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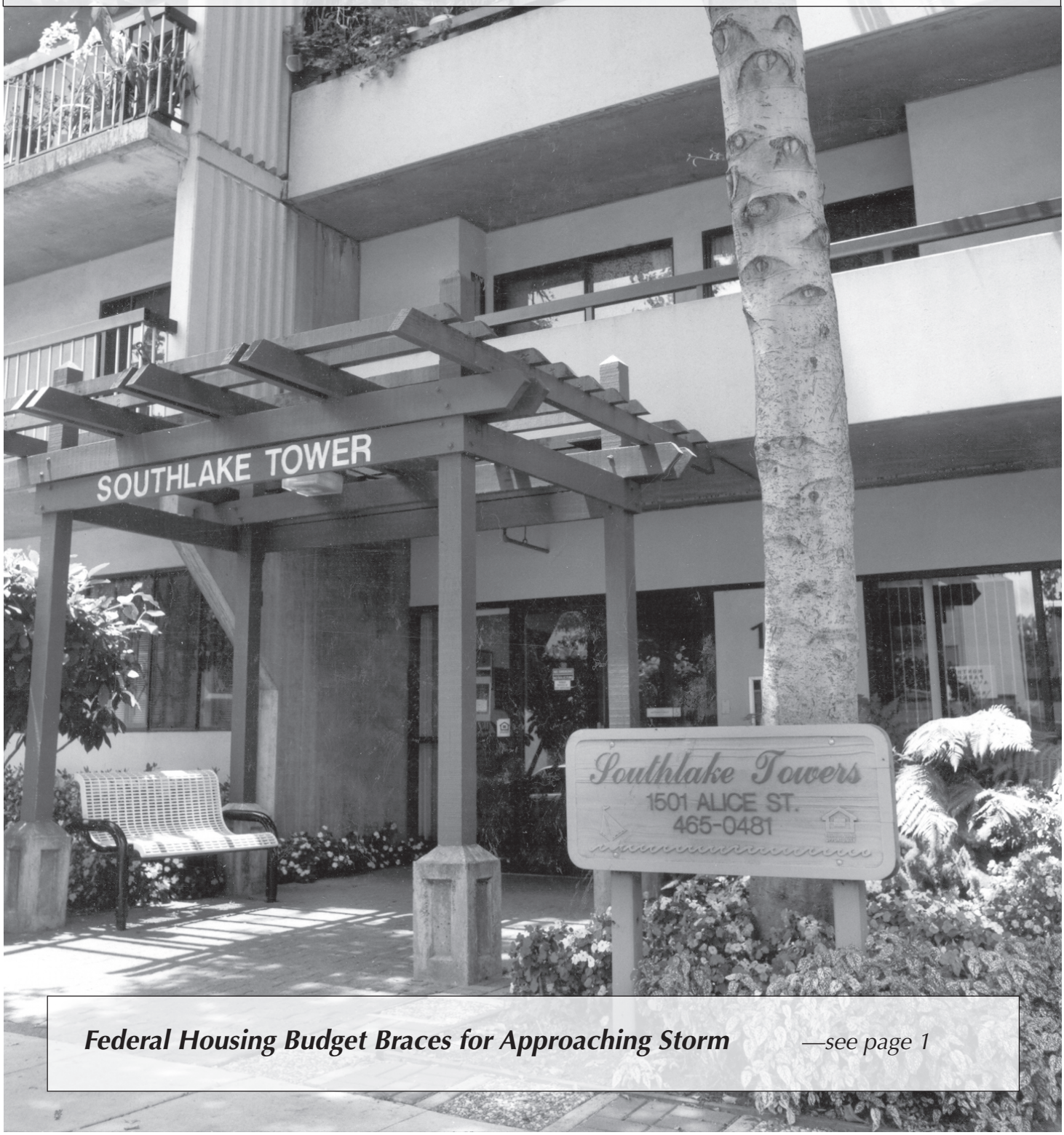

Federal Housing Budget Braces for Approaching Storm *—see page 1*

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Cover: Southlake Tower, a 130-unit Section 8 housing development in Oakland, California. Originally developed by a for-profit developer under the HUD §221(d)(3) program, the development was purchased and is currently managed by Christian Church Homes, a nonprofit management and development organization, using funds from the California Housing Finance Agency and the City of Oakland.

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Federal Housing Budget Braces for Approaching Storm

Recent *Bulletins* have provided brief updates on the status of the still-unpassed Fiscal Year (FY) 2003 appropriations bill for HUD programs, and the related Continuing Resolutions providing pro-rata funding at FY 2002 levels.[1] As that annual funding ritual remains stalled,[2] other budget forces have been unleashed and gathered momentum that will directly affect federal housing funding. These forces include the negotiations concerning overall federal domestic spending limits for FY 2003, the Administration's FY 2004 budget and tax cut proposals, as well as some important fiscal developments concerning HUD's own housing programs.

Looking ahead, other budget forces will certainly quickly add pressure. Stagnation in economic activity and revenues, more tax cuts, the fiscal crisis of state and local governments, increased military spending and the costs of certain entitlement programs such as Medicare drug benefits—all of these factors will dramatically affect both existing and needed federal housing initiatives. These threats to domestic spending may well last for years, starting with the Administration's FY 2004 budget scheduled for release during the first week of February.

This article briefly explores what all this might mean for affordable housing.

FY 2003 HUD Appropriations

Congress never completed action on the House and Senate HUD-VA-IA Appropriations bills for FY 2003 before adjournment of both the regular and lame-duck sessions near the end of last year.[3] Instead, like almost all other federal agencies, HUD has received pro-rata appropriations at the FY 2002 levels under a series of Continuing Resolutions, the most recent of which ran through January 31, 2003.[4] Escalating HUD budget needs are certain to collide with the fiscal priorities of the new Congress and Administration as the FY 2003 Appropriations process proceeds once again.

Appropriators' Agreement with Administration to Slash Proposed Senate Levels for FY 2003

The federal budget consists of three main components—the military, entitlements and so-called "domestic

[1] *Usual Waiting Game for HUD Appropriations Brings New Twists*, 32 HOUS. L. BULL. 235 (Oct. 2002); *Congress Adjourns with Few Housing Accomplishments*, 32 HOUS L. BULL. 249 (Nov./Dec. 2002).

[2] This article was written prior to the Senate's passage of an Omnibus Appropriations Bill on January 23, 2003. The details of that bill and compromises reached with the House on a final appropriations bill will be discussed in future issues of the *Housing Law Bulletin*.

[3] H.R. 5605, Rep. Walsh (R-NY), reported out of committee October 10, 2002 (H.R. Rep. No. 107-740), and S. 2797, Sen. Mikulski (D-MD), reported out of committee on July 25, 2002 (S. Rep. No. 107-222). For more background on the funding levels and contents of these bills, as well as the Continuing Resolutions, *see Usual Waiting Game for HUD Appropriations Brings New Twists*, 32 HOUS. L. BULL. 235 (Oct. 2002).

[4] H.J.Res. 1, Pub. L. No. 108-02 (Jan. 10, 2003).

discretionary spending," covering virtually everything from education, parks and transportation to homeland security and housing. Now more than ever, the domestic discretionary category that depends on annual federal appropriations is the only place where politicians look to control federal expenditures, even though the category now represents only about 17 percent of the $2.1 trillion federal budget. While entitlement programs such as Social Security, Medicare, Medicaid and farm income supports are much more costly, those costs are determined by automatic formulas already set by law, and thus are harder to control. In addition, Congress last year approved increased military spending in preparation for possible war.

Since the November elections returned control of the Senate to the Republicans, the GOP has quickly commenced plans to reduce domestic discretionary spending below levels previously approved by the Democratic-controlled Senate of the 107th Congress, and more in line with the lower House levels. Congressional appropriations committee chairs have agreed with the Administration to curb FY 2003 domestic discretionary spending levels by billions. Essentially, in attempting to set a new fiscal plan that could govern discretionary spending for the foreseeable future, the agreement seeks to limit spending on all discretionary programs (including defense and homeland security) to $750 billion. Because defense already received $365 billion of that amount ($40 billion above FY 2002 levels), and about $70 billion more is slated for homeland security, foreign aid and other defense costs, only about $316 billion remains for the domestic programs, essentially a freeze in FY 2003 spending at FY 2002 levels. This level would produce an overall cut in domestic programs of about $10 billion from the previous levels proposed by the Senate's pre-election appropriations bills.

Congressional budget and appropriations staffers reportedly worked out revised allocations for the 11 appropriations subcommittees with unfinished spending bills in December, and the appropriations committees would normally seek to mark up revised bills that account for the lower allocations prior to floor action. But the precise process that will be followed this year is really anyone's guess. Republicans reportedly were hoping to finish the bills containing the revised spending package by the time of the President's January 28 State of the Union address, but that seems increasingly unlikely as we go to press, as floor action in the Senate appears contentious.

In order to complete the FY 2003 federal spending plan for all 11 remaining appropriations bills, Congress will undoubtedly have to develop a massive omnibus spending bill that combines all of the individual bills into a single package, containing about $390 billion for domestic programs including homeland security. Proposed amendments to the package are more likely on the Senate floor, where debate is more open as long as one party lacks a 60-vote majority to cut it off by a cloture motion. Amendments will seek to restore some of the $10 billion in cuts made under the revised cap, or add more funds for politically popular purposes, such as education, farm relief, Medicare, wildfire protection, election reform, aid to states or even more defense and homeland security. Amendments proposing to reallocate funding among programs, taking from some to augment others, are also likely.

When it comes time to actually appropriate funds, individual departments and programs may fare slightly better or worse than FY 2002, both in the revised bills and in the versions ultimately enacted, depending on the nature of their programs and their political favor. For specific programs, the impact has yet to be revealed, although cuts to some non-HUD programs for low-income people have already been proposed, such as a $300 million reduction in low-income energy assistance.

More than ever, the domestic discretionary category that depends on annual federal appropriations is the only place where politicians look to control federal expenditures, even though the category now represents only about 17 percent of the $2.1 trillion federal budget.

The HUD bill (which actually covers Veterans Affairs, HUD and Independent Agencies) is slated for an allocation of $90.35 billion, $640 million less than the House bill produced in the 107th Congress, and about $1.1 billion less than the Senate proposal. If the entire reduction were to come from the HUD budget, instead of some of the many other programs funded under the bill, this reduced allocation would translate into a proposed HUD appropriation of only about $30.8 billion, almost 3 percent less than proposed by the Senate.

The Administration's favor for certain existing or even new programs within this category (*e.g.*, certain education programs, wildfire control spending, or state election reforms) may produce increased pressure in the short-run as the FY 2003 package is debated. One strategy reportedly being considered to produce the revenue needed for any new initiatives is an across-the-board percentage reduction in all line items, which would cause further damage to HUD programs already on the edge.

Brief Recap of Prior Actions to Reduce HUD's Budget Authority

Fiscal pressure on federal housing programs is of course not unknown to HUD and federal appropriators. Since 1994, Congress has pursued a variety of measures to reduce HUD budget authority and enable survival within the spending caps established by prior negotiations that focused on achieving a balanced federal budget or, in the short-lived years of federal surplus, providing a mix of increased spending and tax cuts. Prior measures and gimmicks to reduce HUD spending have included:

- *elimination of funds for any new units*, with the exception of modest numbers of incremental vouchers funded under one-year commitments in a few of the years;
- *reduction or elimination of capital spending for preservation or rehabilitation* of federally supported units, such as reducing the Capital Fund for public housing and recapturing and rescinding unspent Interest Reduction Payments authorized for recycling as rehab funds for preserving HUD-subsidized multifamily housing;
- *reducing subsidized rent levels and operating support* (*e.g.*, HUD-published Fair Market Rents for vouchers or the public housing Operating Fund) below levels needed to support real choices within the market or to provide current services to units;
- *reducing federal budget authority commitments to one-year funding*, especially for expiring Section 8 contracts for project- and tenant-based assistance, in lieu of longer-term contracts or commitments requiring commensurately higher sums of budget authority;
- *reducing project-based Section 8 contract rents to market levels*, while shifting spending from the discretionary side of the budget to the mandatory side through mortgage restructuring under the "Mark to Market" program;
- *making "advance appropriations"* to take advantage of the delayed need to draw on Section 8 budget authority over the course of a fiscal year, shifting recognition of the spending to a later year, a one-time gimmick that saved $4.2 billion in FY 2000 but requires continual repetition in order to avoid catastrophe;
- *cutting Section 8 program reserve levels* held by PHAs to 60 days of program funding and recapturing and rescinding any leftovers; and
- *raising tenant contributions*, *e.g.* by imposing minimum rents and permitting tenant contributions under the voucher program to rise as high as 40 percent of tenant income for the first lease, with virtually no limit thereafter.

While several of these actions were just accounting legerdemain, most others have created real and lasting damage to the programs or the interests of extremely low-income beneficiaries. In any case, the bag of budget tricks has been virtually exhausted. From this point on, most new proposals—offered in a much different fiscal environment that presents projected deficits for several years—will bring starker policy choices, forcing existing units or subsidies to disappear or tenants to pay more.

One example of this possible deeper damage is the House's proposed FY 2003 revised Section 8 voucher renewal funding formula (H.R. 5605), offered ostensibly to save about $938 million in budget authority from a proposed Section 8 renewal budget of approximately $16.6 billion. This proposal, which bases reimbursement to PHAs on utilization data almost two years old, would cause PHAs to retract formerly reimbursed spending and produce an overall decline of an estimated 125,000 vouchers nationally. Members of both parties in Congress have expressed concern through letters to appropriations chairs, with 31 Senators and many House members signing on to two separate letters. The Senators have expressed grave concern that the House proposal will lead to a "downward spiral that will lead to further, significant reductions in the voucher program."

In response, the omnibus FY 2003 bill under deliberation in the Senate reportedly contains a new proposal to address the perennial problem of uncertainty in actual voucher costs and utilization, while maintaining the existing promise to renew the same number of expiring Section 8 units. The Senate proposal would authorize and direct HUD to renew the full number of existing vouchers but would implicitly require HUD to more accurately determine the number of vouchers that PHAs actually expect to use and reallocate any chronically unused voucher funds to neighboring PHAs.

As the horse-trading on the FY 2003 HUD bill continues prior to a final agreement between the Senate and the House, line items for the Section 8 renewal funding, Public Housing and HOPE VI remain vulnerable to cuts to enable a final bill within the negotiated spending cap.

When evaluating HUD budget levels, it is important to remember that maintaining HUD programs means more than just finding funds to maintain spending at last year's levels. To keep HUD programs operating at a level sufficient to maintain current services, more funds are required to keep pace with inflation, albeit modest, as well as to provide funds sufficient to renew all expiring Section 8 contracts. The projected increase in the number of Section 8 contracts actually expiring and requiring renewal costs an additional billion or two of budget authority each year over the next several years. In addition, the "Mark Up to Market" initiative authorized by Congress in 1999 to provide additional subsidy funds to encourage owners to renew certain expiring contracts bearing below-market rent levels requires budget authority beyond prior contract rent levels in order to operate.

HUD's Recent Public Housing Operating Subsidy Funding Cuts

As if all this were not enough, HUD announced in early January that public housing operating subsidy funds—the primary source of operating support for public housing in addition to tenant rent contributions that are generally set at 30 percent of income—might be cut by as much as 30 percent due to inaccurate budget projections about program costs for FY 2003.[5] The estimated $250 million shortfall in FY 2003 funding results in part from an accounting system that requires HUD to determine its budget before the local PHAs report their actual projected needs for that coming year. When this has happened several times over the past decade,

[5]HUD Notice, PIH 2003-1 (HA), *Subject: Federal Fiscal Year (FFY) 2003 Guidance on Determination of Operating Subsidy Eligibility, Schedule for the Submission of Operating Subsidy Calculations, Issuance of Proration Factor and Approval of Calculations* (Jan. 6, 2003).

HUD has dipped into the following year's budget to make it up. While HUD claims it is changing its accounting practices to address the problem, HUD ran short on operating subsidy funding last year. Thus, some PHAs slated for funding in the first quarter of FY 2003 (commencing October 1, 2002) received only between 50 and 60 percent of their expected funds.

HUD's notice informed PHAs that they will receive operating subsidy funding based on 70 percent of the amount of the last operating budget and subsidy calculation approved by HUD for each PHA, adding that a subsequent adjustment will be made once all the PHAs submit their FY 2003 budgets. HUD has asked PHAs with fiscal years beginning next July and October to submit their budget information early, but even then restorative adjustments could probably not occur until sometime this summer. Because of this uncertainty, PHAs with fiscal years beginning January and April might well curtail spending to the 70 percent level.

The funding shortfall apparently stems from HUD's miscalculation of operating subsidies in FY 2001, which were underestimated by about $175 million due to higher than anticipated inflation factors, audit and unemployment insurance costs, utility cost increases, costs of supporting units approved for demolition, retiring the FY 2000 shortfall, and so on. This apparently established an inadequate base for FY 2002 projected expenses, with another $75 million added last year to arrive at the total $250 million FY 2002 figure.

The funding shortfall apparently stems from HUD's miscalculation of operating subsidies in FY 2001, which were underestimated by about $175 million

HUD notified PHAs on January 15, 2003, that it hopes to provide more funds later in the year, possibly up to 90 percent of the needed operating fund level if Congress approves HUD's budget request and PHA needs do not substantially exceed those of last year. But even a 10 percent cut would cause serious financial difficulties for most of the 3,200 PHAs nationwide, especially those lacking any substantial reserves or means of local financial support. In the short run, any shortfalls would usually result in reduced services for properties and tenants. This all comes at a time when needs for assisted housing are at all-time highs.

These prior shortfalls raise substantial questions about the projected FY 2003 operating subsidy needs supposedly supported by the pending appropriations bill. Some have estimated that the shortfall in FY 2003 will approach $300 million, as it replicates and likely expands any shortfall for FY 2002.

The Administration's Tax Cut Proposal

Another key factor in the picture for federal housing funding is the overall fiscal situation of the federal government. The federal fiscal picture in turn will be strongly influenced by the fate of the previously approved 2001 tax cut (will it be made permanent or modified?), and by the Bush Administration's ability to get Congress to enact further tax cuts as proposed in the President's plan that was announced in early January. If the plan is adopted and growth projections fail to quickly materialize, federal deficits could soar into the hundreds of billions annually, perhaps to record dollar levels, likely further starving domestic discretionary spending in general and housing programs in particular. When combined with the advent of increased public fiscal demands of a retiring baby boom generation on Social Security and Medicare several years hence, the picture darkens indeed.

This year, the Administration has proposed tax cuts totaling $674 billion over 10 years. But the proposals face tough sledding in the Senate, since, unlike the 2001 tax cut situation, these funds cannot simply be allegedly covered by existing or anticipated budget surpluses, which now have completely vanished. An environment of projected mounting deficits changes both the economics and the politics of further deep tax cuts. Democrats, joined by at least a few Republicans, contend that any tax cut be structured primarily to provide an economic stimulus package—a one-time cash injection into the economy that does not produce additional long-term federal budget deficits. The Administration, for its part, contends that only fundamental changes in the tax system, such as those proposed as part of the tax reduction package, will produce the necessary economic growth that will then generate increased tax revenues necessary to meet domestic spending needs. Opponents will continue to press for a smaller tax package that provides more short-term stimulus and less tax relief that is better targeted to the less wealthy.

The heart of the Bush 2003 tax cut plan is the proposal to exempt corporate dividends from "double taxation" at both the corporate and then individual levels. Such changes produce little stimulus up front, while promising significant long-term revenue costs to the Treasury. Shifting to a so-called "dynamic scoring" model has been proposed by some in the Administration to allow recognition of their contention that such long-term structural changes in the tax system will actually cost far less because of their alleged impact in producing additional economic growth.

Many projections forecast deficits in the $300 billion annual range if the tax cut is enacted. And there is even debate about the projected cost of the dividend tax proposal, with wide variations depending upon the specific nature of certain provisions.

Administration's Proposal to Slash Dividend Tax Portends Major Damage to LIHTC Program Even If Never Enacted

Beyond the general threats to domestic spending posed by reducing revenues through tax cuts, a key feature of the Bush plan poses special harm to housing by dramatically reducing the value of the Low-Income Housing Tax Credit

(LIHTC). First passed in 1986 and substantially expanded by Congress at the end of 2000, the LIHTC, now representing an annual federal housing investment of more than $4 billion, is one of the few remaining federal supports for the production of new and rehabilitated low-income housing units. It operates through the tax side of the budget and requires no discretionary appropriations, but is capped in amount and allocated through state agencies. Developers obtaining LIHTC awards then sell the credits primarily to corporate investors, permitting them to reduce their income tax liability by specific amounts for a specific period of time, in exchange for which the investors contribute cash equity to the development.

The value and marketability of Low-Income Housing Tax Credits is directly threatened by the Bush Administration's proposal to exempt corporate dividends from "double taxation" at both the corporate and individual levels.

The value and marketability of the credits is directly threatened by the Bush Administration's proposal to exempt corporate dividends from "double taxation" at both the corporate (where such funds are taxed as earnings) and individual (where dividends are taxed as income) levels. All domestic tax credits, such as the LIHTC, would apparently be considered to have reduced a corporation's taxable income, thereby converting dividends of that amount back to taxable status. Domestic tax credits would effectively nullify the new tax exemption for dividends. The proposal would greatly reduce the value of credits held by corporations that pay dividends, by about half according to some estimates. If they do not need them as much to reduce their tax liability, then the demand for credits will fall and their value as well, producing a ripple effect throughout the LIHTC system. Development financing gaps will certainly follow, requiring additional and already scarce public subsidy resources or rendering projects infeasible. Even the prospect of enacting such a change may well paralyze new LIHTC activity, as investors look elsewhere for more certain benefits.

House Ways and Means Committee Ranking Member Charles Rangel recently sent a letter to HUD Secretary Mel Martinez urging intervention with the White House to obtain an exemption for LIHTC from the proposed treatment of domestic credits in the dividend exemption proposal. Rangel also sent a similar letter to other House members, which also raised concerns about the effects of the Bush proposal on corporate buyers of tax-exempt bonds, including school construction bonds.

The Administration's FY 2004 Housing Budget Proposal

The President may provide a preview of the major components of his FY 2004 federal budget proposal in the State of the Union speech set for January 28. Unless some politically significant major change is proposed for housing programs, details on any changes may not be known until the formal release of the Administration's FY 2004 budget scheduled for February 3.

While details are scarce because of the closely held no-leak "passback" negotiations between HUD and the Administration's Office of Management and Budget, in light of all the factors discussed above, probably none of the scenarios are positive for low-income housing. The Administration's housing focus has been limited to homeownership downpayment assistance and tax credits, and on the administrative side, negotiating contentious changes in the rules governing Real Estate Settlement Procedures (RESPA), such as restrictions on yield spread premiums paid to brokers.

What is likely are proposals to further cut HUD programs such as the Public Housing Capital and Operating Funds, HOPE VI for public housing redevelopment, or the Section 8 Housing Certificate Fund, perhaps eliminating funds for a handful of incremental vouchers, or reducing funds for renewal of expiring project-based or voucher contracts. Also rumored possible is a proposal to convert Section 8 voucher funding to block grants to state and local governments, which would eventually result in less funds, fewer units assisted or higher tenant contributions. Other reports have mentioned discussion of reviving the rejected 1995 Clinton Administration plan to "voucher out" project-based Section 8 contracts.

Where's Mel?

Normally one of the roles of a Cabinet Secretary is to fight to defend, sustain and improve programs within his or her department that serve important social or political needs against attacks from elsewhere in the Administration and Congress. Certainly Secretaries Cisneros and Cuomo exhibited some success in that regard. To most people involved in housing work, and to the general public, Mel Martinez has been practically invisible.

The Secretary reportedly has been seen occasionally talking about homeownership, faith-based initiatives, and even RESPA reform. But more often he seems to be spotted stumping the Republican cause with Hispanic audiences, perhaps preening for a Florida gubernatorial run when Jeb Bush's term expires.

No reports have surfaced of the Secretary articulating the case for maintaining funding levels for HUD programs that serve extremely low-income family and community needs for affordable housing, much less the case for expanding funding to confront the growing housing affordability gap.

We've seen the conservative side of the Administration's "compassionate conservatism." We're still waiting for the compassion to surface. ■

Uniform Relocation Act Guidance for HOPE VI Developments Issued

On September 17, 2002, HUD issued a notice providing more guidance on the application of the *Uniform Relocation Act* (URA) to HOPE VI developments.[1] Attached to the notice are form letters to be sent to residents and a HOPE VI Relocation Plan Guide which is also called a Relocation Plan Template (Template). The Template was developed with input by the public housing industry and representatives of resident advocacy groups in response to "difficulties which many PHAs have experienced in the past with the planning process."[2] The Relocation Plan (Template) is designed to assist PHAs that are applying for HOPE VI grants to compile critical project and resident information, outline their planned relocation resources and processes, address anticipated concerns and issues, and address budget information related to relocation costs.[3] It is a form, which, if completed, is intended "to ensure that the URA and many *Quality Housing and Work Responsibility Act* issues are addressed as completely as possible at the time of the application for funds."[4]

Draft Recommendations

Prior to the issuance of the notice, HUD issued Draft Recommendations on Relocation.[5] With the issuance of the notice, the status of the recommendations is unclear. The recommendations covered many issues that are now included in the notice. However, the draft recommendations also included many issues and best practices that are not included in the notice. For example, the recommendations, in emphasizing the importance of ensuring that opportunities for original residents should be improved by the HOPE VI process, urged PHAs to exceed the baseline standards of the URA.[6] The recommendations also explain the interrelationship between other PHA obligations, such as the Community and Supportive Services (CSS) requirement of the HOPE VI program and the PHA plan process with respect to the PHA's HOPE VI relocation effort. For example, the recommendations point out that the CSS funds obligate the PHA to provide case management and a range of services designed to help residents who need support to relocate successfully and to transition to self-sufficiency. Hence, they urge that relocated tenants be tracked so that services may follow.[7] Other areas in which the recommendations and notice vary are addressed below under the specific topic headings.

An Analysis of the Positive and Negative Elements

Overall the notice is of mixed benefit. On the positive side, the notice provides a Relocation Plan Guide (Template) which, if followed by a PHA, would provide the basis for a comprehensive relocation plan. It also emphasizes that if a HOPE VI development includes funds for HOME or CDBG, the one-for-one replacement requirement is triggered. The notice also addresses some critical issues regarding the right of residents who are displaced from a development that is revitalized due to HOPE VI to return to the site and the importance of involving residents in the development of the return policy. It also stresses the importance of gathering, maintaining and analyzing data related to relocation efforts and of involving residents in all stages of the development and revision of the relocation plan.

On the negative side, the Relocation Plan Guide (Template) is not mandatory.[8] More important, several issues included in the Draft Recommendations on Relocation were not addressed in the notice or were addressed in a less specific or helpful manner. Also the notice is very uneven. It contains statements and policy positions that are more thorough in one place and less clear and more cryptic in another. In addition, the rules and guidance are scattered throughout the notice and attachments.

The following will highlight some of the favorable aspects of the notice and point out some of the negative aspects.

Purpose of the Notice

The purpose of the notice is to provide guidance to HUD and PHA staff on the applicability of the URA in HOPE VI projects. It outlines requirements and provides good practices. As a cautionary note, however, the notice, "serves only as a guide and . . . only a portion of the applicable rules [are] highlighted. . ."[9]

Applicability of the HUD Notice

There are two related issues regarding applicability. One is the applicability of the URA to the particular displacement activity. Second is the activity that the notice is intended to

[1]HUD Notice CPD 02–8, Guidance on the Application of the *Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970* (URA), as Amended, in HOPE VI Projects (Sept. 17, 2002), hereinafter "HUD Notice CPD 02–8," available at www.hudclips.org; see also Relocation and Expanding Opportunities for Public Housing Residents: Draft Recommendations on Relocation Guidance for the HOPE VI Program (11/2000) available at www.housingresearch.org/hrf/hrfhome.nsf/FSHomeHope Relocation!OpenFrameset, hereinafter Recommendations.

[2]HUD Notice CPD 02–8, ¶ V.B., p. 22.

[3]*Id.*, ¶ IV.B. and V.B. p 6 and 22.

[4]*Id.*, ¶ IV.B. 4., p. 6.

[5]See Recommendations, supra note 1.

[6]Recommendations, p. 4.

[7]*Id.*; see also *id.* p. 3 (relocation plan must provide information on how a grantee will provide coordinated case-management services so that relocating families will have maximum opportunity to become self-sufficient). Significantly, the notice does provide that the URA requires that tenants be provided with advisory services which may include referral to "employment, health, welfare or legal services." HUD Notice CPD 02–8, ¶ II, p. 3.

[8]*See also* HOPE VI FY 2002 NOFA, 67 Fed. Reg. 49,766, 49,780 (July 31, 2002) (FY 2002 NOFA requires PHAs to certify that they adopted a relocation plan which conforms to the URA requirements set forth in the NOFA. Previously, PHAs were required to obtain HUD approval of the relocation plan.)

[9]HUD Notice CPD 02–8, ¶ I., p. 2.

cover. The URA is applicable to some but not all HOPE VI activity.[10] There is other activity such as Section 971 Mandatory Conversion Plans (a.k.a. Section 202 Conversion Plan) which is also subject to the URA. Moreover as the notice points out, the URA may be triggered if a project that would not be covered in accordance with one funding scheme also receives funding from other HUD programs that are subject to the URA, such as CDBG or HOME programs.[11] In other words, receipt of CDBG funds makes a project subject to the URA that would otherwise not be subject to the URA.

The notice is applicable to HOPE VI activity that is subject to the URA. But the notice, in particular the Relocation Plan Guide (Template), may also be used to develop a relocation plan for other public housing demolition, disposition or public housing development and for conversion of public housing units to vouchers.[12]

Resident Involvement in the Development of the Relocation Plan

The notice emphasizes that the vision of the HOPE VI program includes the active participation of residents and the community in the revitalization effort and that residents must be actively involved in the early development of the relocation plan.[13] To encourage participation, the notice suggests that residents be informed through posted notices and/or delivery of individual notices to each family.[14] Moreover, the notice emphasizes that residents should be involved in any revisions, and informed of proposed changes and final revisions.[15] The Relocation Plan Guide (Template) prompts PHAs to describe how residents will be involved in the planning process and any technical assistance that will be provided to the residents "so that they may be involved in the development and revisions."[16] PHAs are also requested to describe how they will effectively communicate with residents who need services or information in languages other than English and/or who have disabilities.[17] Each resident should have access to the relocation plan and/or be provided with a copy.[18]

Resident Return Policies

The HUD guidance regarding resident return policies is scattered throughout the notice and attachments. Overall, HUD cautions that return criteria should be simple to avoid confusion and misunderstanding.[19] Significantly, the HUD notice urges that any return policy should be formally adopted and executed by the recognized resident body, the PHA and any management agent.[20] The Relocation Plan Guide (Template) asks the PHA to describe the standards for re-occupancy, whether the occupancy plans for the revitalized site are different from the occupancy criteria at other developments, the number of current residents who can meet the standards without additional assistance, the number of families who want to return to the revitalized site and the number of public housing units anticipated to be available at the revitalized site.[21] The Relocation Plan Guide (Template) further explains that if time limits are imposed or incorporated in a return policy the applicant should be provided with ample notice.[22] For example, some PHAs have imposed a work requirement upon returning families and further defined the criteria to be one year of employment. If such a requirement were imposed, the Relocation Plan Guide (Template) explains that the tenant desiring to return should have ample notice so that he or she may qualify. In other words, informing returning applicants of the criteria at the time they reapply would not be sufficient. The notice is clear that "no resident who has been displaced from a project should be precluded from applying and being considered for housing in the project after completion"[23] and that returning applicants

HOPE VI Applicants Announced

HUD recently released the list of 58 PHAs that applied timely for $492.5 million of HOPE VI FY 2002 grants, the availability of which were announced on December 6, 2002. The list is available at www.hud.gov/offices/pih/programs/ph/hope6/index.cfm and www.housingresearch.org/hrf/hrfhome.nsf/FSHomeHope?OpenFrameSet. In FY 2001, 66 applicants submitted HOPE VI grant applications and HUD awarded approximately $492 million to 16 of them. That same year another 70 applicants sought HOPE VI demolition grants. HUD awarded $75 million to 44 of those applicants. The list of the FY 2001 awards is also available on the above-mentioned Web sites.

[10]HOPE VI projects which were approved after the effective date of the *Quality Housing and Work Responsibility Act* (QHWRA) for demolition and/or disposition only under Section 18 of the *United States Housing Act* are subject to the relocation provisions of Section 18. 42 U.S.C.A. § 1437p (a)(4) (West Supp. 2002).

[11]HUD Notice CPD 02–8, ¶ VI. B. 2, p. 6.

[12]*Id.*, Form HUD 52774 (8/2002), p 3.

[13]HUD Notice CPD 02–8, ¶ IV. B. 4, p. 6 and V.A.1.d., p. 16; *see also* HOPE VI FY 2002 NOFA, 67 Fed. Reg. 49,766, 49,778 (July 31, 2002) (requires meetings with residents and the broader community and that certain specified topics, including relocation, be covered at the meetings. HUD will evaluate applications based on resident involvement to date and the plans for continued resident and community involvement in the planning and implementation of the HOPE VI revitalization plan).

[14]HUD Notice CPD 02-8, ¶ V.A.1.d., p. 16.

[15]*Id.*, ¶ IV.B.4, p. 6.

[16]Form HUD 52774 (8/2002), p. 20. The recommendations further noted that "where there is an existing Resident Association, issues of maintaining or reconfiguring the Association during and after the revitalization should be addressed early and openly" and noted that there is no one acceptable mode. Recommendations, p. 2.

[17]HUD Notice CPD 02-8, ¶¶ V.A.1.d. and V.A.3., p. 16, 18.

[18]*Id.* ¶¶IV.B.4., p. 6 and V.A.1.d., p. 16.

[19]*Id.*, ¶ V.E.3, p. 24.

[20]*Id.* ¶ III and HUD form 52774, p. 17.

[21]HUD Notice CPD 02-8, p. 17.

[22]*Id.*

[23]*Id.* ¶ IV. A. 5, p. 5 and Form HUD 52774 (8/2002), p. 17. The recommendations also provide that the PHA should maximize the original tenants' opportunity to return to the revitalized site if they wish to do so. Recommendations, p. 4.

should be given priority. In the event that there are more residents who request and qualify to return than units, then rating and ranking criteria may apply.[24] Finally, the notice recognizes that the return policy may change and that a process should be established to address that reality and that residents should be involved.[25]

One-for-One Replacement and 60 Months of Rental Housing Payments

The notice recognizes that QHWRA eliminated the one-for-one replacement requirement for public housing units that are disposed or demolished. However, where Section 104(d) of the *Housing and Community Development Act of 1974* is triggered because of the use CDBG, HOME or UDAG funds, the one-for-one replacement requirement can be re-triggered.[26] In addition, if Section 104(d) is applicable, it mandates the provision of relocation assistance to any lower-income person displaced as a direct result of the activities. The Section 104 relocation levels are for 60 months as contrasted with 42 months for a family who is subject only to the URA.

Temporary Displacement

The notice discusses temporary displacement but essentially concludes that there are very few situations that qualify as such. To be temporarily displaced, the following four criteria must be met. One, the HOPE VI project must be solely a rehabilitation project. Two, there must be a sufficient number of suitable units so that all residents can be guaranteed the ability to return to a unit after rehabilitation. Three, the PHA has made a final determination under the return criteria and the individual is eligible to return. Four, the resident will be in temporary housing for less than one year. To further emphasize that temporary displacement is unusual, the notice stresses that "whenever there is any possibility that a resident may not be able to return to a project, a PHA is advised to provide displacement benefits applicable to a permanent move."[27]

Data

In the planning phase of the relocation process, PHAs are urged to determine the characteristics of the current residents, including at a minimum income, race, ethnicity and family size, and the future housing needs and desires of those families.[28] Each PHA is also required to create a list of all current residents on the date of the initial submission of the HOPE VI application, a list of all persons moving into or out of a project after the date HUD approved the revitalization plan, and a list of all persons occupying the project when completed.[29] Individual files should be maintained for each affected tenant and the files should include information regarding referrals to replacement housing, identification of the actual replacement property selected by the family and whether the unit was in an area of minority concentration or high poverty.[30]

Comparable Replacement Housing and Mobility

Comparable replacement housing includes but is not limited to another public housing unit or a voucher. The notice states that a PHA's Relocation Plan should "assure that every displaced resident receives a full range of housing choices and adequate counseling (which includes counseling that provides residents with rights under the *Fair Housing Act* and Mobility Counseling) to fully explore these choices."[31] The information that should be included in a local relocation plan includes the efforts that a PHA plans to undertake, which includes those efforts set forth in the "Expanding Housing Opportunities" factor of the Section 8 SEMAP (Section 8 Management Assessment Program).[32] The Relocation Plan Guide (Template) further asks the PHA to describe the availability of rental housing in the community, the success rate of voucher holders, the utilization rate of the PHA in the past three years and how the PHA will insulate the relocating families from increased costs.[33]

In the event that families are relocated to other public housing, PHAs are asked to "explain the basis on which the replacement/relocation public housing is comparable or an improved housing opportunity."[34]

Timeline

The notice sets forth a hypothetical timeline for relocation issues. This timeline should be augmented with the obligations set forth in the recommendations. For example,

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[24] *Id.* App. B-3, pp. 52-53.

[25] HUD Notice CPD 02-8, ¶¶ V.A.1.d and V. E. 3., p. 16 and 24 and Form HUD 52774 (8/2002), p. 20. The Recommendations state that the relocation activities "should not begin until re-occupancy standards and preferences are established, with resident consultation." Recommendations, p. 4.

[26] HUD Notice CPD 02-8, ¶ IV. B.5 and C, pp. 7 and 8; see also 42 U.S.C.A. § 5304(d) (West WESTLAW Current through P. L. No. 107-377).

[27] HUD Notice CPD 02-8, ¶ IV.A. 3, p. 5.

[28] *Id.* HUD form 52774, p. 5.

[29] *Id.* ¶ V.A.2.

[30] *Id.*

[31] *Id.* ¶ IV.B.6., p. 7.

[32] 24 C.F.R. § 985.3(g) (2002) (requires a PHA to adopt a policy to encourage participation by owners of units located outside areas of poverty or minority concentration, inform tenants of the full range of areas where they may lease units, supply a list of landlords willing to rent units in these areas, prepare maps that show various areas with housing opportunities outside areas of poverty or minority concentration, assemble information about the characteristics of those areas which may include information regarding schools, transportation, etc., and analyze barriers to mobility. In addition, the PHA must have documentation that shows that it has analyzed whether voucher holders have experienced difficulty in finding housing in non-impacted areas and, if difficulties were found, the PHA determined if exception payment standards would help and has sought HUD approval to increase the payment standard when necessary).

[33] *Id.* HUD Form 52774, p. 11. The recommendations require the PHA to "describe the steps it will take to assure that residents who relocate with Vouchers are supported in making a smooth transition to private sector housing." It also urges that PHAs provide tenants with the maximum feasible extensions of housing voucher search time and suggests an initial offer of 120 days. Recommendations, p. 3.

[34] *Id.* p.13. The recommendations state that the "Grantees must ensure, however, that families who do not return to the revitalized site also have access to better living environments." Recommendations, p. 2.

the obligations of the PHA with respect to the PHA plan process and the Community and Supportive Services should be added.[35]

Survey of Tenant Interest

The notice mentions the need for a tenant survey to identify the initial housing choice.[36] The example provided is a simple letter in which seven options are listed and the tenant marks a preference. The draft letter is inadequate. It does not state, as do other letters, "do not move now." With respect to the survey, it assumes that the residents are aware of the implications of different terms, such as Section 8 Assisted Housing and Section 8 Voucher Assisted Housing. It is not clear that a resident may choose both to return to the site and also select other housing. The recommendations are more instructive as to the problems with the survey process and best practices. The recommendations provide that

> Each household to be relocated must be surveyed individually with respect to their relocation preferences. Many grantees have found that multiple surveys, individual counseling and group information sessions are needed to clearly explain all housing options, particularly where literacy and language barriers present obstacles.[37]

Persons Not Lawfully Present in the United States

The definition of "displaced person" was amended, effective November 21, 1997, to exclude persons not lawfully present in the United States.[38] The HUD notice makes reference to this amendment because the HUD Handbook has not been changed to incorporate the statutory change.[39] Advocates should be aware that the definition of persons lawfully present in the United States is broader than the definition of an individual with eligible immigration status as provided for in Section 214 of the *Housing and Community Development Act of 1980*.[40] Thus, for example, certain battered immigrants (including a spouse and children who are battered) and Cuban or Haitian entrants are not covered by Section 214 but should be considered "persons lawfully present in the United States" and thus should be eligible for relocation benefits.[41]

[35]*Id.* p. 8-9.

[36]HUD Notice CPD 02-8, ¶ IV.D, p. 8 and ¶ V.A.4.b., p. 21.

[37]Recommendations, p. 2.

[38]An exception to the disqualification for URA benefits is allowed if the displacing agency can demonstrate by clear and convincing evidence that the determination of ineligibility would result in exceptional and extremely unusual hardship to an individual who is the displaced person's spouse, parent or child and who is a citizen of an alien lawfully admitted for permanent residence. 49 C.F.R 24.2 (2002); HUD Notice CPD 02-10 (Nov. 19, 2002). Implementation of *Uniform Relocation Act*–Coordination with CPD.

[39]HUD, Tenant Assistance, Relocation and Real Property Acquisition, Handbook 1378.0, CHG–4.

[40]42 U.S.C.A. § 1436a(a) (West Supp. 2002).

[41]8 U.S.C.A. § 1641(b)(7) and (c) (West Supp. 2002).

Conclusion

The HOPE VI program will be evaluated on how well it treats the current residents and relocation is an essential element. Planning for relocation should be a key element of any HOPE VI development. Residents and advocates should continue to be involved in developing and monitoring a PHA's relocation plans. ■

Seattle HOPE VI Project Subject to NEPA

Innovative arguments that highlighted the interconnection of housing advocacy and environmental justice recently won the day in Seattle. A group of public housing residents and community organizations were successful in suing under the *National Environmental Policy Act* (NEPA) to temporarily halt the demolition of a public housing development as part of a $35 million HOPE VI revitalization project based on the alleged inadequacy of the project's environmental review. The plaintiffs ultimately settled the lawsuit with the Seattle Housing Authority (SHA), the City of Seattle (the City) and HUD and received significant enforceable concessions that address some of the outstanding social and environmental impacts of the project.

Housing Background

Rainier Vista, a 481-unit low-income public housing project, is located in the Rainier Valley neighborhood of south Seattle. Rainier Vista and Rainier Valley "share a cultural diversity and richness rare in Seattle. Rainier Vista and immediately surrounding areas in the Rainier Valley also represent one of Seattle's highest concentrations of very low-income individuals and racial and ethnic minorities."[1]

SHA successfully applied for a $35 million HOPE VI revitalization grant from HUD to displace and disburse Rainier Vista residents, demolish their homes and raze the existing public housing project, and redevelop the site as "mixed income" housing. SHA's plans generated substantial objections from, and controversy in, the community. In response, SHA and the City entered into a Memorandum of Agreement (MOA) setting forth certain elements of the Rainier Vista redevelopment plan.[2]

In place of 481 family public housing units, the MOA called for the construction of 1,010 new units, of which only 310 were to be public housing units. An additional 171 "replacement" rental units were to be constructed to replace the remaining public housing units originally on the site. However, 100 of these units were to be restricted to occupancy by

[1]*Harris v. United States Dept. of Hous. and Urb. Dev.*, CA No. 1481C (Order, Oct. 18, 2002), p. 1-2.

[2]Rainier Vista, Memorandum of Agreement 2001, signed October 17, 2001 and December 5, 2001.

elderly or disabled households and the bedroom configurations of the units were to differ substantially from current units. For example, only 121 out of 282 two-bedroom units were to be replaced, resulting in 161 fewer two-bedroom units. While a number of the new units to be constructed under the HOPE VI plan were described as "affordable" and were to be targeted to families at certain income levels, the term "affordability" was not defined in the MOA.

Moreover, the MOA failed to explain the terms under which displaced residents were to be selected to occupy units to be constructed under the HOPE VI plan. According to the MOA, displaced residents in "good standing" were to be permitted to return to the redeveloped sites. However, the term "good standing" was also not defined.

Environmental Review Background

SHA published a draft Environmental Impact Statement (DEIS) on the Rainier Vista HOPE VI redevelopment as required by the *State Environmental Policy Act* (SEPA). The final environmental impact statement (EIS) differed significantly from the draft. Pursuant to NEPA, the City published an environmental assessment (EA) and a finding of no significant impact (FONSI). Although the City relied upon the SEPA EIS, several of the findings in the FONSI are contradicted by the SEPA EIS. Contradictions appeared in the following categories: environmental justice, demographic changes, displacement, and education facilities.

The public housing residents and community organizations submitted written objections to the City's EA and FONSI. After limited modifications to the environmental reports, the City notified them that it found nothing in the comments to warrant any alteration of the FONSI.

Thereafter, the residents and the community organizations filed a lawsuit in July 2002. The complaint set forth four causes of action.[3] It alleged a violation of NEPA[4] and the *Administrative Procedure Act* (APA) against HUD for approving the City's request to release funds and its environmental certification while failing to require the City to address both the beneficial and adverse impact of the proposed HOPE VI redevelopment[5] and all impacts on the human environment.[6] A NEPA claim was also alleged against the City for its failure to prepare an adequate EA that properly considered the criteria for determining when a project will significantly affect the human environment. Plaintiffs also alleged a *Fair Housing Act*[7] claim against HUD for failure to affirmatively further fair housing by failing to assess the racial and socioeconomic effects of the HOPE VI plan prior to its approval. A similar claim was made against SHA for a violation of the Moving to Work Agreement and the FY 1999 HOPE VI Notice of Funding Availability (NOFA)[8] which obligated SHA to affirmatively further fair housing. The complaint sought *inter alia* an injunction to stop the expenditure of funds for redevelopment and the demolition of Rainier Vista, an order to withdraw the EA and FONSI, rewrite the EA and prepare an EIS. Plaintiffs also sought declaratory relief that the EA and FONSI violated NEPA and that the failure to address the environmental justice issues and fair housing impacts of the HOPE VI redevelopment violated HUD and the City's duties to affirmative further fair housing.

The court rejected plaintiffs' argument that HUD and SHA violated their duties to affirmatively further fair housing in failing to assess the racial and socioeconomic impacts of their decisions.

The federal district court denied plaintiffs' request for a preliminary injunction, dismissed their *Fair Housing Act* claims and denied SHA's motion for partial summary judgement.[9] The court rejected plaintiffs' argument that HUD and SHA violated their duties to affirmatively further fair housing in failing to assess the racial and socioeconomic impacts of their decisions.[10] It rejected plaintiffs' arguments that HUD and SHA failed to establish an adequate institutionalized process to assess the fair housing impacts of their decisions because the court found such a process was not required by the *Fair Housing Act*. In so holding, it declined to follow the lead of other courts[11] because it believed that the plaintiffs were required and had failed to establish that the Rainier Vista HOPE VI project threatened the *Fair Housing Act* policies prohibiting discrimination and perpetuation of segregation.[12]

With respect to the NEPA claims, the court found that plaintiffs, in their claim against the City, "demonstrated the presence of serious legal issues and a possibility, but not a

[3] *Harris v. United States Dept. of Hous. and Urb. Dev.*, CA No. 1481C (Complaint for Declaratory and Injunctive Relief, July 19, 2002).

[4] 42 U.S.C.A. § 4321 et seq.

[5] Required by 24 C.F.R. § 58 (2002).

[6] Required by 40 C.F.R. §§ 1508.25(c), 1508.27(b)(4)–(7) and 1508.8 (2002).

[7] 42 U.S.C.A. § 3608(e)(5) provides that "the Secretary of Housing and Urban Development shall . . . administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [the Fair Housing Act.]"

[8] 64 Fed. Reg. 9,618, 9,627-8 (Feb. 26. 1999) which states that successful applicants "will have a duty to affirmatively further fair housing."

[9] *Harris v. United States Dept. of Hous. and Urb. Dev.*, CA No. 1481C (Order, Oct. 18, 2002), p. 3–5.

[10] *Shannon v. HUD*, 436 F.2d 809 (3rd Cir. 1970) and *King v. Harris*, 464 F.Supp. 827 (E.D.N.Y. 1979).

[11] *Id.* and *Anderson v. City of Alpharetta*, 737 F. 2d. 1530 (11th Cir. 1984).

[12] *Harris v. United States Dept. of Hous. and Urb. Dev.*, CA No. 1481C (Order, Oct. 18, 2002), p. 5.

probability of success on the merits."[13] In particular it found that "socioeconomic impacts 'will' be discussed '[w]hen' an environmental impact statement is prepared; not that such impacts 'by themselves' require preparation of an impact statement and that there was insufficient evidence before the court to grant the plaintiffs' request for a preliminary injunction.[14] On the NEPA claim against HUD, "the court concluded that plaintiffs demonstrated very little likelihood of success on the merits."[15]

The plaintiffs sought reconsideration of the decision by the district court, which was denied. They then appealed the denial of the preliminary injunction to the Ninth Circuit and the district court granted a temporary injunction in consideration of the expedited briefing scheduled in time not to halt the demolition.[16] Thereafter, all parties agreed to mediation by a federal magistrate judge.

A Settlement Agreement with Teeth

A reportedly intense week-long mediation resulted in a judicially enforceable settlement agreement providing benefits for Rainier Vista residents who will be displaced by the HOPE VI project. Under the agreement, all replacement units will be targeted to extremely low-income households (those with incomes at or below 30 percent of area median income), and extremely low-income households will be given admission preference over higher-income families. The units affected will include the on-site 310 public housing units, the 100 senior and disabled units, and the off-site 71 units. In general and subject to available funding, the rents for all these units will be set at 30 percent of income for at least 40 years.

All residents who were living at Rainier Vista as of the date of the HOPE VI grant award are guaranteed a right to return to a comparable unit unless they have been evicted prior to the time new housing becomes available. Current and returning residents of Rainier Vista receive a preference for the 100 senior and disabled units. Households on the SHA waiting list have a preference for all 71 off-site units. Tenants who previously accepted vouchers will be notified of the right to return to the new development. Tenants who lost their vouchers may also request a hearing to re-qualify for the new development. To qualify, they will need to prove that extenuating circumstances (*e.g.*, disability or limited English proficiency) contributed to the loss of their voucher.

SHA also agreed to study, within 60 days, the feasibility of replacing, on a one-for-one basis, the 481 units of public housing that are scheduled for demolition on the site that is to be revitalized. Regardless of the study's result, SHA also agreed to build or acquire additional units in southeast Seattle, subject to compliance with the Consolidated Plan.

In a partial victory for neighbors and future residents of the redeveloped property, the SHA and the City pledged to reserve space for community gardens, to preserve and replace some trees on the site and to study traffic patterns, although it made no commitment to actually install traffic calming measures.

All Rainier Vista residents are guaranteed a right to return to a comparable unit unless they have been evicted prior to the time new housing becomes available.

Importantly, the settlement agreement incorporates the SHA's agreement to comply with the density restrictions and construction mitigation measures that it agreed to as part of the City's re-zoning and permitting process that was necessary to gain approval for the HOPE VI project. This inclusion enables the plaintiffs to enforce these obligations against SHA if the city should fail to hold the housing authority accountable.

The settlement also creates a Citizen Review Committee to assess redevelopment plans as the project progresses, and imposes a duty on the housing authority to give notice of changes in the plans to neighbors well beyond the 300-foot zone mandated by law.

The settlement agreement also addresses the competition that is created by Seattle's unmet demand for low-income housing between poor families and seniors and which is exacerbated by the HOPE VI development. The plaintiffs argued that ever-increasing rents in senior housing were pushing seniors into affordable public housing, thus decreasing access to public housing for poor families. The city initially refused to see the impact that the HOPE VI project had on increasing senior housing rents, but ultimately agreed to delay for 10 months a significant rent increase for all senior housing units managed under the Seattle Senior Housing Program.

The litigation was directed by the Northwest Justice Project, Columbia Legal Services, National Housing Law Project, and Smith and Lowney of Seattle, Washington. The City agreed that plaintiffs are the prevailing party in the litigation and paid plaintiffs' attorneys' fees.

The National Housing Law Project extends our thanks to Hong Tran, John McLaren and Carolee Colter for materials which contributed to this article. ■

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[13] *Id.* at p. 8. Plaintiffs argued that the City never considered how the redevelopment would impact various constituencies:

- how it would affect people of color;
- how it would affect people now waiting for access to public housing;
- how it would affect people relocated for two to six years during the redevelopment; or
- how the redevelopment would encourage other demographic changes such as gentrification and homelessness.

[14] *Id.*

[15] *Id.* at p. 10.

[16] *Id.* (Order, Dec. 3, 2002).

Victory on Hold for Voucher Tenants Facing Evictions

In *Wasatch Property Management v. Degrate*,[1] the California Court of Appeal, 4th District, decided that a California statute (Civil Code Section 1954.535), which, in limited circumstances, requires a 90-day notice to terminate a government contract, applies statewide in both rent-control and non-rent-control jurisdictions. The court also held that a federally subsidized Section 8 lease that requires cause prior to termination automatically renews on the same terms and conditions unless the landlord changes the terms of the lease.[2] The California Supreme Court announced, on January 28, 2003, that it will review whether the Court of Appeal properly interpreted Civil Code Section 1954.535. The second issue in *Degrate*, which may have nationwide impact, will not be reviewed by the California Supreme Court. However, in the interim, because of the grant of the petition for review, the entire Court of Appeal opinion is depublished and may not be cited.[3]

90-Day Notice

Ms. Degrate argued that California Civil Code section 1954.535, applied in non-rent-control jurisdictions. The court of appeal agreed and ruled that statute is applicable in all jurisdictions.

Civil Code Section 1954.535 provides that

> Where an owner terminates or fails to renew a contract or recorded agreement with a governmental agency that provides for rent limitations to a qualified tenant, the tenant or tenants who were the beneficiaries of the contract or recorded agreement shall be given at least 90 days' written notice of the effective date of the termination and shall not be obligated to pay more than the tenant's portion of the rent, as calculated under the contract or recorded agreement to be terminated, for 90 days following receipt of the notice of termination of nonrenewal of the contract.

In reaching its decision, the court relied upon the plain language of the statute, which did not limit its applicability to rent-controlled jurisdictions. The court supported its conclusion by noting that Section 1954.535 was enacted as part of Senate Bill No. 1098 and that another provision of that bill was expressly limited to rent-controlled jurisdictions. It also found that the legislative history of Section 1954.535 supported the conclusion that the provision applied statewide.[4]

Notice of Good Cause

Ms. Degrate's second argument was that the federally subsidized Section 8 lease requires good cause for termination and automatically renews on the same terms and conditions unless the landlord changes those terms. In reviewing the lease, the court noted that it had a fixed initial term of six months that, by its terms, converted to a month-to-month lease at the end of the initial term.[5]

Section 8 b of that lease provided that

> [d]uring the term of the lease (the initial term of the lease or any extension term), the owner may only terminate the tenancy because of: (1) Serious or repeated violation of the lease; (2) Violation of Federal, State or local law that imposes obligations on the tenant in connection with the occupancy or use of the unit and the premises; (3) Criminal activity or alcohol abuse . . .; or (4) Other good cause (as provided in paragraph d).

Section 8 d (3) of the lease provided that

> After the initial term, such good cause includes: a) The tenant's failure to accept the owner's offer of a new lease or revision; b) The owner's desire to use the unit for personal or family use or for a purpose other than use as a residential rental unit, or c) A business or economic reason for termination of the tenancy (such as sale of the property, renovation of the unit, the owner's desire to rent the unit for a higher rent).

The court interpreted these provisions to require a notice of good cause at the end of any successive month-to-month term.[6] The lessor, Wasatch Management Property, argued that because Congress amended the Section 8 statute to delete the good cause requirement after the initial term, it was not required to provide Ms. Degrate with a notice of good cause. The court responded by noting that the lessor under both California and federal law is required to give a written notice to amend the lease. It then concluded that because the lessor failed to amend the lease to conform to the new federal law, it was required to provide Ms. Degrate with a notice of good cause.

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[1]103 Cal. App. 4th 913, 126 Cal. Rptr.2d 923, 2 Cal. Daily Op. Serv. 11,261, 2002 Daily Journal D.A.R. 13,045 (Cal. Court of Appeal, Fourth District, Division 1 (Nov. 19, 2002)).

[2]For background information, see *Amici Brief Filed in California Voucher Eviction Case*, 32 HOUS. L. BULL. 162 (July 2002).

[3]Note that a grant of a petition of review depublishes the opinion of the Court of Appeal which means that it may not be cited or relied upon during the pendency of the review. *Quintano v. Mercury Casualty, Co.*, 11 Cal4th 1049, 1067 fn 6 (1995); *Gapsan v. Jay*, 66 Cal.App.4th 734, 745 n 10; see also Cal Rule of Court, 979(d) and 24.3(c).

[4]*See id.* for a review of the supportive legislative history.

[5]Ms. Degrate's initial lease was a one-year lease. Subsequently, she signed a six-month lease which, at the end of the term, converted automatically into a month-to-month term.

[6]The lease did not contain any provision that stated that good cause does not apply if the owner terminated the tenancy at the end of the initial term or at the end of any successive term.

Applicability of *Degrate*

What follows are answers to several questions that have arisen as to the applicability of *Degrate.*

To what housing programs is California Civil Code Section 1954.535 applicable?

By its terms, Section 1954.535 is applicable to any owner with a contract with a governmental agency that provides for rent limitations. The legislative history makes it clear that the tenant-based Section 8 program was the key focus of the legislation. While the statute may apply to the project-based Section 8 program, the provision has limited benefit because California law also requires owners of project-based Section 8 housing and/or federally insured multifamily housing to provide tenants with a 12 and six-months' notice of termination of a subsidy contract or prepayment of the federally insured or federally held mortgage indebtedness.[7] In determining to what other programs the statute may apply, it is important to determine if the action involves a termination or non-renewal of a contract with a governmental agency and whether that action is taken by the owner.

Must a lessor provide a 90-day notice to a Section 8 tenant if the landlord is claiming non-payment of rent or tenant non-compliance with the lease terms?

Section 19454.535 was not intended to restrict a lessor's ability to evict problem tenants. The legislative history of the section makes it clear that the intent of the provision is to increase the notice period for a termination of a contract with a governmental agency that would have been subject to a 30-day notice in accordance with California Civil Code Section 1946.[8] It is not applicable to tenancies forfeited due to a tenant's misconduct. California Code of Civil Procedure Section 1161 and case law permit a landlord to evict problem tenants who have not paid rent, have violated a covenant of the lease, or are a nuisance with a three-day notice to quit and an opportunity to cure or a 30-day notice.[9] These authorities are not nullified by Section 1954.535. Moreover, with respect to the payment of rent, Section 1954.535 notes that the tenant may not be required to pay more than the tenant's portion of the rent. The underlying assumption is that absent other legitimate reasons, such as the application of the right to repair and deduct or claims of a breach of the warranty of habitability, the tenant has an obligation to continue to pay his or her share during the 90-day notice period.

If the landlord has a business reason to terminate the voucher contract, is the landlord subject to the 90-day provision?

Section 1954.353 is applicable to a termination by the landlord for no reason (*i.e.*, when a 30-day notice for no cause would have applied) and for a business reason such as a desire to occupy, rehabilitate or sell the unit.

Will the 90-day notice provision discourage landlords from participating in the voucher program?

A landlord's decision to participate in the voucher program is dependant upon many factors. The 90-day notice provision is not extreme and should not present a substantial barrier. Those PHAs that have already informed landlords of the 90-day notice provisions have found landlords still willing to participate in the program. Significantly, as of January 1, 2003, all landlords in California will be required to serve those tenants with a year or more of residency a 60-day notice to terminate their tenancy for no reason.[10] In this context, requiring an extra 30 days' notice for voucher tenants when the landlord wants to terminate a Section 8 voucher tenancy for no reason, or a business reason, should not be viewed or advertised as burdensome. Moreover it is not bad policy to require a 90-day notice. HUD studies have concluded that it is taking voucher tenants longer to find units.[11] Thus it is equitable to recognize their need for additional time. During this 90-day period, the PHA continues to make the housing assistance payments and the tenant pays his or her share; therefore, the landlord is not harmed by a loss of rental payments.

What is the applicability of Degrate in jurisdictions outside of California?

The rationale of the California Court of Appeal decision should be persuasive nationwide with respect to the holding that the federally subsidized Section 8 lease that requires good cause automatically renews on the same terms unless the landlord changes those terms. Although the lease in question was a form lease that the San Diego Housing Commission provided, the pertinent provisions regarding the for-cause terminations are identical to the provision in the Tenancy Addendum Section 8 Tenant-Based Assistance

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[7]Cal. Govt. Code § 65863.10 (West Westlaw 2002).

[8]The legislative history provides as follows:

> Existing law generally requires an owner to give at least 30 days' written notice to terminate a month-to-month tenancy, and requires 30 days' notice to effect a change in the rental terms of the tenancy.
>
> This bill requires a landlord to give Section 8 tenants at least 90 days' written notice of the effective date of the owner's termination or nonrenewal of a "Section 8" housing agreement, and provides that the affected tenant shall not be obligated to pay more than the tenant's portion of the rent, for 90 days following receipt of the notice of termination or nonrenewal. Senate Rules Committee, page 4, (8/31/99).
>
> Existing Law: . . . .2) Requires, generally, that an owner must give at least 30 days' written notice to effect a change in the rental terms or terminate a month-to-month tenancy ([Civ. Code] Section 1946). Assembly Committee on Judiciary, page 3, (07/13/99).

[9]Cal. Civ. Pro §1161 (West Westlaw 2002); *Mitchell v. Poole*, 203 Cal.App.3d Supp. 1,3 (1988).

[10]SB 1403. The pertinent section will be codified at Civ. Code Section 1946.1. A tenancy of at least one year must be terminated with a 60-day notice.

[11]Abt Associates, *Study on Section 8 Voucher Success Rates*, *Vol. 1, Quantitative Study of Success Rates in Metropolitan Areas* (Nov. 2001) available at www.abtassoc.com or www.huduser.org. For a more complete discussion of this study, *see Study Released on Voucher Success Rates,* 32 HOUS. L. BULL. 132 (May/June 2002).

Housing Choice Voucher Program, HUD form 52641–A (3/2000).[12] Thus, depending upon the lease that is in use and state law regarding renewal of a month-to-month tenancy, tenants in other jurisdictions could rely upon the reasoning of the *Degrate* court. The argument is that good cause for eviction is required at the end of a month-to-month tenancy because the terms of the lease carry over and that a notice of a change in the terms and conditions of the lease is required before a no-cause notice of termination may be served to evict the tenant. The *Degrate* court considered the change in federal law which permits a landlord to terminate a tenancy at the end of the lease term without cause and determined that the lessor failed to amend (or initially draft) the lease to allow that result. ■

Successful Housing Justice Network Meeting

On December 8th and 9th, 2002, the Housing Justice Network (HJN) met in Crystal City, Virginia. Nearly 150 participants from legal services programs, tenant outreach organizations, resident associations and clinical law programs around the country attended the meeting, which celebrated the organization's 25-year anniversary. The meeting packed a voluminous amount of information into 30 workshops and four plenaries over the course of two days. Topics included public and subsidized housing, the Hope VI Program, preservation, Con Plans and the fair housing process, relocation issues, desegregation cases, voucher utilization and senior housing issues.

True to HJN tradition, the majority of the workshops served as meeting opportunities for various substantive working groups and venues for interactive exchanges of information between experienced advocates. Other workshops, however, offered newer attorneys and housing advocates, as well as experienced attorneys, the opportunity to be trained in a particular subject area and arrive at action plans together. For example, in the Data Access and Census Issues workshop, participants were schooled in the art of accessing demographic information that is critical to fair housing litigation, predatory lending analyses, housing cost analysis, and other areas of our work.[1] In addition, a representative from the Office of Planning and Policy Development at HUD shared the latest information on a new data system that HUD will be using that will increase tremendously access to information by government staff and the public alike. For example, demographic information will be available *by building*, and data systems will be connected to a GIS Geographic Information Systems) system, providing layers of information tied to a spatial, usually geographic location, and data that is more current.[2]

The Section 3 workshop is another example of the type of useful information that was exchanged at the HJN meeting. "Section 3" refers to a portion of the *Housing and Urban Development Act of 1968* mandating that agencies receiving federal housing and community development funds offer opportunities to low-income people for employment and training. Several members of HUD's National Office staff participated as presenters in the workshop and the question-and-answer session was fruitful. Participants learned that HUD will be doing 30 Section 3 compliance reviews of jurisdictions and PHAs in 2003. This is a significant increase from 2002. HUD also reported that its Washington D.C. Section 3 staff has recently grown from four people to 11. Additionally, as of 2003, HUD regional offices will no longer investigate Section 3 complaints. Instead, headquarters will handle all complaints. In the meantime, HUD is considering revising its Section 3 reporting form (HUD Form 60002) to require recipients of Section 3 funds to include information regarding the number of hours worked by Section 3 employees and the number of dollars paid to Section 3 employees in wages (in comparison to new hires) to determine meaningful compliance with Section 3.

Language access for people with limited English proficiency, housing as a political issue and working with resident organizations and residents were three of the plenary topics interspersed between workshops that drew participants together to learn and share their experiences. The fourth plenary, on the impact of U.S. Supreme Court decisions on fair housing litigation and access to the courts, was led by Professor Erwin Chemerinsky, the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science at the University of Southern California Law School, currently a visiting professor at Duke. He led a particularly interesting, albeit somewhat distressing, one-hour lecture about recent Supreme Court cases on these issues.

Peter Edelman, professor of law at Georgetown University in the District of Columbia, spoke at one of the meeting lunches, criticizing the current administration's housing policies and urging advocates to continue their efforts to meet the dire housing needs of extremely low-income households.

Barbara Sard of the Center on Budget and Policy Priorities, together with Anita Bryson, presented the David B. Bryson Award to Mac McCreight of Greater Boston Legal Services. Mac is the second recipient of the award, which was instituted in 1990. See *Mac McCreight Honored with the 2002 David B. Bryson Award*, next page, for a more complete description of the presentation and Mac's accomplishments.

A day-long housing training preceded the HJN conference, providing new attorneys and advocates an overview of federal housing programs and an opportunity to focus during break-out sessions on the more advanced topics of

[12]Available at www.hudclips.org.

[1]See the http://gulpny.org Web site for easy access to a number of useful census data systems.

[2]NHLP will be submitting comments to HUD on what types of fields (areas of information) we think will be useful to HJN members and other advocates. If you have suggestions about the types of information to which you would like improved access, please submit them to mebrown@nhlp.org.

how to utilize the public housing authority plan process as well as understanding the impact of the *Rucker*[3] decision. Workshop trainers included Fred Fuchs from Texas Rural Legal Aid, Mac McCreight from Greater Boston Legal Services, Betsy Julian, a private practitioner, and Barbara Sard from the Center on Budget and Policy Priorities. NHLP staff, including Catherine Bishop and James Grow, also conducted the training.

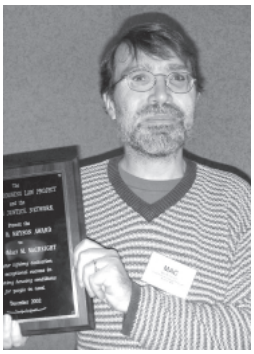
For the first time, both the HJN meeting and the preceding housing conference qualified for continuing legal education credit in many jurisdictions. For more information about the qualifying jurisdictions, please contact Amy Siemens at asiemens@nhlp.org.

The conference was a tremendous success, offering newer advocates an opportunity to make connections with more experienced colleagues from various programs, and advocates at all levels a chance to learn from each other and from an experienced and diverse array of presenters. Participants also had a chance to commune with one another and deepen connections with colleagues who may normally be voices on a conference call or simply an e-mail contact. NHLP looks forward to the next HJN meeting and hopes that those who attended this meeting will encourage others to attend in the future by sharing their experience. ■

Mac McCreight Honored with the 2002 David B. Bryson Award

This past year's Housing Justice Network conference, held in December 2002, featured a presentation of the David B. Bryson Award to James "Mac" McCreight, a senior staff attorney with Greater Boston Legal Services (GBLS). The award ceremony took place during Sunday's luncheon, with more than 100 conferees in attendance.

The award is named for NHLP colleague and nationally renowned housing attorney David Bryson, who passed away in 1999. David was an immensely talented and committed advocate whose passion, wisdom and impact on housing law and tenants' rights were unsurpassed. The award honors his life's work and legacy, recognizing those who have likewise demonstrated an unwavering commitment and a venerable track record in fighting for and achieving housing justice for low-income people.


Mac McCreight

Barbara Sard, Director of the Center on Budget and Policy Priorities, delivered the award presentation with a ringing tribute to the award's namesake and its honoree. A longtime friend and colleague of both men, she said that Mac, like David, epitomized what it meant to be a "lawyer's lawyer" and a "low-income tenant's lawyer."

They were alike in many ways, according to Barbara: "I don't know another legal services attorney who is more like David than Mac, from their physical similarities to their tremendous work ethic." She went on, "At his core, the formidable energy that drives Mac's work is his commitment to low-income tenants, his desire to improve their lives and particularly to help them empower themselves. In his work with tenant groups, Mac is without par."

Prior to attending law school, Mac did adult literacy work in Philadelphia and community organizing work in North Carolina. It was in North Carolina that he first observed legal services attorneys working with community organizations, and was exposed to the idea of community lawyering. He earned his law degree from Northeastern School of Law, and went to work for New Haven Legal Assistance. In New Haven, a housing court had just come into being, and Mac was one of the first attorneys there to work with public housing tenant organizations to press for repairs and to make the lease and grievance procedures more meaningful.

Mac returned to Boston to get married and joined GBLS in the summer of 1982. He got to know David Bryson and other NHLP staff in the mid-1980s when he served as managing attorney for GBLS's Housing Unit. On his work in this capacity, Mac said, "My main delight during this period was meeting with a lot of public housing tenants' organizations and taking whatever openings we could to try to build the power of those organizations."

In 1992, Mac quit his management post and joined GBLS's newly formed Homelessness Unit, chaired, at the time, by Barbara Sard. When, in the mid-1990s, GBLS combined its Homelessness and Housing Units, Mac returned to his public housing tenant work, which remains his primary focus today.

This rigorous and accomplished career path has helped build Mac's "encyclopedic knowledge of the law," according to Barbara Sard. She also pointed out his integrity, his generosity with his time, and his uncanny effectiveness in getting opponents to take him at his word when it comes to the finer points of housing law.

"In many ways, Mac exemplifies the best of what a legal services housing lawyer should be," she said. "He represents tenant groups. He brings class actions to help achieve systemic change. He works with the city council on city ordinances. He works with state legislatures. He works on federal regulations. Yet he still carries a caseload of individual cases that would crush most of us."

"This comes as a genuine shock," began Mac, clearly moved, as he accepted the plaque from Anita Bryson, David's wife of 23 years. "I am very humbled by this because David Bryson has always been a real mentor and model to me of what a legal services lawyer could do. He was the people's lawyer for public housing residents. There are so many others here in this room who I think deserve this more than I, but I very much appreciate this, and I hope that all of us push forward on David's path for the future." ■

[3]*Department of Housing and Urban Development v. Rucker,* 122 S.Ct. 1230 (2002).

Recent Housing Cases

The following are brief summaries of recently reported federal 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.

Coliseum Square Assoc. v. HUD, 2002 WL 31886808 (E.D. La. Dec. 18, 2002). A group of nonprofit organizations, including a local neighborhood association and a local merchants' association, moved to voluntarily dismiss the Housing Authority of New Orleans (HANO) from a suit seeking to halt a HOPE VI project for failure to comply with the *National Environmental Protection Act* (NEPA) and the *National Historical Preservation Act* (NHPA). The motion, which was opposed by the authority, was based on plaintiffs' claim that the housing authority was not subject to suit under the statutes.

At issue was a proposed redevelopment initiative aimed at revitalizing a decaying 1,510 unit housing property in New Orleans. HANO secured a $25 million HOPE VI revitalization grant, plans for which included development of a Wal-Mart Superstore. Plaintiffs filed suit alleging that both HANO and the Department of Housing and Urban Development (HUD) had failed to comply with NEPA and NHPA. They requested injunctive relief in an attempt to prevent the housing authority from receiving the grant from HUD until the project was found to be in compliance with the statutes.

When the plaintiffs filed a motion for partial summary judgment and a permanent injunction halting all work on the project until an Environmental Impact Statement was completed, HANO sought a continuance in order to conduct discovery in order to better defend against the motion. The plaintiffs responded by filing a motion to dismiss the housing authority from the suit entirely. The plaintiffs asserted, and the court agreed, that HANO was not subject to suit under NEPA as the act confers no private right of action, and that HANO's NEPA compliance could not be reviewed under the *Administrative Procedures Act*. In addition, the court found that plaintiffs' NHPA claims against HANO were certain to fail, as only a federal agency can be found in violation of NHPA. Despite the court's finding that HANO would be prejudiced by the exclusion because of its ownership of much of the land on which the project was proposed, the futility of the claims against the housing authority merited dismissal with prejudice.

Reyes v. Erickson, 2003 WL 42003 (S.D.N.Y. Jan. 3, 2003). The court dismissed federal claims against city officials and the beneficiary of a city program that transferred ownership of city-owned buildings to a private "neighborhood entrepreneur." Seven Latino building residents challenged the transfer, alleging that they had been denied an opportunity to establish a tenants' cooperative as an alternative to private ownership. Claiming that the denial was based on their Latino heritage, their limited English-language skills, and their relative lack of education, the residents brought claims under the *Housing and Community Development Act's* (HCDA) nondiscrimination provision, 42 U.S.C. §5309, and its implementing regulations, as well as under 28 U.S.C. §§ 1981 and 1983 and various state claims.

The court held that it lacked subject matter jurisdiction to hear claims under the HCDA, as the provision conferred no private right of action. Rather, the court found that the act delineates procedures and remedies by which the Secretary of HUD, and not private citizens, may enforce nondiscrimination in the administration of HUD-funded programs.

The claim brought under Section 1983 also failed for lack of subject matter jurisdiction. The plaintiffs failed to comply with a New York state law requirement that constitutional claims against state agencies be filed initially in state court. The court found this to be a jurisdictional bar to the suit. The Section 1981 claim was dismissed for failure to allege facts supporting the inference that the city's actions were based on animus towards the plaintiffs based on their ethnicity. The court declined to exercise supplemental jurisdiction over state claims, and dismissed the action.

Conway v. Housing Authority of Asheville, 2002 WL 31883046 (W.D.N.C. Dec. 19, 2002). The court denied a public housing authority's motions to dismiss and for summary judgment in a suit alleging the housing authority had failed to provide a grievance hearing when the plaintiff requested a hearing after an eviction action was decided against him, but before he was evicted.

Conway was evicted from his public housing unit after a small claims court entered a judgment against him for failing to pay rent. Prior to a final order of eviction being entered while the case was on appeal, Conway contacted the housing authority in an attempt to tender the outstanding rent amount, which the apartment manager refused to accept. Soon afterwards, Conway requested a grievance hearing in regard to the housing authority's refusal to accept his rent money. When that was denied, Conway filed this suit in federal court, claiming his statutory right to a grievance hearing under 42 U.S.C. §1437d(k) had been violated.

The defendants moved to dismiss, claiming that Conway was attempting to relitigate the eviction action and that the *Rooker-Feldman* doctrine precluded federal subject matter jurisdiction. The court found *Rooker-Feldman*, which prohibits federal courts from reviewing state court decisions, was inapplicable given that Conway sought redress for the housing authority's failure to provide him with a grievance hearing, and not the state court's eviction order. The defendants' *res judicata* argument thus failed as well.

The defendants argued that the statute providing grievance hearings for public housing tenants conferred no private right of action and thus could not form the basis of a suit

[1]www.westlaw.com.

[2]www.lexis.com.

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

under Section 1983. This argument was rejected by the court based on prior circuit court analyses finding a private right of action under Section 1983 to redress a denial of this type of grievance hearing, specifically *Samuels v. District of Columbia*, 770 F.2d 184 (D.C.Cir.1985) and *Farley v. Philadelphia Hous. Auth.*, 102 F.3d 697 (3rd Cir.1996). The court briefly analyzed Section 1437d(k) and its implementing regulation, codified at 24 C.F.R. § 966.52, finding no congressional intent to foreclose a right of action and finding the language to be specific, mandatory and enforceable by the courts.

The court also disagreed with defendants' claim that Conway was no longer a legal tenant of the housing authority when he requested the grievance hearing. The court found Conway to be a "resident" since, at the time he requested a hearing, he was still living in the unit. Furthermore, the housing authority's policy stated that the tenancy shall not terminate until the tenant's opportunity for a hearing has expired, even if a state or local notice to vacate has expired.

In addition to denying defendants' motion to dismiss and for summary judgment, the court found no genuine issue of material fact, dismissed the matter in its entirety, with prejudice, and ordered the parties to proceed with the grievance hearing.

Royal Oak Apartments v. Solt, 573 S.E.2d 773 (Table) (N.C.App., 2002) (unpublished). Citing *HUD v. Rucker* in a non-drug-related context, the North Carolina state appeals court found that good cause for eviction existed based on the disruptive actions of a tenant's ex-husband. Recent state case law held that public housing tenants were not personally at fault for criminal activity by other members of the household and that thus such activity failed to constitute good cause. However, the court found that case inapposite because the tenant was on notice of the guest's violent propensities and yet invited him onto the property. The tenant was evicted based on a lease provision allowing eviction due to criminal activity on or near the premises by a tenant, any member of the tenant's household, or any guest or other person under tenant's control. The tenant's argument that she could not in fact control her ex-husband's actions was rejected. The court held, based on the *Rucker* reasoning, that actual control was not necessary, but rather was imputed to her by virtue of her failure to take measures to exclude him from the premises. Although the court acknowledged that the eviction was a "harsh result," it found no abuse of discretion in the termination of the tenant's lease.

In re Stoltz, 2002 WL 31845886 (2nd Cir. Dec. 20, 2002). The Second Circuit affirmed a district court decision reversing a bankruptcy court's decision to allow the eviction of a tenant due to non-payment of rent that was discharged in bankruptcy proceedings. Debtor-Appellee Stoltz had been living in the public housing for four years when she was forced to declare bankruptcy. Stoltz's prepetition debts, including back rent owed to the Brattleboro Housing Authority (BHA), were discharged in the bankruptcy proceedings. The bankruptcy court then granted BHA's motion to evict her on account of having defaulted on her rent.

The district court reversed the bankruptcy court's decision, interpreting Section 525(a) of the bankruptcy code. Section 525(a) restricts the government from limiting debtors' interests in any "license, permit, charter, franchise, or other similar grants," and was, in the court's opinion, intended to prevent discrimination against debtors by the government. The appeals court found that Section 525(a) covered public housing leases under the "other similar grants" language, since, like a license or charter, a public housing unit was not available from the private sector, and the regulation's enumerated property interests were comparable to an interest in public housing. The court disagreed with BHA's contention that only a debtor's *future* right to access public housing was covered, noting that a debtor would be prevented from making a "fresh start" if she were evicted just as she attempted to regain financial solvency.

The court's decision resolved potential conflicts between Sections 525(a) and 365 of the Bankruptcy Code, which states that where there has been a default, a debtor's lease will be deemed to have been rejected unless the trustee who is assuming the lease can compensate or make assurances to a landlord-creditor. The court held that Section 525(a) of the code overrides Section 365(b) when a conflict emerges, since Section 525(a) is more specific and creditors' interests were adequately protected by the fact that Stoltz would not be protected by a postpetition failure to pay rent. Ultimately, the circuit court determined that the district court had correctly found that the anti-discrimination provision of Section 525(a) prevented Stoltz from being evicted for having failed to pay her rent prior to declaring bankruptcy.

Fisher v. Housing Authority of Kinston, 573 S.E.2d 678 (N.C.App., 2002). The North Carolina Court of Appeals reversed a trial court's grant of summary judgment in a minor's suit against a housing authority for personal injuries resulting from the presence of lead in the apartment. The trial court held that the minor's claims of negligence, breach of warranty, and violations of the state consumer protection act against the housing authority were barred by sovereign immunity. On appeal, the reviewing court rejected the housing authority's argument that since it operated the project pursuant to governing statutes, its acts were "governmental." The appeals court found instead that owning, managing and maintaining low-income housing was a proprietary, rather than a governmental, function, based on the presence of similar rental enterprises in the private sector and the exchange of money involved. Given the proprietary nature of the housing authority's acts, the housing authority was not afforded the protections of sovereign immunity, and the case was remanded to the trial court. ■

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 December of 2002. 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 Rules

67 Fed. Reg. 74,550 (Dec. 9, 2002)
Semiannual Regulatory Agenda

Summary: HUD is publishing its agenda of regulations already issued or that are expected to be issued over the next several months. The agenda also includes rules currently in effect that are under review, and describes those regulations that may affect small entities as required by Section 602 of the Regulatory Flexibility Act. The purpose of publication of the agenda is to encourage more effective public participation in the regulatory process by providing the public with early information about pending regulatory activities.

67 Fed. Reg. 76,096 (Dec. 10, 2002)
Public Housing Total Development Cost

Summary: This final rule amends HUD's regulations governing the Total Development Cost (TDC) limit for the development of public housing. The amendments implement statutory changes made to the TDC limit previously established by statute. Among other changes, this final rule limits the amount of public housing capital assistance that a public housing agency may use to pay for housing construction costs. The rule also provides that demolition and environmental hazard remediation costs are subject to the TDC limit only to the extent that such costs are associated with the replacement of public housing units on the project site. Further, the final rule provides that other extraordinary site costs, as determined by HUD, are not subject to the TDC limit. This rule follows publication of a January 4, 2001, proposed rule and takes into consideration the public comments received on the proposed rule.

Effective Date: January 9, 2003.

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

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

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

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

HUD Notices

67 Fed. Reg. 71,580 (Dec. 2, 2002)
Announcement of Funding Awards for Fiscal Year 2002 for the Housing Choice Voucher Program

Summary: This document notifies the public of funding awards for Fiscal Year (FY) 2002 to housing agencies (HAs) under the Section 8 housing choice voucher program. The purpose of this notice is to publish the names, addresses and the amount of the awards to housing agencies for housing conversion actions, special housing conversion fees, public housing relocations and replacements, and Section 8 counseling.

67 Fed. Reg. 71,978 (Dec. 3, 2002)
Notice of Reminder for Fiscal Year 2002 HOPE VI Demolition Grant Applicants of the Need for Prior Demolition Approval

Summary: This notice reminds potential applicants for FY 2002 HOPE VI demolition grants that they must secure demolition approval under Section 18 of the United States Housing Act of 1937 on or before the HOPE VI demolition grant application deadline.

67 Fed. Reg. 76,452 (Dec. 12, 2002)
Statutorily Mandated Designation of Difficult Development Areas and Qualified Census Tracts for Section 42 of the Internal Revenue Code of 1986

Summary: This document designates ''Difficult Development Areas'' and ''Qualified Census Tracts'' (QCTs) for purposes of the Low-Income Housing Tax Credit (LIHTC) under Section 42 of the Internal Revenue Code of 1986 (Code). HUD makes new Difficult Development Area designations annually and makes Qualified Census Tract Designations at this time due to the recent release of relevant data from the 2000 Census.

67 Fed. Reg. 76,648 (Dec. 12, 2002)
Notice of Public Interest (NOPI) for the Partnership for Advancing Technology in Housing (PATH)

Summary: The purpose of this notice is to inform potential applicants that HUD's Office of Policy Development and Research (PD&R) is interested in receiving ideas for cooperative agreements for research and activities in support of the Partnership for Advancing Technology in Housing (PATH) program. PATH is working to foster the development and use of advanced housing technologies through partnerships between U.S. businesses and the federal government. These efforts, which improve the quality, affordability, durability, energy efficiency and environmental performance of a home, help everyone—industry, consumers, and the environment. PATH encourages developing and adopting innovative housing components and systems, designs and production methods as well as reducing the amount of time needed to move technologies to the marketplace.

67 Fed. Reg. 77,073 (Dec. 16, 2002)
Announcement of Funding Awards for Fiscal Year 2002; Brownfields Economic Development Initiative

Summary: This document notifies the public of funding awards for the FY 2002 Brownfields Economic Development Initiative. The purpose of this document is to announce the names and addresses of the award winners and the amount of the awards to be used to stimulate economic development by local governments and private sector parties in brownfields.

HUD PIH Notices

Notice PIH 2002-26 (HA) (December 13, 2002)
Extension of Notice PIH 2001-13 (HA), Fiscal Year 2001 and 2002 Renewal of Expiring Section 8 Moderate Rehabilitation (Mod Rehab) Housing Assistance Payments (HAP) Contracts

Summary: HUD has been operating under a Continuing Resolution since October 1, 2002. The procedures outlined in PIH Notice 2001-13 are extended during the period of the current Continuing Resolution and any subsequent Continuing Resolutions that the Department may operate under during Federal FY 2003. Procedures contained within PIH Notice 2001-13 will continue to apply to HAP contracts expiring during Federal FY 2003 until superceded by HUD Directive to implement any statutory changes in renewal procedures.

Expires: September 30, 2003.

Notice PIH 2002-27 (HA) (December 13, 2002)
Section Eight Management Assessment Program (SEMAP) Guidance to HUD Field Offices Assisting SEMAP Troubled and Non-Troubled PHAs

Summary: This notice provides guidance for Hub Directors and Program Center Coordinators to follow in assisting Public Housing Agencies (PHAs) determined troubled or non-troubled under the Section Eight Management Assessment Program (SEMAP) for the Housing Choice Voucher Program.

Expires: Indefinite.

Notice PIH 2002-29 (TDHEs) (December 30, 2002)
Administrative and Planning Expenses Requirements for the Indian Housing Block Grant Program

Summary: This notice provides specific guidance on the Administrative and Planning expense requirements for the participants in the Indian Housing Block Grant (IHBG) program. In the Office of Inspector General's report titled Nationwide Audit of Implementation of the Native American Housing Assistance and Self-Determination Act of 1996 issued on August 2, 2001, they identified confusion by tribes and tribally designated housing entities (TDHEs) over what constitutes allowable Administrative and Planning expenses and recommended the regulations be clarified.

Expires: Indefinite.

RHS Rules

67 Fed. Reg. 78,321 (Dec. 24, 2002)
Reengineering and Reinvention of the Direct Section 502 and 504 Single Family Housing (SFH) Programs

Summary: The Rural Housing Service (RHS) published an interim final rule on November 22, 1996 (61 Fed. Reg. 59,761–59,802) requesting comments on the Single Family Housing regulations. This action incorporates the changes made as a result of the comments received.

Effective Date: January 23, 2003, except 3550.63 (the maximum loan limit) will be effective on March 24, 2003.

RHS Federal Register Notices

67 Fed. Reg. 79,030 (Dec. 27, 2002)
Notice of Timeframe for Section 514 Farm Labor Housing Loans and Section 516 Farm Labor Housing Grants for Off-Farm Housing for Fiscal Year 2003

Summary: This notice announces the timeframe to submit applications for Section 514 Farm Labor Housing loan funds and Section 516 Farm Labor Housing grant funds for new construction and acquisition and rehabilitation of off-farm units for farmworker households. Applications may also include requests for Section 521 rental assistance (RA) and operating assistance for migrant units. A NOFA announcing the level of funding for the program will be published upon passage of a final appropriations act.

Dates: The closing deadline for receipt of all applications in response to this Notice is 5 p.m. local time on March 27, 2003 for each Rural Development State Office.

67 Fed. Reg. 79,033 (Dec. 27, 2002)
Notice of Timeframe to Submit Applications for the Section 515 Rural Rental Housing Program for Fiscal Year 2003

Summary: This notice announces the timeframe for submitting applications for the Section 515 Rural Rental Housing Program for FY 2003.

Dates: The deadline for receipt of all applications in response to this notice is 5 p.m. on February 25, 2003.

67 Fed. Reg. 79,036 (Dec. 27, 2002)
Notice of Timeframe for Section 533 Housing Preservation Grants for Fiscal Year 2003

Summary: The Rural Housing Service (RHS) announces that it is soliciting competitive applications under its Housing Preservation Grant (HPG) program. The HPG program is a grant program which provides qualified public agencies, private nonprofit organizations and other eligible entities grant funds to assist very low- and low-income homeowners to repair and rehabilitate their homes in rural areas, and to assist rental property owners and cooperative housing complexes to repair and rehabilitate their units if they agree to make such units available to low- and very low-income persons. The actual funds available for FY 2003 will be published at a later date in a subsequent notice.

Dates: The deadline for receipt of all applications in response to this notice is 5 p.m. local time on March 27, 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*	_____	$ _____
Welfare and Housing—How Can the Housing Assistance Programs Help Welfare Recipients? (2000)	$5.00*	_____	$ _____
Congress' New Public Housing and Voucher Programs (1998)	$10.00**	_____	$ _____
Housing for All: Keeping the Promise (1995)	$5.00*	_____	$ _____
The Family Self-Sufficiency Program: An Advocate's Guide (1994)	$10.00*	_____	$ _____
Let's Choose a New Owner! What Residents Need to Know When an Owner Wants to Sell an Expiring-Use Project Under Title VI (1993) (master for duplicating)	$10.00*	_____	$ _____
A Passage from Poverty: Self-Sufficiency Policies and the Housing Programs (1991)	$10.00*	_____	$ _____

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**This is a very abbreviated index of the cases listed in the Recent Housing Cases in each issue of the Bulletin. For cases reported on in separate articles, see "Cases."*

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