discrimination under Massachusetts law: 1) refusing to rent to a family with children; 2) refusing to rent to his family because the property contained lead paint and/or would trigger duties under the abatement requirements of the lead paint law; and 3) refusing to rent to a recipient of public assistance. The Superior Court allowed the plaintiff's motion for preliminary injunction, despite the defendant's claims that he could discriminate against families with children due to a provision in the law that allows such discrimination when

an apartment in the complex is occupied by an elderly or infirm person who would be placed in a position of hardship by the presence of children. The court held that the defendant never told the plaintiff about his elderly tenants, and that the defendant consistently rejected prospective tenants based on their status as Section 8 voucher holders and the presence of children. The court therefore ordered that the landlord bring the rental unit into compliance with the lead paint law, and that he offer the unit to the plaintiff on the same terms and conditions that he would to other tenants who did not receive Section 8 assistance and who did not have young children. ■

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 June of 2003. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

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

HUD Interim Rule

68 Fed. Reg. 37,660 (June 24, 2003) Minimum Funding Under the Indian Housing Block Grant Program

Summary: This interim rule revises the current regulation to extend the period for which an Indian tribe, after its first year of funding, may receive a minimum grant amount under the need component of the Indian Housing Block Grant (IHBG) formula. The minimum funding provision in the regulation for returning tribes expired on September 30, 2002. This interim rule authorizes the extension of the minimum funding provision under the need component through Fiscal Year (FY) 2003 to avoid hardship to the affected tribes.

Effective Date: July 24, 2003.

Comment Due Date: August 25, 2003.

¹www.westlaw.com.

²www.lexis.com.

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

¹At www.access.gpo.gov/su_docs.

²At www.hudclips.org/cgi/index.cgi.

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

⁴At www.rdinit.usda.gov/regs.

HUD Final Rule

68 Fed. Reg. 37,664 (June 24, 2003)

Deregulation for Small Public Housing Agencies

Summary: This final rule simplifies and streamlines HUD's regulatory requirements for small public housing agencies (PHAs) that administer the public housing and voucher assistance programs under the *United States Housing Act of 1937*. Consistent with HUD's basic regulatory responsibilities, the final rule further streamlines the PHA Annual Plan requirements for certain small PHAs and deregulates the assessment and scoring of small PHAs under the Public Housing Assessment System (PHAS) and the Section 8 Management Assessment Program (SEMAP). These changes will alleviate administrative burden and better enable small PHAs to focus on their core mission of providing decent, safe and affordable housing for the neediest American families. The final rule follows publication of an August 14, 2002, proposed rule and takes into consideration the public comments received on the proposed rule.

Effective Date: July 24, 2003.

HUD Notices

68 Fed. Reg. 33,176 (June 3, 2003)

Notice of Proposed Information Collection: Tracking Clearance Examination in Association with the Lead Safe Housing Rule

Summary: The proposed information collection requirement will be submitted to the Office of Management and Budget (OMB) for review. The objective of the proposal survey is to determine the number of units that pass a lead clearance examination as a result of the Lead Safe Housing Rule (Lead-Based Paint Hazards in Federally Owned Housing and Housing Receiving Federal Assistance; 24 C.F.R. 35, subparts B–R). This information will aid HUD in assessing its implementation of the rule with the goal of eliminating assisted housing with lead-based paint hazards by 2010.

Comments Due Date: August 4, 2003.

68 Fed. Reg. 33,177 (June 3, 2003)

Notice of Proposed Information Collection: Survey of HUD Grantees to Assess Implementation of the Lead Safe Housing Rule

Summary: The proposed information collection requirement will be submitted to the Office of Management and Budget (OMB) for review. The objective of the proposed survey is to assess the level of compliance of the Final New HUD Regulation on Lead-Based Paint Hazards in Federally Owned Housing and Housing Receiving Federal Assistance, 24 C.F.R. 35, subparts B–R, *et al.* (the "Lead Safe Housing Rule") that was published September 15, 1999, and was fully in effect January 10, 2002, by recipients of HUD housing assistance funds. The information is valuable for HUD to provide compliance assistance and enforcement functions regarding the Lead Safe Housing Rule. The Department is soliciting public comments on the subject proposal.

Comments Due Date: August 4, 2003.

68 Fed. Reg. 34,627 (June 10, 2003)

Notice of Proposed Information Collection for Public Comment: Section 8 Random Digit Dialing Fair Market Rent Telephone Survey

Summary: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review. The telephone survey provides HUD with a fast, inexpensive way to estimate and update Section 8 Fair Market Rents (FMRs) in areas not covered by AHS or CPI surveys, and in areas where FMRs are believed to be incorrect. It also provides estimates of annual rent changes. Section 8(C)(1) of the *United States Housing Act of 1937* requires the Secretary to publish Fair Market Rents (FMRs) annually to be effective on October 1 of each year. FMRs are used for the Section 8 Rental Certificate Program (including space rentals by owners of manufactured homes under that program); the Moderate Rehabilitation Single Room Occupancy Program; housing assisted under the Loan Management and Property Disposition programs; payment standards for the Rental Voucher Program; and any other programs whose regulations specify their use. Random digit dialing (RDD) telephone surveys have been used for several years to adjust FMRs. These surveys are based on a sampling procedure that uses computers to select statistically random samples of telephone numbers to locate certain types of rental housing units for surveying. HUD contracts with a private company to conduct two types of RDD surveys: approximately 50 individual FMR areas are surveyed every year to test the accuracy of their FMRs, and 20 RDD surveys are conducted every year to provide updating factors for FMRs not surveyed individually and for Annual Adjustment Factors (AAFs). These surveys are conducted in the non-metropolitan portions of all 10 HUD regions, and in the 10 metropolitan portions of the regions that do not have their own Consumer Price Index (CPI) surveys. The department is soliciting public comments on the subject proposal.

Comments Due Date: August 11, 2003.

68 Fed. Reg. 35,421 (June 13, 2003)

Notice of Proposed Information Collection: Comment Request Standardized Form for Collecting Information Regarding Race and Ethnic Data

Summary: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review. HUD's standardized form for the Collection of Race and Ethnic Data complies with OMB's revised standards for federal agencies issued October 30, 1997. These standards apply to HUD program offices and partners that collect, maintain and report federal data on race and ethnicity for program administrative reporting and civil rights compliance reporting. The new standards are intended to give federal agencies enhanced ability to collect information that reflects the growing diversity of the United States population. The department is soliciting public comments on the subject proposal.

Comments due: August 12, 2003.

68 Fed. Reg. 37,511 (June 24, 2003)

Notice of Submission of Proposed Information Collection to OMB; Fair Housing Initiatives Program Application; Notice of Proposed Information Collection for Public Comment

Summary: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review and approval. This notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. This is a revision to the currently approved information collection for selecting applicants for the Fair Housing Initiatives Program (FHIP) grants which will be part of the Notice of Funding Availability (NOFA). These grants are to fund fair housing enforcement and/or education and outreach activities under the following initiatives: Administrative Enforcement; Private Enforcement; Education and Outreach; and Fair Housing Organizations. Proposed revisions to the currently approved information collection would include: descriptions of how program activities will support HUD goals, identify performance measures/outcomes in support of these goals, and identify baseline conditions and target levels of the performance measures that each applicant plans to achieve in reports submitted to HUD. The department is soliciting public comments on the subject proposal.

Comments Due Date: August 25, 2003.

HUD Housing Notice

Notice H 2003-10 (May 30, 2003)

Compliance with Section 504 of the Rehabilitation Act of 1973 and the Disability/Accessibility Provisions of the Fair Housing Act of 1988

Summary: Notice 01-02, which was issued on February 6, 2001, and expired February 28, 2002, is being reinstated and extended to May 31, 2004.

Expires: May 31, 2004.

Notice H 2003-11 (June 12, 2003)

Verification of Immigration Status in HUD-Assisted Properties

Summary: This notice rescinds all references in Notice H 95-55, Procedures for Implementing Section 214 of the *Housing and Community Development Act of 1980*, as amended—Restrictions on Assistance to Noncitizens, regarding the touch-tone telephone method for accessing the Department of Homeland Security's (formerly Immigration and Naturalization Service (INS)) Systematic Alien Verification for Entitlements (SAVE) Program to perform verification of immigration status of non-citizens at admission and annual recertification in assisted housing programs. On March 31, 2003, DHS phased out the touch-tone telephone method and replaced it with the personal computer (PC) method. All users were transitioned into the new SAVE PC System 2 Automated Status Verification System 2 (ASVS). This notice provides guidance to owners on using the SAVE PC System 2 / ASVS.

Expires: June 30, 2003.

Notice H 2003-12 (June 25, 2003)

Officer Next Door and Teacher Next Door (OND/TND) Sales Programs—Waiver of Occupancy Requirement for Active Duty Military Service

Summary: The purpose of this notice is to advise that a Single Family Property Disposition Waiver authorizing an accommodation for participants in the Officer Next Door and Teacher Next Door Sales Programs who are called to active duty military service during the program occupancy requirement period of three years, was executed on June 25, 2003. This waiver provides authority to provide a credit of time reducing the program occupancy requirement equivalent to the time served on active duty military service at a post outside of the program participant's hometown commuting area.

Expires: June 30, 2004.

HUD PIH Notice

Notice PIH 2003-17 (HA) (June 20, 2003)

Reinstatement of the Community Service and Self-Sufficiency Requirement

Summary: This notice discusses the reinstatement of the public housing community service and self-sufficiency requirement authorized under Section 12 of the *United States Housing Act of 1937*, as amended. The community service and self-sufficiency requirement is intended to assist adult public housing residents in improving their own economic and social well-being and give these residents a greater stake in their communities. The community service and self-sufficiency requirement allows residents an opportunity to "give something back" to their communities and facilitates upward mobility.

Expires: June 30, 2004.

RHS Proposed Rules

68 Fed. Reg. 32,872 (June 2, 2003)

Streamlining and Consolidation of the Sections 514, 515, 516 and 521 Multi-Family Housing (MFH) Programs

Summary: The Rural Housing Service (RHS) proposes to streamline and reengineer its regulations and to utilize private sector processes and techniques in the administration of the origination, management, servicing and preservation of its Multi-Family Housing (MFH) programs. These programs include the Section 515 Rural Rental Housing (RRH) loan program, the Section 514/516 Farm Labor Housing loan and grant program, and the Section 521 Rental Assistance (RA) program. This action is to reduce regulations, assure quality housing for residents, improve customer service, and improve the agency's ability to achieve effectiveness and flexibility in managing the MFH portfolio. This streamlining will result in a reduction to the Code of Federal Regulations (CFR) coverage of the MFH programs by 90 percent. To explain how this was accomplished, the rewrite of the 1930-C regulation is offered as an example. This regulation alone covers 366 pages of CFR. The extensive language currently describes in detail the form and format for conducting internal MFH supervisory activities by agency personnel. This regulation has been replaced in the proposed rule with a four-page chapter. This was accomplished by using the authority of the regulation to develop a new handbook, which will provide direction on conducting monitoring actions. The handbook will incorporate many ideas that were obtained from the streamlining process into the streamlining of agency supervisory efforts and will clarify and standardize the monitoring requirements, thereby reducing burden on borrowers and management agents.

Dates: Written or e-mail comments on this proposed rule must be received on or before August 1, 2003.

68 Fed. Reg. 34,552 (June 10, 2003)

Guaranteed Rural Rental Housing Program; Secondary Mortgage Market Participation

Summary: The Rural Housing Service (RHS) proposes to amend its regulations for the Guaranteed Rural Rental Housing Program (GRRHP). Under the GRRHP, RHS guarantees loans for the development of housing and related facilities for low- or moderate-income families in rural areas. RHS administers the GRRHP under the authority of the *Housing Act of 1949*. The GRRHP regulations are being amended to allow RHS, in the case of a default, to buy back guaranteed loans from investors. Another change includes lowering the minimum level of rehabilitation work when guaranteed loans are used for acquisition and rehabilitation. These regulatory changes are made to increase participation by the secondary mortgage market in the GRRHP.

Dates: Written or e-mail comments must be received on or before August 11, 2003.

RHS Notices

68 Fed. Reg. 37,453 (June 24, 2003)

Housing Demonstration Program

Summary: The Rural Housing Service (RHS) announces the availability of housing loan funds for FY 2003 for the Rural Housing Demonstration Program. For FY 2003, RHS has set aside \$1 million for the Innovative Demonstration Initiatives. The Agency is soliciting proposals for a Housing Demonstration program under Section 506(b) of Title V of the *Housing Act of 1949*. Under Section 506(b), RHS may provide loans to low-income borrowers to purchase innovative housing units and systems that do not meet existing published standards, rules, regulations or policies. The intended effect is to increase the availability of affordable rural housing for low-income families through innovative designs and systems.

Effective Date: June 24, 2003.

68 Fed. Reg. 37,455 (June 24, 2003)

Notice of Funds Availability (NOFA) for Section 514 Farm Labor Housing Loans and Section 516 Farm Labor Housing Grants for Off-Farm Housing for Fiscal Year 2003; Correction

Summary: The Rural Housing Service (RHS) corrects a notice published May 16, 2003 (68 Fed. Reg. 26,941–26,943). This action is taken to remove references to the application deadline of August 14, 2003. Accordingly, the notice published May 16, 2003 (68 Fed. Reg. 26,941–26,943) is corrected as follows: On page 26,941, in the third column, in the 30th line of the Summary, remove the sentence reading "This Notice changes the timeframe to submit applications for the Section 514 Farm Labor Housing Loans and Section 516 Farm Labor Housing Grants for Off-Farm Housing for Fiscal Year 2003 to be August 14, 2003." On page 26,942, in the third column, under "Application Process," in the eighth line, remove the sentence reading "No application will be accepted after 5 p.m., local time, on August 14, 2003 unless date and time is extended by another Notice published in the Federal Register."

Dated: June 18, 2003.

RHS Administrative Notices

RD AN No. 3877 (1980-D) (June 19, 2003)

Loss Mitigation Comprehensive Clarification of Policy

Summary: This administrative notice clarifies policies concerning loss mitigation actions in the United States Department of Agriculture Rural Housing Service (RHS) single-family guaranteed rural housing loan program. The attached guide describes loss mitigation options, identifies circumstances for their use, and discusses situations in which each may be appropriate. It is intended for use by lenders who service RHS-guaranteed loans, and for agency field office staff who may be called upon to give guidance to lenders and borrowers. Lenders should use the guide as a reference when considering loss mitigation options for guaranteed

borrowers. Agency staff should use the guide as a basis for considering the appropriateness of a lender's loss mitigation action.

Expiration Date: June 30, 2004.

RD AN No. 3875 (1940-L) (June 5, 2003)

Section 502 Direct Rural Housing Demonstration Program

Summary: The objective of the Rural Housing Demonstration Program is to test new approaches to constructing innovative housing. In accordance with RD Instruction 1940-L, Exhibit A, Attachment 2, \$1 million has been set aside for FY 2003 Innovative Demonstration Initiatives under the Section 502 Direct Loan program for eligible very low and low-income applicants who wish to purchase an approved demonstration dwelling. Grant funds for innovative proposals are not authorized by the agency.

Expiration Date: September 30, 2003.

RD AN No. 3873 (1965-B) (June 9, 2003)

Preservation Proposals for Equity Funding

Summary: The purpose of this administrative notice is to provide guidance on how to access \$4.3 million of the Section 515 reserve that is made available to fund innovative approaches to preserve rental housing. For example, providing equity at the time of transfer to a nonprofit or public body in exchange for a restrictive-use agreement that assures that the project will remain as affordable housing for its remaining useful life would be considered an innovative approach to preservation. This administrative notice announces that proposals to use funds should be submitted to the Office of Rental Housing Preservation (ORHP) by July 14, 2003.

Expiration Date: November 30, 2003. ■

Publication Order Form

National Housing Law Project
614 Grand Avenue, Suite 320 • Oakland, California, 94610
(510) 251-9400; fax: (510) 451-2300

	PRICE	QTY.	TOTAL
HUD Housing Programs: Tenants' Rights (2d ed. 1994)	\$165.00	_____	\$ _____
HUD Housing Programs: Tenants' Rights (1998 Supplement)	\$120.00	_____	\$ _____
Combined HUD Housing Programs: Tenants' Rights and 1998 Supplement (add \$6.00 postage/handling)	\$220.00	_____	\$ _____
RHCDS (FmHA) Housing Programs: Tenants' and Purchasers' Rights (2d ed. 1995)	\$55.00	_____	\$ _____
Combined HUD Housing Programs (2d ed.), 1998 Supplement and RHCDS (FmHA) Housing Programs (add \$9.00 postage/handling)	\$250.00	_____	\$ _____
Housing Law Bulletin (annual subscription, 10-12 issues)	\$150.00*	_____	\$ _____
<i>Welfare and Housing—How Can the Housing Assistance Programs Help Welfare Recipients?</i> (2000)	\$5.00*	_____	\$ _____
<i>Congress' New Public Housing and Voucher Programs</i> (1998)	\$10.00**	_____	\$ _____
<i>Housing for All: Keeping the Promise</i> (1995)	\$5.00*	_____	\$ _____
<i>The Family Self-Sufficiency Program: An Advocate's Guide</i> (1994)	\$10.00*	_____	\$ _____
<i>Let's Choose a New Owner! What Residents Need to Know When an Owner Wants to Sell an Expiring-Use Project Under Title VI</i> (1993) (master for duplicating)	\$10.00*	_____	\$ _____
<i>A Passage from Poverty: Self-Sufficiency Policies and the Housing Programs</i> (1991)	\$10.00*	_____	\$ _____

*Includes postage and handling ** \$5.00 each additional copy
 All materials are mailed book rate. Allow four weeks for delivery.
 For more information on first-class mailing and large quantity discounts, call (510) 251-9400 x108.

Subtotal:	_____	\$ _____
Tax (California residents only):	(Subtotal, excluding Bulletin x 8.25%):	\$ _____
Postage and Handling:	Number of books _____ x \$3.00 per book:	\$ _____
TOTAL AMOUNT ENCLOSED:		\$ _____

PLEASE TYPE OR PRINT

Name _____

Organization _____

Address _____

_____ Zip _____

ALL ORDERS MUST BE PREPAID

Please do not send cash. Make check or money order payable to the NATIONAL HOUSING LAW PROJECT, attach to a copy of this form and send to:

NATIONAL HOUSING LAW PROJECT • Attn: Publications Clerk
614 Grand Avenue, Suite 320 • Oakland, CA 94610

I want to charge my credit card. Visa Mastercard

Card # _____ Exp. date _____

Name on card: _____

Credit card billing address _____

Signature (required for credit card) _____



National Housing Law Project
614 Grand Avenue, Suite 320
Oakland, California, 94610

First Class Mail