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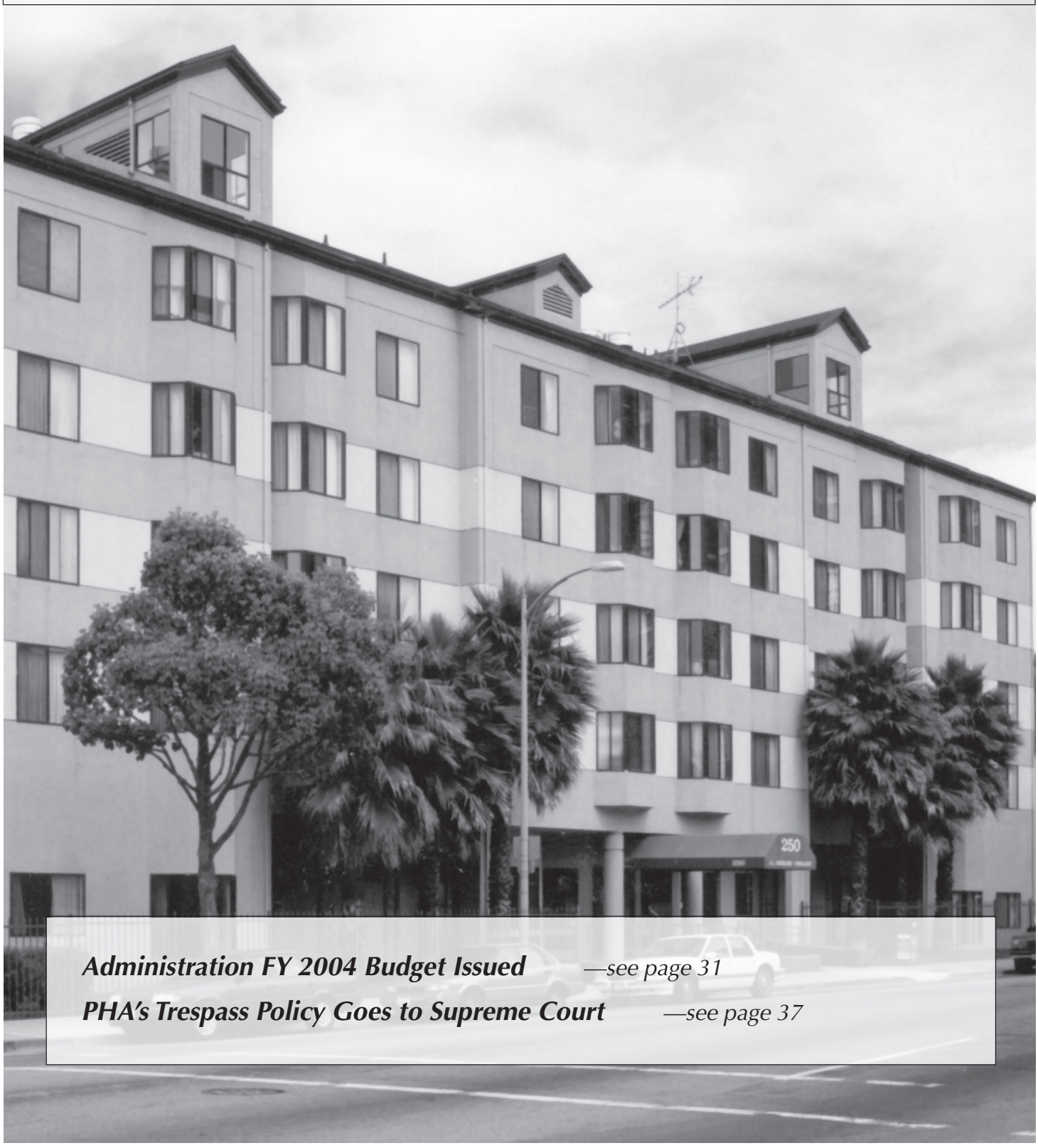

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Published by the National Housing Law Project
614 Grand Avenue, Suite 320, Oakland CA 94610
Telephone (510) 251-9400 • Fax (510) 451-2300
www.nhlp.org • nhlp@nhlp.org

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Cover: J.L. Richards Terrace, 80-unit senior development financed and subsidized under Section 202/8 programs. Owned by Evergreen Terrace Corporation, Oakland, California. Managed by Christian Church Homes.

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

While Bush Issues FY 2004 Budget, Congress Finally Enacts FY 2003 Appropriations

Congress certainly outdid itself this year in neglecting to promptly carry out one of its most basic functions. Even with the Republicans in control of both chambers of Congress and the White House, it took until mid-February to complete action on most of the appropriations bills for Fiscal Year (FY) 2003 that began last October 1, including that for the Department of Housing and Urban Development (HUD) programs. By mid-February, the Bush Administration had already released its budget for FY 2004. This article briefly reviews both the FY 2003 HUD appropriations and its 2004 budget request.[1]

The FY 2003 Omnibus Appropriations Bill

On February 13, both the House and Senate quickly passed the Conference Report on House Joint Resolution 2, the Omnibus FY 2003 Appropriations bill that had been negotiated between the House and Senate conferees over the prior week. The President then signed the measure on February 20, 2003.[2] The bill includes discretionary spending for 11 of the 13 appropriations categories, including that for the Department of Veterans Affairs (VA), HUD and Independent Agencies (IA), for which bills had not yet been passed, forcing programs to operate under continuing resolutions generally providing funding at lower FY 2002 levels. Congress had passed two other appropriations bills last year, providing $366 billion for the military.

The bill's $397 billion price tag comes in considerably (about $12 billion) over the target sought by the President and GOP leaders, but much of the excess was for various farm relief, defense and security, and education programs that decision-makers found sufficiently palatable. Apparently this final tab does not even include additional spending that comes from other accounts, such as almost $32 billion for highways, about $49 billion over 10 years to increase Medicare reimbursements for doctors and $2.2 billion for education programs. And the Administration is expected to request a reported $20 billion more in spending through supplemental appropriations for the military, homeland security, anti-terrorism and similar programs after Congress reconvenes in late February.

Big winners of more spending, aside from the military and related activities, included the Department of Education

[1]For background, *see Federal Housing Budget Braces for Approaching Storm*, 33 HOUS. L. BULL. 1 (Jan. 2003).

[2]Pub. L. No. 108-7, ___ Stat. ___ (Feb. 20, 2003). The bill text and Joint Explanatory Statement of the Conference Committee are contained in H.R. Rep. 108-10. The HUD appropriations are in Division K, Title II (pp. 476 *et seq.*, with "Administrative Provisions" starting on p. 494); the Joint Explanatory Statement comprises the second part of the report, with report language affecting HUD also found in Division K (pp. 1367 *et seq.*).

($53.1 billion, $3.1 billion over last year), $1.5 billion to states for overhauling their election systems, $4.3 billion for the FBI and $15.4 billion for NASA ($500 million over last year), more funding for border security, and a $227 million boost (about 50 percent) for the Securities and Exchange Commission.

The overall HUD-VA-IA bill category ($90.4 billion) received less than the President's original FY 2003 budget request of $93.4 billion, and less than last year ($95.4 billion). HUD programs generally saw little of the enthusiasm exhibited by the Administration and Congressional leaders for higher spending.

HUD programs are funded at a total program level of $36.3 billion, an increase of $1.8 billion over FY 2002, representing a net appropriation of $31.2 billion, which is only an increase of $1.2 billion over FY 2002 levels. However, this overall funding level will be reduced by an 0.65 percent across-the-board offset[3] to support additional spending for programs like wildfire control and voting modernization, effectively a $203 million cut for HUD. The offset applies proportionately to every program, project and activity within every item of budget authority, with a few stated exceptions, although the HUD Secretary has discretion in how to apply the across-the-board cut to the Housing Certificate Fund.

Once again, virtually all of this "increase" is needed to provide budget authority to renew an increasing number of expiring Section 8 project and tenant-based contracts. Some highlights include:

- The Housing Certificate Fund, which provides renewal funding for expiring contracts, receives $17.2 billion, a $1.6 billion increase over FY 2002. Supposedly, this amount is sufficient to renew all expiring contracts so that every family or unit currently assisted by a Section 8 voucher or project-based subsidy can continue to receive assistance, subject to program rules. Congress also maintains that PHAs have flexibility to increase the number of families assisted with vouchers up to their authorized level.
- The HOME program is funded at $2 billion, an increase of $129 million over FY 2002, to help states and localities increase the affordable housing supply, including a $75 million set-aside for the Administration's new Downpayment Assistance Initiative to help about 15,000 low-income families become homeowners, and $40 million for housing counseling, double that for FY 2002.
- Public Housing Operating Subsidies receive $3.6 billion, $105 million above FY 2002 and $70 million above the budget request. HUD can use $250 million to cover the FY 2002 shortfall, which in turn could jeopardize the sufficiency of the Operating Fund for FY 2003 needs.
- The Public Housing Capital Fund gets $2.7 billion, $300 million more than the President's request. (While the Senate's proposal to use $100 million for a loan financing program was rejected, HUD must report to the Appropriations Committees about PHAs which use private financing for capital needs.)
- HOPE VI is funded at $574 million, with authorization to expend these funds through September 30, 2004, and no comment on the Administration's proposed defunding of HOPE VI in the FY 2004 budget request.
- The Community Development Fund receives $4.9 billion, with $4.4 billion for Community Development Block Grants and $261 million in individual earmarks under the Economic Development Initiative.
- Homeless Assistance is funded at $1.23 billion, $102 million over FY 2002, including full funding of $193 million for Shelter Plus Care renewals.
- Section 202 Supportive Housing for the Elderly is funded at the FY 2002 level of $783 million, $10 million above the budget request.
- Section 811 Supportive Housing for People with Disabilities receives $251 million, $16 million above FY 2002 and $9 million above the request.
- Native American Housing Block Grants are funded at $649 million.
- Housing Opportunities for Persons with AIDS (HOPWA) is funded at the requested level of $292 million, which is $14 million above last year.
- Lead Hazard Reduction is funded at $176 million, compared to $126 million requested by the President, with $50 million for a Senate initiative for areas with the highest lead paint abatement needs.
- A rescission of $100 million in funds pooled from previously budgeted Section 236 interest reduction payments (IRP) on loans that have since been prepaid or foreclosed, which Congress had earlier earmarked for rehabilitation of HUD-insured multifamily housing.

Concerning the voucher program, Congress provided substantially more funding for voucher renewals than either the House or Senate bills. For the first time since fiscal year 1998, Congress has provided no new (incremental) vouchers, despite the Administration's request for 34,000 incremental vouchers, and lesser amounts in various earlier versions of the House and Senate bills. Nor did Congress adopt any permanent authorization for a welfare-to-work voucher program, leaving intact the existing program of 50,000 vouchers initially funded in fiscal year 1999.

The voucher renewal funding formula, a tremendously controversial issue in earlier versions[4] that had threatened substantial reductions to the program, was resolved as follows. The conferees provided a separate line item of

[3]Section 601 of Division N, H.R. Rep. No. 108-10 at p. 544.

[4]According to the Center on Budget and Policy Priorities, the renewal formula proposed by the House (along with its $11.7 billion funding level) would have resulted in a cut of 125,000 vouchers (around 7 percent of the total). The Senate later proposed a reduced voucher funding level, based on less than full utilization, along with a current indefinite appropriation entitling HUD to additional funds should utilization increase.

$12.5 billion for voucher renewals and fees, including a central reserve fund of $392 million. While retaining a commitment to preserving the number of currently authorized vouchers, the law changes the funding formula for local PHAs to reduce the need to recapture unused funds in the future. The conference report states that the bill is sufficiently flexible to ensure that PHAs can increase utilization to their authorized level and strongly encourages them to increase the number of families served. Whether the funding level will prove sufficient for full renewal of all vouchers remains uncertain, however, and may depend on HUD's access to unobligated balances from previous years. PHAs will receive renewal funds for the number of vouchers leased according to their most recent financial statement, adjusted by additional information regarding actual units under lease, with an inflation factor accounting for increases in per-unit costs. HUD can use the central reserve fund for contract amendments based on an increase in per-unit costs or in the total number of units leased. But where PHAs use up half of their own reserves, HUD must expeditiously use the central fund for amendments to cover increased costs or units. The law does not mandate, but permits, HUD to reallocate vouchers from PHAs with chronic underutilization, and changes the treatment of administrative fees.

The limited spending on housing, the environment and other social programs will further undermine these programs' ability to sustain current services, much less meet growing needs for assistance.

The Administration's FY 2004 HUD Budget

On February 3, the Bush Administration performed the Executive's annual ritual, delivering to Congress its FY 2004 budget request.[5] The $2.23 trillion spending plan for 2004, which promises record deficits, seeks to put more money into the military and homeland security, not even counting any money for a possible war in Iraq. The limited spending on housing, the environment, and other social programs outlined by the budget request will further undermine these programs' ability to sustain current services, much less meet growing needs for assistance.

Here is a brief summary of the President's $31.3 billion request for HUD programs in FY 2004:

- a request for $3.6 billion for the public housing Operating Fund;
- a request for $2.6 billion for the public housing Capital Fund;
- no funding for HOPE VI;
- no funding for Public Housing Drug Elimination (PHDEP);
- authorization for PHAs to use public housing capital funds to obtain private financing for the capital needs of properties that can be underwritten to market standards, similar to the proposals in last year's Administration budget proposal;
- division of the former Section 8 Housing Certificate (Expiring Contract Renewal) Fund into two parts:
- $11.48 billion in Section 8 voucher funds and $609 million in "support and amendment" funds to start the process of block granting the program—the entire program is to be block granted to the states in FY 2005—while renaming the program "Housing Assistance for Needy Families" (HANF). The Administration plans to submit new block grant legislation permitting states greater flexibility to set the terms of assistance and facilitate coordinated administration of HANF and TANF funds.
- $4.82 billion for renewing expiring project-based rental assistance contracts, of which up to $100 million would cover fees paid to Section 8 contract administrators;
- an increase of minimum rents for the poorest tenants in the public housing and Section 8 programs to *at least* $50 monthly;
- a request of $2.2 billion for the HOME program, a nominal 5 percent increase of $133 million, with $200 million proposed as an earmark for homeownership expansion under the President's stalled "American Dream Downpayment Initiative" to boost first-time homeownership for 40,000 low-income families;
- an essential freeze of CDBG at current levels, with a total fund of $4.7 billion, of which $4.43 billion would be for the CDBG program, possibly subject to a revised allocation formula to be proposed by HUD;
- a request for $646 million for Native American Housing Block Grants; and
- a request for $1.375 billion for the Homeless Assistance program, $50 million of which would support a "Samaritan" housing program jointly administered with the Department of Health and Human Services (HHS) and the VA.

Overall, the $31.3 billion FY 2004 budget represents a nominal increase of about 1 percent from this year's actual final appropriations level. In real terms this is a reduction, since even without adjusting for the cost of inflation in running the housing programs, more than a 1 percent increase is required to just renew the still-increasing number of expiring Section 8 contracts. The budget proposes to continue the Administration's path of malign neglect of rental housing programs that serve extremely low-income people, in favor of a few boutique initiatives to support expansion of

[5]The complete budget submission with supporting documents is available from the Office of Management and Budget's Web site at www.whitehouse.gov/omb/budget/fy2004/index.html.

homeownership and little else. HUD Secretary Mel Martinez takes a different view, characterizing it as a budget filled with "compassion and empowerment." Contrast that rhetoric with these additional facts.

For public housing, the Operating Fund request ignores the recent major HUD mistakes in calculating PHA operating subsidy needs under the current system, and thus fails to request any additional funding to cover such prior or future shortfalls through reserve funds or otherwise. Similarly, the Capital Fund request includes primarily funds to cover annually accruing rehabilitation needs, but no real funding to address the huge backlog (variously estimated around $20 billion or more) of existing capital needs. The request proposes that up to $131 million be used for a partial loan guarantee initiative to address the backlog by enabling PHAs to privately finance their properties. It is hard to discern how such a proposal could succeed, in light of the federal government's funding decisions for operating and capital needs, which have promoted uncertainty and unreliability in the financial structure, unless more of the financial burdens were to be off-loaded onto tenants in the form of rent increases.

For the voucher program, the budget delivers the Administration's opening gambit to divest federal responsibility.

For the voucher program, the budget delivers the Administration's opening gambit to divest federal responsibility. For many years, the Office of Management and Budget (OMB) has sought to convert project-based housing assistance to vouchers, which it believes are cheaper, then cut the average cost per voucher, turn the program over to state and local governments, and allow the states to combine housing assistance with other forms of public assistance to the poor such as TANF. Many believe OMB's overall objective is to reduce federal expenditures for housing assistance, transferring more of the burden to tenants or states and localities.

The Administration's FY 2004 proposal for a $13.6 billion block grant for Section 8 vouchers to the states, implemented over a two-year transition period, is the latest in this line of proposals. While such a grant could include restrictions preserving the number of assisted families, benefit levels would likely no longer be a matter of federal concern. Although likely to find a sympathetic ear among some key housing legislators,[6] the block grant proposal is usually a Trojan horse that should be closely scrutinized for its effects on tenants, especially the ability of the grants to keep pace with actual local housing costs over time and the resulting distribution of financial burdens.

For privately owned project-based subsidy programs, the budget is predictably silent on expanding the number of federally assisted units, and equally quiet on preserving what we have. As has been customary since 1996, the budget proposes to fund the renewal of all units assisted under expiring Section 8 contracts, subject to applicable laws generally establishing market subsidy levels and owner choice, with enhanced vouchers for tenants where contracts are not renewed. HUD proposes to rescind the only funding that exists for rehabilitation, the approximately $100 million annually in previously appropriated budget authority for Interest Reduction Payments, which accrues when Section 236 mortgages are prepaid or foreclosed.

As noted in recent editorials in both the *Washington Post* and the *New York Times*, the "compassion" often voiced by the President and Secretary Martinez was apparently AWOL when someone inserted the budget's proposal to increase minimum rents on those with the least incomes. Current laws require public housing and Section 8 voucher tenants to pay minimum rents, regardless of actual income levels, as set by their local PHAs anywhere between zero and $50. Project-based Section 8 tenants pay a HUD-set minimum of $25. Hardship exemptions are required. The Administration proposes to increase the floor to $50, and permit PHAs to establish even higher levels with no limit. Exceptions would be required for senior and disabled households, and hardship exemptions would be distributed at the HUD Secretary's discretion. The long-standing protection of income-based rents established by the Brooke Amendment, ensuring that at least those poor people served by federal housing programs would have access to decent and affordable housing with some ability to pay for other life necessities, would be jettisoned for a growing but indeterminate number of people with the lowest incomes. Such families would be excluded from the programs or face insecurity while participating in them. The program provides a poignant contrast to the Administration's "super-sized" tax plan to provide billions in benefits to wealthier Americans.

A bonus in this year's submission is a new document called the "Performance and Management Assessments," which OMB Director Mitch Daniels hopes will be included in all future budgets. Supposedly, this document contains this Administration's self-assessment of its management performance and an "objective performance rating" of 234 separate programs, including several HUD programs. While it is unlikely that these superficial assessments will themselves be determinative in the budget and policymaking process, they will doubtless provide additional grist for the opponents of public spending on social programs.

The appropriations process should move forward with the Administration explaining its budget to Congress through committee hearings during March and April, and Congress putting together its initial appropriations bills soon thereafter, which will spell the fate of the budget's proposed funding levels and initiatives. The *Bulletin* will report on any significant subsequent developments as the year progresses. ■

[6] *See Proposal to Transform Federal Housing Assistance Into Block Grants Is Introduced in the Senate*, 30 HOUS. L. BULL. 118 (Aug. 2000).

HUD FY 2004 Budget Chart for Selected Programs*

HUD Program *(set-aside indented)*	FY00 Enacted	FY01 Enacted	FY02 Request	FY02 Enacted	FY03 Request	FY03 Enacted	FY04 Request
Housing Certificate Fund[1]	$11,376	$13,941	$15,717	$15,641[2]	$17,527[3]	$17,224[4]	$0[5]
Housing Assistance for Needy Families	—	—	—	—	—	—	13,607
Contract Renewals	10,640	12,972	15,108	15,085[6]	16,812[7]	16,742[8]	13,147[9]
New Section 8 Vouchers	346	453	197	144[10]	204[11]	0	36[12]
Project-Based Rental Assistance	—	—	—	—	—	—	4,823[13]
Contract Administration	194	192	196	196	196	196	100
Public Housing Capital Fund	2,900	3,000	2,293	2,843[14]	2,426[15]	2,730[16]	2,641[17]
Resident Opp'ty & Self Sufficiency	55	55	55	55	55[18]	55[19]	55[20]
Public Housing Operating Fund	3,138	3,242	3,385	3,495	3,530	3,600[21]	3,574[22]
Drug Elimination Grants	310	310	0	0[23]	0	0	0
HOPE VI	575	575	574	574	574[24]	574[25]	0[26]
Native American Housing Block Grants	620	650	649	649	647	649	647
Native Hawaiian Housing Block Grant	—	—	—	—	10[27]	10[28]	35[27]
Elderly Housing (Section 202)	710	779	783	783	774[29]	783[30]	774[31]
Disabled Housing (Section 811)	201	217	218	241[32]	250[33]	251[34]	251[34]
Rental Housing Assistance	—	—	—	—	—	0[35]	0[36]
HOME Investment Partnership Prog.	1,600	1,800	1,796[37]	1,846[38]	2,084[39]	2,000[40]	2,197[41]
Housing Counseling Assistance	15	20	20	20	35[42]	40[43]	45[42]
Community Development Block Grants	4,800	5,057	4,802	5,000[44]	4,732[45]	4,937[46]	4,716[47]
Self-Help Homeownership Opp'ty[48]	20	20	22	22	65	25	65
Youthbuild	42.5	60	60	65	65	60	65
Economic Development Initiative	256	292	0[49]	294	0	261	0
Homeless Assistance Grants	1,020	1,025[50]	1,023[51]	1,123[52]	1,130[53]	1,225[54]	1,325[55]
Shelter Plus Care Renewals	0	100	100	0	0	0	0
Samaritan Housing	—	—	—	—	—	—	50[56]
Emergency Food and Shelter (FEMA)[57]	110	140	140	140	153[58]	153[59]	153[58]
Housing for Persons with AIDS	232	258	277	277	292	292	297
Rural Housing and Economic Dev't	25	25	0[60]	25	0[60]	25	0[60]
Brownfields Redevelopment	25	25	25	25	25	25	0
Fair Housing Assistance Program	20	22	23	26	26	26	30
Fair Housing Initiative Program	24	24	23	20	20	20	20
Lead-Based Paint Hazard Reduction	80	100	110	110	126	176[61]	136
Salaries and Expenses	1,005	1,070	1,097	1,097	1,070	1,090	1,112
TOTAL (Discretionary)[62]	**$26,496**	**$30,309**	**$30,404**	**$30,149[63]**	**$31,422**	**$31,200[64]**	**$30,901**

*This budget chart was prepared by and is printed with permission from the National Low Income Housing Coalition.

Footnotes to HUD FY 2004 Budget Chart

[1]Includes $4.2 billion in advance appropriations in all cases.

[2]Represents actual spending of $16.3 billion, using $640 million from the reduction of Section 8 reserves from two months to one month. Also provides for $1.2 billion in rescissions from Section 8 recaptures.

[3]Provides for $1.1 billion in rescissions.

[4]Provides for $1.6 billion in rescissions.

[5]Tenant-based and project-based housing assistance are no longer funded through Housing Certificate Fund but separated into a tenant-based voucher program called Housing Assistance for Needy Families (HANF) and Project-Based Rental Assistance. HANF will be a block grant to the states in FY05.

[6]Represents actual spending of $15.7 billion, using $640 million from the reduction of Section 8 reserves from two months to one month.

[7]Does not include $260 million in tenant protection vouchers and $52 million for Family Self-Sufficiency coordinators.

[8]Includes $15.3 billion for renewals plus a central fund of $392 billion and $1.08 billion in administrative fees (but does not include $48 million for FSS coordinators or $234 million in tenant protection vouchers). Directs HUD to use central fund to replenish public housing agency (PHA) reserve accounts when PHAs expend one-half of their reserves; directs HUD to provide quarterly reports on project-based opt-outs, prepayments and repair needs.

[9]Includes $11.5 billion for HANF tenant-based renewals, $1.2 billion for administrative fees, and $473 million of a $609 million central fund (from which $36 million for incremental vouchers and $100 million for capacity building funds for states are subtracted). Does not include $252 in tenant protection vouchers or $72 million for Family Self-Sufficiency coordinators, but includes by nearly $1.1 billion in unobligated balances transferred from the Housing Certificate Fund.

[10]Funds 26,000 new vouchers, with 18,000 for fair share for PHAs with high utilization and 8,000 for certain non-elderly disabled families.

[11]Funds Section 8 downpayment assistance ($15 million) and approximately 33,400 new vouchers, consisting of fair share vouchers for PHAs with high utilization rates ($143 million), vouchers for community-based living opportunities for people with disabilities ($6 million), vouchers for certain non-elderly disabled families, and vouchers for homeless veterans.

[12]Funds 5,500 vouchers for certain non-elderly disabled families; additional vouchers to be distributed to states may be funded by the central fund if available, subject to broad statutory and regulatory waiver authority.

[13]Funds renewal of project-based housing assistance contracts; includes $300 million in carryover funds rescinded and reappropriated.

[14]Includes $15 million for the Neighborhood Networks Initiative for PHAs to establish computer centers in and around public housing and $10 million in remediation funds for troubled PHAs.

[15]Represents an overall decrease in unrestricted capital funds of $441 million due to increased set-asides. HUD proposes conversion of public housing units to project-based voucher assistance to facilitate private financing for capital needs.

[16]Sets aside $447 million for capital and management activities for PHAS that have obligated all assistance for FY98 through FY01; directs HUD to provide a report on PHAs that have used private financing to meet capital needs by August 7, 2003.

[17]Includes proposal to meet public housing capital needs through conversion to project-based voucher assistance to support private financing, combined with up to $131 million in loan guarantees. Includes $30 million for demolition, revitalization, replacement housing and tenant-based assistance.

[18]In FY01 and FY02, ROSS was a set-aside within CDBG.

[19]Follows Administration's request to make this a set-aside within the Public Housing Capital Fund rather than CDBG.

[20]Set-asides of $40 million in Public Housing Capital Fund and $15 million in Public Housing Operating Fund.

[21]Includes $10 million for anti-drug programs in public, Indian and federally-assisted low income housing administered by the Department of Justice; authorizes the use of up to $250 million for FY02 operating cost needs, but prohibits use of funds from FY04 or later for FY03 public housing operating costs and instructs HUD to report by May 15, 2003 on actions taken to address the practice of using current year funds for prior year costs.

[22]Includes $15 million for ROSS.

[23]The conference report noted that PHAs are allowed to use their operating and capital funds for anti-crime and anti-drug efforts.

[24]Includes a set-aside of $50 million for grants for capital costs associated with conversion from public housing to project-based voucher assistance.

[25]Reauthorizes HOPE VI through the end of FY04.

[26]No funding requested because HUD claims enough funding has been committed to meet 1992 demolition goals, with significant funds in pipeline.

[27]Authorized under the Hawaiian Homelands Homeownership Act of 2000, amending the Native American Housing and Self-Determination Act of 1996 and allocating funds for affordable housing for eligible low income Native Hawaiian families; to be funded under its own account.

[28]To be funded under CDBG rather than under its own account as the Administration requested.

[29]Includes $44 million, plus up to $9 million in recaptured funds for service coordinators and $30 million for conversion to assisted living.

[30]Provides $50 million for service coordinators, $30 million for conversion to assisted living and $30 million for grants to facilitate development of Section 202 projects.

[31]Provides $53 million for service coordinators and $30 million for conversion to assisted living.

[32]Includes $23 million for the renewal of tenant-based assistance, rather than renewing under the Housing Certificate Fund.

[33]The Administration has proposed that up to $62.5 million can be earmarked for tenant-based assistance.

[34]The Secretary may designate up to 25% for tenant-based assistance.

[35]Recaptured Section 236 budget authority would be rescinded, despite Senate proposal to make up to $100 million available for rehabilitation grants.

[36]$303 million in recaptured Section 236 budget authority would be rescinded.

[37]The Administration has proposed a $200 million set-aside within the HOME program for a Downpayment Assistance Initiative. This would reduce the amount of HOME funds available for formula grants.

[38]Includes $50 million set-aside for the Downpayment Assistance Initiative, subject to authorization; if there is no authorization of the program by June 30, 2002, then the funds can be used for any purpose under the HOME program.

[39]Includes $200 million set-aside for Downpayment Assistance Initiative.

[40]Includes set-aside of $75 million for Downpayment Assistance Initiative.

[41]Includes set-sides of $200 million for Downpayment Assistance Initiative and $25 million for lead hazard reduction demonstration program.

continued next page

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[42]This program has been a set-aside in HOME; the Administration proposes to make it a separate program.

[43]Remains a set-aside within HOME.

[44]Includes $4.3 billion in CDBG formula block grants and $659 million in set-asides; makes funds available for three years, but requires a report from HUD on obligating and expending CDGB funds, as well as recommendations on how to accelerate this process, by April 1, 2002.

[45]Includes $4.4 billion in CDBG formula block grants. Includes proposal to reduce by 50% the formula funds for entitlement communities with per capita income at least twice the national average, with the savings applied to the $16 million Colonias Gateway Initiative.

[46]Includes $4.4 billion for formula grants; does not change the CDGB formula or fund the Colonias Gateway Initiative.

[47]Includes $4.4 billion for formula grants and $16 million for the Colonias Gateway Initiative, among other set-asides.

[48]SHOP funds homeownership programs by providing grants to groups such as Habitat for Humanity and other sweat-equity organizations.

[49]The Administration requests the termination of Economic Development Initiative funding.

[50]Requires use of 30% of funds for permanent housing and provides $500,000 to fund the Interagency Council on Homelessness. Shelter Plus Care renewals are funded separately.

[51]Maintains the requirement that 30% of funds be used for permanent housing. Shelter Plus Care renewals are funded separately.

[52]Includes Shelter Plus Care renewals, maintains 30% requirement for permanent housing, and provides $500,000 for Interagency Council on the Homeless.

[53]Includes Shelter Plus Care renewals, maintains 30% requirement for permanent housing and provides $1 million for Interagency Council on the Homeless.

[54]Includes Shelter Plus Care renewals, maintains 30% requirement for permanent housing and funds Interagency Council on the Homeless as a separate agency at $1.5 million. Also funds $10 million two-year demonstration of programs and best practices.

[55]Includes $194 million for Shelter Plus Care renewals, maintains 30% requirement for permanent housing and provides $1.5 million for Interagency Council on the Homeless. The Administration will submit legislation to consolidate competitive programs (Shelter Plus Care, Supportive Housing and Section 8 Moderate Rehabilitation SRO).

[56]Proposed competitive grant program that would be part of a broader interagency program to combat long-term homelessness. The Administration will submit legislation for the new initiative.

[57]EFSP is currently part of FEMA's budget.

[58]This program would be transferred from FEMA to HUD.

[59]Rejects Administration's proposal to move EFSP to HUD from FEMA.

[60]The Administration is requesting the termination of this program on the basis that it duplicates USDA rural housing programs.

[61]Includes $50 million set-aside for an urban lead hazard reduction demonstration program.

[62]This is overall total for HUD's discretionary spending. As the chart shows selected programs, does not include all of HUD's programs and other expenses, and may include programs proposed for HUD's appropriation, numbers above will not total the amounts listed at this line. In addition, there is inconsistency from year to year within HUD's own budget documents as to total amount requested and enacted, as HUD makes retroactive adjustments.

[63]This total does not include $2 billion in emergency supplemental funds in connection with recovery from September 11, 2001 terrorist attacks.

[64]Does not reflect impact of 0.65% across-the-board cut.

Supreme Court to Review PHA's Trespass Policy

The United States Supreme Court has granted *certiorari* to review of the constitutionality of the trespass policy used by the Richmond Redevelopment and Housing Authority. *Virginia v. Hicks*, No. 02-371 (U.S. Sup. Ct. review granted Jan. 24, 2003). The Richmond policy permitted individuals to be banned from PHA premises by management personnel with no published standards or procedural protections. Last year, the Virginia Supreme Court ruled the PHA's anti-trespass policy was challengeable by a criminal defendant, and unconstitutionally overbroad under the First and Fourteenth Amendments to the United States Constitution.[1]

Many public housing authorities (PHAs) have developed "banning" or anti-trespass policies as a strategy to control drug and criminal activity or other management problems. These policies usually seek to bar access to PHA-owned premises, both common areas and individual units, by people with a history of troublemaking or illegal activity as identified by the PHA, often a history demonstrating harm or potential harm to other tenants. Violations are often penalized by arrest of the offenders for criminal trespass, and sometimes eviction for any tenants that invited them onto the premises. Depending on their design and application, these policies may infringe upon the contractual and constitutional rights of both the banned individuals and the tenants they visit to use their homes, speak freely and associate with relatives and friends who have not engaged in any activity harmful to other tenants. The Supreme Court will now explore the constitutional boundaries presented by Richmond's policy.

The RRHA Trespass Policy

The Richmond Redevelopment and Housing Authority had sought to eradicate illegal drug activity at Whitcomb Court, a PHA development described as an "open-air drug market." The Richmond City Council had closed the city streets in Whitcomb Court to public use and travel and abandoned them as city streets, conveying them to the PHA. The deed required the PHA to take steps to demonstrate that the closed streets were in fact private streets, and the PHA posted "No Trespassing" signs with warnings at each building and about every 100 feet along the streets.

Because most people arrested for drug crimes at Whitcomb Court were non-residents, the PHA then sought to deny access to its property to persons who did not have legitimate reasons to visit the premises. The PHA's trespass policy was not specified in writing, but consisted of an "authorization" given to the local police to enforce state trespass law on PHA premises. Under the policy, the PHA or the police could ban an individual from its property if that individual was not a resident, employee, or could not demonstrate a

[1]*Commonwealth v. Hicks*, 264 Va. 48, 563 S.E.2d 674 (Va. June 7, 2002). For background on the issue and related cases, *see State Courts Revisit Trespass Public Housing Policies*, 32 HOUS. L. BULL. 169 (Aug. 2002).

"legitimate business or social purpose" for being on the premises. After receiving either written or oral notice of the ban from either the PHA or the police, a person could then be arrested for trespass if remaining on or returning to the premises.[2]

As a part of its unwritten policies, the PHA's property manager was required to determine whether a person could demonstrate a legitimate business or social purpose for visiting the premises. Individuals seeking access to the development and the private streets had to obtain the manager's permission. If someone sought to disseminate materials or participate in an activity on the property, that person had to obtain her authorization, and sometimes the request would be referred to a "community council" which met with "the Board and the residents." If someone requested to distribute flyers and the request was not "routine," she referred that request to the other PHA staff. The PHA, however, had no written policies or procedures to govern decisions regarding who might distribute materials or participate in activities on the premises.

Pursuant to the unwritten policies, an unauthorized individual who used the premises received a warning from the local police, and the PHA would send a banning letter to that individual.

Facts of the Case and the Legal Challenge

Kevin Hicks was issued a summons for trespass when the police saw him walking on a sidewalk on a "private street" located within the development. The officer had known Hicks for about four years, and also knew that Hicks had received notice of his ban by the manager. He had been arrested twice previously for trespass on the property, and had previously signed a hand-delivered "barment notice." Hicks claimed to the officer that he was bringing diapers to his son, who lived at Whitcomb with his mother.

Hicks was charged with trespass and three violations of the conditions of suspended sentences received for prior trespass convictions. After trial and conviction in a lower district court, Hicks appealed the convictions and moved to dismiss the charges, contending that the PHA's trespass policy violated the First and Fourteenth Amendments to the U.S. Constitution. The reviewing court denied the motion, and conducted another bench trial, also convicting him of trespass, with a suspended sentence of one year in jail, and revoking his prior suspended sentences. On appeal to the Virginia Court of Appeals, a panel initially affirmed the judgment,[3] but the Court of Appeals *en banc* disagreed and vacated the conviction, finding the PHA's policy unconstitutional.[4] The Commonwealth then appealed.

[2]563 S.E.2d at 676.

[3]*Hicks v. Commonwealth*, 33 Va.App. 561, 535 S.E.2d 678 (2000).

[4]*Hicks v. Commonwealth*, 36 Va.App. 49, 52, 548 S.E.2d 249, 251 (2001). The Court of Appeals had decided this case on the basis that the PHA's private streets constitute a public forum and that the policy regulating speech in that forum violated the First Amendment. Under its holding, the Virginia Supreme Court did not need to resolve that issue.

The Virginia Supreme Court's Decision

The Virginia Supreme Court affirmed that the policy was unconstitutional, but first held that the PHA's policy could be collaterally attacked by a challenge to Hicks' criminal conviction, without a civil constitutional challenge.

On the constitutional issue, the court found the PHA's trespass policy invalid. Even though the trespass policy was intended to punish activities unprotected by the First Amendment, the court found that the policy also prohibited clearly protected speech and conduct, and was thus overly broad, violating the fundamental constitutional right to freedom of speech guaranteed by the First Amendment, made applicable to the states under the Fourteenth Amendment's due process clause.

To reach this question, the court first had to make two other preliminary rulings. First, it found that Hicks had standing to assert an overbreadth challenge, even though his conduct did not involve protected speech. Second, it held that Hicks could assert a facial constitutional challenge even though much of the policy was unwritten, noting that holding otherwise would permit the government to violate First Amendment protections simply by refusing to memorialize unconstitutional policies in writing.

The Virginia Supreme Court found that the policy also prohibited clearly protected speech and conduct, and was thus overly broad, violating the fundamental constitutional right to freedom of speech.

The PHA's lack of written procedures or guidelines delineating how someone could obtain permission for access or how the policy should be enforced was determinative on the main constitutional question.[5] The PHA manager, with "unfettered discretion," could determine whether a non-resident had authorized access or could speak or distribute literature on the premises. The manager had further testified that she would give permission to distribute material only if she was "used to seeing" it, thus possibly prohibiting constitutionally protected speech.

Dissenting, two of the Virginia Supreme Court justices believed that Hicks lacked standing to challenge the PHA's policy because his conduct did not involve protected speech. Even crediting Hicks' account that he was bringing diapers for his son, the dissent stated that family visitation did not involve the exercise of the fundamental right of privacy that

[5]563 S.E.2d at 681.

encompasses certain other intimate relationships. Thus, citing the U.S. Supreme Court's recent *Rucker* ruling upholding HUD's one-strike eviction policy,[6] the dissent would have upheld the PHA's policy as rationally related to the legitimate governmental objective of drug crime reduction.

This position, also emphasized by Virginia in seeking review, may have piqued the U.S. Supreme Court's interest in the case, and may well presage what some of the Justices may hold. Another state supreme court decision issued around the same time, albeit reviewing a more definitive written PHA policy, had upheld the policy against constitutional claims based on the right of "intimate association," overbreadth and void for vagueness.[7]

Considerations on Appeal

In all of the legal controversy about potential abridgment of speech, for most tenants and guests the main issues concern the specificity and breadth of the PHA's discretion to determine who is subject to a banning order, what standards must apply, and what procedural protections must exist for tenants and guests to challenge the findings of the management or police. Of prime importance are the rights of tenants to associate with persons of their choosing, so long as they are not engaged in activities harmful to other tenants, and have no recent history of doing so. These rights derive not only from the Constitution, but also the governing law concerning "reasonable" lease terms applicable to most of the federal housing programs[8] and their lease agreements. Policies that seek to restrict access of invited guests through the common areas necessary to reach a tenant's apartment, that improperly permit legitimate activity to serve as grounds for banning, or that provide no procedures for challenging a ban, still require close judicial scrutiny. Hopefully these important questions will not get swept away by the ideological tide surrounding *Hicks*. ■

[6]*Department of Hous. & Urban Dev. v. Rucker*, ___U.S. ___, 122 S.Ct. 1230, 1232, 152 L.Ed.2d 258 (2002) (citing "reign of terror" imposed by criminal activity in public housing).

[7]*City of Bremerton v. Widell*, 146 Wn.2d 561, 51 P.3d 733, 2002 WL 1206584 (Wa., 2002). That court found no intimate association claim, refusing to recognize protection for nonfamilial relationships such as the fiancées involved there (and thus no need to evaluate the due process adequacy of the banning procedure), and no overbreadth because of the absence of any showing that protected First Amendment expressive activities were involved. Finally, the decision also rejected any void-for-vagueness claim because the PHA's policy did not define a criminal offense, but only identified grounds for exclusion. *See also Minnesota v. Holiday*, 585 N.W.2d 68 (Minn. App. 1998).

[8]42 U.S.C.A. §1437d(*l*)(2) (West Supp. 2001) (each PHA "must utilize leases which do not contain unreasonable terms and conditions"); 12 U.S.C.A. §1715z-1b(b)(3) (West 2001) ("...the Secretary shall assure that ... leases approved by the Secretary ... do not contain unreasonable terms and conditions").

Faith-Based Initiatives and Community Organizations: Government Sponsorship of Religious Activity?

Becoming one of the pioneers in implementing the Administration's oft-mentioned faith-based initiative, the Department of Housing and Urban Development (HUD) recently published a proposed rule for *Participation in HUD Programs by Faith-Based Organizations; Providing for Equal Treatment of All HUD Program Participants*.[1] HUD's asserted purpose behind the rule is to remove regulatory prohibitions that currently restrict the equal participation of faith-based organizations in HUD's programs. HUD contends that these changes are needed to ensure that HUD programs are open to all qualified organizations, regardless of their religious nature, and to establish the proper uses of funds, as well as the conditions for receiving funding. This article will briefly review the proposed rule, together with the prior Executive Order 13198 which created Centers for Faith-Based and Community Initiatives in five Cabinet departments, and some of its possible ramifications.

Executive Order 13198: Background

On January 29, 2001, President Bush issued Executive Order 13198 creating the Centers for Faith-Based Initiatives in five departments, including HUD.[2] The order required each center to

> conduct a department-wide audit to identify all existing barriers to the participation of faith-based and other community organizations in the delivery of social services by the department, including but not limited to regulations, rules, orders, procurement, and other internal policies and practices, and outreach activities that either facially discriminate against or otherwise discourage or disadvantage the participation of faith-based and other community organizations in Federal programs [and take steps to eliminate them.][3]

Faith-based organizations provide not only places of worship, but may also sponsor or include small nonprofit organizations created to offer social services in communities of need. These organizations often participate in community renewal programs by providing housing, shelter or rehabilitation services for impoverished families. Faith-based organizations act alone or in collaboration with other social

[1]68 Fed. Reg. 648 (Jan. 6, 2003)(proposing amendments to 24 C.F.R. Parts 92, 570, 572, 574, 576, 582, 583, and 585).

[2]66 Fed. Reg. 8,499 (Jan. 31, 2001).

[3]www.whitehouse.gov/news/releases/2001/08/unlevelfield.html.

service and housing providers to help strengthen individual lives and the community as a whole.

Funding for these organizations may come from a variety of sources, but typically federal policy has restricted their eligibility to receive financial assistance from the government. The existing restrictions on federal funding for faith-based organizations have historically emanated from the constitutional principle separating church and state.

HUD's Proposed Rule Changes

The proposed rule would amend the regulations for the following eight HUD programs:

(1) HOME Investment Partnerships;

(2) Community Development Block Grants (CDBG);

(3) Hope for Homeownership of Single Family Homes (HOPE);

(4) Housing Opportunities for Persons with AIDS (HOPWA);

(5) Emergency Shelter Grants;

(6) Shelter Plus Care;

(7) Supportive Housing; and

(8) Youthbuild.

The pending regulatory amendments are compartmentalized into six topic areas, detailed below, which are the same for each program. Lastly, the proposed rule has an additional amendment regarding equal employment opportunity applicable only to the CDBG program.

1. *Participation by Faith-Based Organizations in HUD Programs*

This portion of the proposed rule attempts to clarify that organizations are eligible to participate in HUD programs regardless of their religious associations, and also that organizations may not be excluded from competition for HUD funds based on their religion. This amendment seeks to put religious groups on equal footing with other nonprofits. As long as the faith-based organization meets the eligibility requirements, it would be able to seek federal funding.

2. *Faith-Based Activities*

The proposed rule purports to describe requirements for all recipient organizations regarding the use of HUD funds for faith-based activities. Specifically, "inherently religious activities" may not be supported with HUD funds. The rule proposes no exact criteria for determining what is an "inherently religious activity," but emphasizes that worship, religious instruction, and proselytization would constitute such activity.[4] The rule requires any activities of this character to be offered separately in time or location from the programs or services funded with HUD assistance. For example, HUD funds provided directly to a participating organization may not be used to conduct prayer meetings, studies of sacred texts, or any other inherently religious activity. The proposed rule claims that this requirement ensures that HUD funds would not be used to support "inherently religious activity."

Because commingling of secular and religious activity is likely, and activities need be separated only in time or location, the shortcoming of this portion of the proposed amendment probably lies in enforcement. Nowhere in the proposed rule does it outline how HUD will assure that the federal funds are used *only* for non-religious secular services, calling into question any assumption that the rule raises no separation of church and state issues. How can an inherently religious institution provide purely secular services with federal funds, while assuring that no impermissible overlap in resources, facilities, activities and staff will occur?

Under the proposed rule, the restrictions on inherently religious activity do not apply when the recipient of HUD funding received the benefit independently of the faith-based organization, and made a "genuine and independent private choice" to select the faith-based organization as the service provider. For example, if someone had a voucher, certificate, or similar funding mechanism provided by HUD under a program intended to give that individual a choice of providers, then the recipient can redeem the funds at any housing provider they desire, including religious organizations and their affiliates.[5]

3. *Independence of Faith-Based Organizations*

The proposed rule explains that the faith-based organization will retain its independence and may continue to engage in religious activities provided that it does not use any HUD funds for any inherently religious activities. The rule would allow organizations to retain their religious name and select board members on the basis of religion, as well as use space in their religious facilities to provide HUD-funded services without removing religious art, icons, scriptures or other religious symbols. Again, there is no specified mechanism to guarantee that HUD funds will be used solely for secular social services rather than inherently religious activities. If the rule would allow a church to provide HUD-funded meals or shelter services under a religious denominated program in a setting replete with religious symbols, it is difficult to see how such confusion could avoid impermissible entanglement of public funds and religion.

4. *Nondiscrimination in Providing Assistance*

A widespread concern is whether public funding of religious organizations will produce bias in distributing public benefits. The rule states that an organization participating in a HUD program shall not discriminate against a recipient on the basis of a religious belief, a refusal to hold a religious

[4] 68 Fed. Reg. 649 (Jan. 6, 2003).

[5] 68 Fed. Reg. 649 (Jan. 6, 2003). In other words, if a church-based nonprofit provided housing services, it could accept HUD-funded vouchers in exchange for those services despite any religious orientation.

belief, or a refusal to participate in a religious practice, regardless of the organization's religion.[6] Despite this proclamation, it is difficult to see how certain HUD-funded religious organizations providing services could avoid permitting religious zeal to impede their impartial judgment. Moreover, the proposed regulations do not emphasize the need to assure that discrimination does not occur when hiring individuals to staff the social service programs.[7]

As stated by Congressman Barney Frank, the Ranking Member of the House Banking Committee,

> the rationale for this endorsement of discrimination encourages religious divisiveness. The theory on which churches, synagogues and mosques are allowed to exclude people of other religions in providing housing, feeding the hungry or sheltering the homeless is that it somehow detracts from the morale of religious people if they have to work with people of other religions in performing their social services. Why does the President believe that Orthodox Jews should not have to associate with Catholics in building housing? How does it hurt Baptists if they have to hire Episcopalians to help feed people? Why does the President believe that Muslims should be able to refuse employment to Jews or Mormons in running recreational programs?

The proposed rule certainly creates enormous potential for discrimination in staffing the publicly funded activities, which in turn creates a significant risk of discrimination in the provision of benefits.

5. *Structures Used for Religious Activities*

The proposed rule also seeks to clarify that HUD funds may not be used for construction, purchase or rehabilitation of any structure to the extent that those structures are used for inherently religious activities, such as worship, religious instruction or prayer. However, HUD funds may be used for purchase, construction or rehabilitation to the extent the structures are used for conducting eligible activities under the HUD program. Thus, if the structures are used for both eligible and inherently religious activities, the HUD funds may not exceed the portion of the costs attributable to eligible activities.[8]

This rule therefore would allow federal aid to be used to buy, build and rehabilitate structures that are used for both secular and religious activities. Taxpayer money could be spent on building part of a religious institution (a church, synagogue or mosque) that is also used for non-religious social service programs.[9] An obvious problem is the burdensome process in which government officials would be required to monitor any designated secular, non-religious areas to assure no religious activity was occurring. More problematic will be how cost apportionments for apparently permissible "mixed-use" facilities providing both secular and religious services will be handled and monitored as activities change over time. With mixed-use facilities, it is hard to see how religious institutions could avoid violating fundamental constitutional principles.[10]

6. *Assurance Requirements*

HUD has also proposed to remove any remaining assurance requirements that the HUD-funded activity is free from religious influences in these faith-based regulations, claiming that such assurances are not required in other contexts. HUD now believes it is unfair to impose a higher standard on religious organizations since no other HUD-funded program is required to make such reports. HUD's position is that everybody has to follow the rules, and there is nothing here which inherently requires additional safeguards.

What HUD seems to overlook is that its actions in funding religious institutions create enormous risks that public funds will be used to support religion or religious discrimination—risks that are qualitatively different from secular obligations to comply with HUD rules. Assurances and certifications, often creating additional legal penalties for falsity, have been a time-honored, albeit poorly monitored and enforced, method of getting recipients of public funds to think twice and evaluate whether their activities actually comply with the law. In an environment of reduced agency staffing to identify and investigate claimed violations, certifications are one of the few tools remaining. Because of the risks involved here, there is no sound reason to jettison them.

The proposed rule also would amend the Community Development Block Grant (CDBG) regulations to provide that Executive Order 11246, concerning equal employment opportunity, and the implementing regulations issued by the Department of Labor do not apply to CDBG grantees. According to HUD, the Executive Order on its face applies only to government contractors and subcontractors, not grantees.

Analysis

In advancing their primary purpose to expand participation in HUD-funded activities by faith-based organizations, the proposed regulatory amendments simultaneously make a half-hearted attempt to ensure constitutional compliance by proclaiming that federal funds may not be used to support "inherently religious activities." Unfortunately, the proposed rules create enormous potential for HUD-funded commingled secular and religious activities and facilities, without any articulated enforcement plan to assure that the funds are actually and appropriately monitored at the organizational level. The proposed rule thus poses a substantial

[6] *Id*.

[7] *See Brookline TAB* (Wednesday, Dec.18, 2002).

[8] 68 Fed. Reg. 649 (Jan. 6, 2003).

[9] *Federal Funds to Build Churches*, The New York Times, Editorial (Jan. 28, 2003).

[10] *Id.*

risk that federal money will be spent on inherently religious activities or construction of facilities that disproportionately provide such activities. Also significant are concerns about religious discrimination in hiring employees to run secular housing or service programs, and religious discrimination in the provision of benefits or services.

Allowing the federal government to fund faith-based organizations without tenacious oversight will directly sacrifice the integrity of the constitution's separation of church and state, license HUD-funded discriminatory employment practices and endanger the nondiscriminatory provision of housing and services to eligible people in need. In the words of Congressman Frank,

> Under the President's order, churches, synagogues and mosques will receive federal money to build or rehabilitate housing, shelter the homeless and provide other important public services with the proviso that they may exclude people who do not share their own religious views from employment with these funds. . . .
>
> . . . President Bush is doing a disservice to both the theory and practice of religious tolerance at a time when the world needs examples of people reaching out across religious lines rather than using them as grounds for excluding each other.[11]

Resolving these issues will take more than just including a requirement that the service providers refrain from discriminating against other religious affiliations when hiring staff. The deeper concern is taxpayer support for activities that mix religion with public funds and programs, a potion no policymakers or administrators have yet perfected within constitutional boundaries.

After the comment period closes on March 7, the recently convened 108th Congress will no doubt soon examine the implications of HUD's proposed regulations in hearings and in political and public discourse. This may prove one of the strongest tests yet for the Administration's faith-based initiative, and fertile ground for the constitutional debate. ■

[11] *See Brookline TAB* (Wednesday, Dec. 18, 2002).

Another Step Towards Deregulation—Temporary Suspension of On-Site Reviews for Troubled Agencies

In mid-December of 2002, the Department of Housing and Urban Development (HUD) published a notice that temporarily authorizes the suspension of the on-site review requirement for public housing authorities (PHAs) deemed to be troubled under the Section 8 Management Assessment Program (SEMAP) during PHA fiscal years commencing between December 31, 2000, and December 31, 2002.[1] This suspension may reflect a trend by which HUD reduces its oversight of the program.

SEMAP became a reality in 1998, the product of numerous comments and revisions to a proposed rule two years earlier.[2] Modeled after the Public Housing Assessment System (PHAS), it has provided a window into Section 8 program management complexities and peculiarities. SEMAP evaluates PHAs managing housing choice vouchers by examining 14 key areas. These include full usage of voucher funds, timely family recertifications and accurate rent calculations, housing quality standards monitoring and enforcement, and assisting participants in accessing the Family Self Sufficiency Program.[3]

SEMAP's five-step process, enumerated in the notice, provides for: "(1) PHA certification and rating; (2) PHA profile modification; (3) PHA appeals; (4) PHAs designated non-troubled (including those PHAs that received 'zero' ratings in one or more SEMAP areas); and (5) PHAs designated troubled."[4] Small PHAs and PHAs that operate limited or total Moving-to-Work (MTW) Demonstration Programs need comply with only a portion of the requirements.

PHAs that fail to submit required SEMAP information within 60 days of the close of their fiscal year are deemed "troubled."[5] In addition, PHAs that do not receive at least 60 percent of the points possible, based on the 14 key factors noted above or on a more limited set of factors applicable to their program, are deemed troubled.[6] Normally, in order to eliminate a "troubled" rating, the PHA must meet with a representative from HUD and participate in an on-site review.[7]

Citing to impediments such as inadequate staffing, a lack of travel funds or inability to partner with a Troubled Agency

[1] *See* HUD Notice PIH 2002-27, issued December 13, 2002, to Hub Directors and Program Center Coordinators, at www.hud.gov/utilities/intercept.cfm?/offices/pih/publications/notices/02/pih2002-27.pdf.

[2] 63 Fed. Reg. 48,548 (Sept. 10, 1998).

[3] 24 C.F.R. § 985.3 (2002).

[4] *Id.*

[5] *Id.* § 985.101(b).

[6] *Id.* § 985.104(c).

[7] *Id.* § 985.105(d).

Recovery Center (TARC) for reviews, HUD permits its Hubs or Program Centers to abdicate, under certain circumstances, their responsibility to conduct on-site assessments of PHAs designated troubled in fiscal years December 31, 2000, through December 31, 2002. Generally, they may do so if the TARC has resolved the SEMAP deficiencies through technical assistance, if the Hub or Program Center identified deficiencies and corrective measures through a management review within a year of the troubled designation, or if the deficiencies are minor or easy to correct (in the Hub or Program Center's opinion).

Unfortunately, the notice does not explain what the obstacles have been to partnering with the TARC on review. TARCs were designed specifically to provide in-depth technical assistance to troubled PHAs, from identifying the underlying causes of the deficiencies to devising plans for improvement and implementing them. The PHA and TARC develop a Memorandum of Agreement, identifying milestones and a time frame for reaching those goals.[8] If the TARCs are not functioning properly, it would seem prudent to invest energy into supporting their operation.

The temporary suspension of on-site reviews of troubled properties appears to fall into lock-step with HUD's attempts to limit the application and duties of what could be a very helpful program.

Though a couple of examples are offered to illustrate what types of deficiencies may be minor enough to warrant the suspension of an on-site review, the notice does not provide any other guidance to assist Hub or Program Centers in making that determination. Without guidance, it seems probable that how this rule is implemented will vary from jurisdiction to jurisdiction. It also seems likely that if a Hub or Program Center feels overwhelmed by other work, it may be more inclined to view deficiencies as minor enough to warrant suspension of the on-site review requirement.

While citing to funding problems on the one hand, HUD proceeds in its notice to offer Hubs and Program Centers the option of utilizing contractors to conduct on-site reviews, provide reports and recommendations for corrective action, and assist in developing corrective action plans. Though the notice states that Hub and Program Center staff remain responsible for monitoring PHA performance on the corrective action plan, the bottom line is that this notice allows staff to become removed from the process of monitoring and assisting their local PHAs.

As far as funding for contractors, Hubs and Program Centers will have to determine the amount of contractor assistance they need, and HUD headquarters, in turn, will have to make sure that there is sufficient funding. The Assistant Secretary at HUD must approve or disapprove a quarterly report provided by the Hubs and Program Centers, listing all SEMAP troubled and non-troubled PHAs. The notice discusses extensively from where the contractors may be drawn, along with providing sample contracts and forms to be used to obtain contractor assistance.

Conclusion

Last year, HUD proposed regulations that included the objective of deregulating small PHAs under the PHAS and SEMAP.[9] In addition, the regulations proposed to streamline HUD's review of all PHA annual plans (*i.e.*, both large and small PHAs and PHAs that operate a Section 8 voucher program only).[10] NHLP and other agencies offered comments, despite the shortened time period provided for that input, pointing out the problems associated with deregulation. The temporary suspension of on-site reviews of troubled properties appears to fall into lock-step with HUD's attempts to limit the application and duties of what could be a very helpful program. ■

[8] *See* www.hud.gov/offices/pih/offices/otar/faq.cfm for HUD's description of TARC duties.

[9] 67 Fed. Reg. 53,276 (Aug. 14, 2002) (Deregulation of Small Public Housing Agencies).

[10] *See HUD Proposes to Deregulate Small PHAs*, 32 HOUS. L. BULL. 260 (Sept. 2002).

It is a seldom proferred argument as to the advantages of a free press that it has a major function in keeping the government itself informed as to what the government is doing.

—Walter Cronkite

Chicago Tenants File Suit to Stop Displacement Abuses

Current and former tenants of the Chicago Housing Authority (CHA) have filed a suit against the agency, challenging their involuntary displacement into high-poverty, segregated neighborhoods following public housing demolition.[1] The plaintiffs initiated their case on behalf of all similarly displaced tenants, seeking to enjoin CHA from continuing any relocation of tenants until a program is developed to assist plaintiffs to move to racially integrated and economically revitalized areas.

Background

In their complaint, the plaintiffs allege that while they lived in CHA-managed units, they endured longstanding physical deterioration of their homes and a legacy of racial segregation, crime and poverty in their communities. They briefly review the history of public housing in Chicago, beginning with a 1969 court finding[2] that it was built as segregated housing for African Americans, and concluding that CHA's family developments are currently occupied by 93 percent African Americans.[3] They maintain that the decades of neglect by CHA was so severe that it led to allegations that CHA was engaged in de facto demolition.[4]

In 1995, CHA began a practice of vacating and demolishing public housing units to clear the way for mixed-income communities. Since few alternative public housing units were available, most displaced tenants received housing choice vouchers, formerly known as the tenant-based Section 8 vouchers and certificates. Initially, CHA did not provide any further assistance to the relocating families; however, in 1997 it began to provide some mobility assistance to enable displaced families to move to racially integrated neighborhoods. The plaintiffs allege that CHA, through its contractors, Changing Patterns for Families, Family Dynamics and E.F. Goughan and Associates, either failed to provide effective counseling and relocation services to displaced residents, or actively steered them to predominately African-American neighborhoods. As a result, displaced residents became segregated in overwhelmingly African-American communities characterized by high poverty, high crime, poor schools and poor municipal services.[5] The suit alleges that the scope of the demolition—eliminating 11,053 family units between 1999 and 2002 while only constructing 758 units—placed acute pressure on Chicago's already strained rental market.

Relocation Guarantees: Move to Jobs and Better Neighborhoods

During this accelerated demolition period, the U.S. Department of Housing and Urban Development (HUD) entered into a Moving to Work Demonstration Agreement with CHA. This agreement was designed to relocate families to economically vital areas with job opportunities. Also, in recognition of the importance of mobility counseling to the success of CHA's plan, the agreement approved CHA's request to temporarily convert a portion of its Section 8 voucher funding into a $25 million fund for relocation costs. The agreement further provided that CHA would: adjust its demolition and relocation schedule according to HUD's determination of the voucher success rate; provide "extensive pre-move" and "second move" counseling; work to expand landlord participation; and affirmatively further fair housing.[6]

By January 2001, CHA and the Central Advisory Council of CHA tenants agreed to the terms of a Relocation Rights Contract, which provided that "Mobility Counseling is available for Leaseholders who indicate an interest in moving to opportunity areas or low poverty or racially diverse census tracts." The contract further assured that comparable replacement housing would be made available, CHA would enter into agreements with local advisory councils to address property-specific relocation issues, and that CHA would provide quarterly reports to the community at large on development and relocation activities.[7]

Relocation Failures: Segregation and Hardship

Plaintiffs contend that CHA failed to fulfill each and every one of its agreements, and that as a result it had perpetuated racial and economic segregation. Plaintiffs allege that CHA failed to take any actions to prevent its three contractors from relocating displaced tenants to predominately African-American neighborhoods. They also allege that CHA breached its obligations under the Moving to Work Agreement by failing to moderate demolition to allow for market absorption of displaced tenants, provide mobility counseling, work to expand landlord willingness to participate in the program, or provide quarterly reports. Similarly, they allege that the terms of the Relocation Rights Contract were breached by CHA's failure to provide counseling, provide comparable replacement housing, or enter into agreements with local advisory councils.

In support of their claim, plaintiffs included details of studies published by Professor Paul Fisher at Lake Forest College, which utilized data from CHA to demonstrate that displaced public housing tenants were being relocated into the poorest, most racially segregated neighborhoods.[8] This

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[1] *Wallace v. Chicago Housing Authority*, Civ. No. _____ (N.D. Ill. filed, Jan. 23, 2003)(hereinafter Complaint), complaint and supporting materials available online at http://povertylaw.org/advocacy/housing/housing.cfm.

[2] *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969).

[3] Complaint, ¶ 74.

[4] *See, e.g. Henry Horner Mothers Guild v. Chicago Hous. Auth.*, 824 F. Supp. 808 (1993).

[5] Complaint ¶¶ 86-96.

[6] Complaint, ¶ 56-58.

[7] *Id.* at ¶¶ 61-66.

[8] Paul Fischer, *Section 8 and the Public Housing Revolution: Where Will the Families Go?* (1999).

study was first published in 1999, giving CHA years of advance notice of the problems with its relocation effort, and an opportunity to take action to stop the segregation. Professor Fisher updated the study in January of 2003, and the findings of the study form part of the factual basis of the litigation.[9] The update reveals that over 78 percent of involuntarily displaced families have been moved to census tracts with a racial composition over 95 percent African American. Over 86 percent of the families have been moved to census tracts in which the racial composition is between 80 and 100 percent African American, and over 93 percent have been moved to census tracts in which the racial composition is over 50 percent African American. Furthermore, the update shows that 80 percent of the families have been moved to census tracts with higher-than-average percentages of households living in poverty, and 50 percent of the families were moved to census tracts with more than double the citywide poverty percentage. According to the plaintiffs, the study demonstrates that CHA's appetite for demolition is far greater than its commitment to affirmatively further fair housing.

Just as profound as the statistics of such complete segregation are the stories of the hardships endured by the named plaintiffs which are included in the complaint.[10] Some tenants received their voucher just weeks before demolition, or were not offered a voucher at all and were instead required to move to other public housing units. Other families, unable to use their vouchers, were forced to second or third public housing units, and face additional moves with vouchers. They allege that each move drains the families' meager resources and causes serious disruption to the children's school life. They further allege that utilities were terminated in buildings before tenants were relocated, in one case freezing the pipes and the front door, trapping the family inside. This family lost all of its possessions as it was not able reenter the apartment before demolition. Lastly, they allege that the homes plaintiffs have found with their vouchers universally suffer from a variety of problems, including location in high-crime neighborhoods, poor schools, security concerns, high energy bills, rodent and insect infestation, and poor plumbing, which leads to mold and exacerbated health problems.

Claims for Relief

Considering the serious and wide-ranging harms alleged, it is not surprising that plaintiffs have a wide range of claims, including:

- violations of the *Fair Housing Act*[11] for failure to affirmatively further fair housing, racial steering, and disparate impact on the basis of race, gender and familial status;
- violations of the *Quality Housing and Work Responsibility Act of 1998*[12] and Executive Orders 11063 and 12892 for failure to affirmatively further fair housing;
- violations of Title VI of the *Civil Rights Act of 1964*,[13] and the *Uniform Relocation Assistance and Real Property Acquisition Act*;[14]
- violations of the Moving to Work agreement between CHA and HUD; and
- violations of the Relocation Rights Contract between CHA and its leaseholders.

The plaintiffs are seeking declaratory and injunctive relief that would enjoin CHA from: (1) failing to develop a program to assist plaintiffs to relocate to racially integrated communities; (2) continuing the relocation of plaintiffs from CHA units with Housing Choice Vouchers without developing and implementing such a program; (3) failing to comply with the Relocation Rights Contract and refusing to permit tenants covered by the Relocation Rights Contract to thereafter complete a new Housing Choice Survey; and (4) failing to comply with the terms of the Moving to Work Agreement.

Negotiation or Judicial Injunctions?

The complaint notes that the plaintiffs attempted to negotiate with CHA outside of court.[15] In news stories, CHA has acknowledged that it needs to make progress on its relocation record, but is "disappointed" that the tenants filed suit rather than work with social service experts to develop solutions.[16] The litigation was apparently unavoidable because after three years of forced relocation, CHA plans to demolish another 2,600 family public housing units in 2003, apparently without completing the needed improvements in the program.[17] Undoubtedly, the tenants' bargaining position in improving the relocation program should be strengthened as a result of the litigation. For further developments in the case, watch the Web site of the National Center on Poverty Law,[18] which is representing plaintiffs along with the Chicago Lawyers' Committee for Civil Rights Under Law, and Business and Professional People for the Public Interest. ■

[9]Paul Fischer, *Where Are the Public Housing Families Going? An Update* (2003), available online at the National Center on Poverty Law Web site, http://povertylaw.org/advocacy/housing/housing.cfm#recent.

[10]Complaint ¶¶ 116-202. This part of the complaint should be read by anyone who might underestimate the serious consequences of such displacement.

[11]42 U.S.C. §§ 3604, 3608.

[12]*Id.* § 1437c-1.

[13]*Id.* § 2000d.

[14]*Id.* §§ 4601, *et seq.*

[15]Complaint ¶ 6.

[16]John W. Fountain, *Suit Says Chicago Housing Renewal Plan Perpetuates Segregation*, N. Y. Times, Jan. 24, 2003.

[17]Complaint ¶ 103.

[18]*See* www.povertylaw.org.

Violent Criminal Acts are Grounds for PHA's Termination of Certificate Even if Not in the Home's Immediate Vicinity

The Pennsylvania Supreme Court reversed two lower courts when it upheld HUD regulations authorizing a housing authority to terminate a tenant's Section 8 certificate assistance based on the off-premises criminal activity of her children. *Powell v. Housing Auth. of Pittsburgh*.[1] The state's highest court rejected the lower courts' analyses, which found the scope of the regulations to be excessive and thus in conflict with congressional intent.

Beverly Powell's two sons committed a carjacking in the parking lot of a supermarket less than a mile away from their home by pepper-spraying the car's elderly occupant and physically removing her from the car. Twenty days later, Ms. Powell received notice that the Pittsburgh Housing Authority was terminating her Section 8 certificate assistance for a violation of the "Family Obligations" that she signed as a Section 8 participant and which provided that members of the family were prohibited from engaging in drug-related or violent criminal activity. HUD regulations authorize a housing authority to terminate Section 8 assistance for violation of any Family Obligation and for the commission of drug-related or violent criminal activity by any member of the household.[2] At an informal hearing, a PHA hearing officer upheld the termination of Powell's Section 8 certificate, finding that the carjacking constituted a violation of the Family Obligations.

Tenant's Appeal of the Informal Hearing Decision

Powell appealed the decision to the Pennsylvania Court of Common Pleas, arguing that no part of the statute creating the Section 8 certificate program allowed a housing authority to terminate Section 8 assistance on the basis of criminal activity. Rather, she contended that the federal statutory language allowed only *landlords* to terminate a lease due to such activity, and that the HUD termination of assistance regulations were invalid. In response, the housing authority contended that the regulations conformed to Congress' clear intent to exclude violent criminals from Section 8 housing.

To determine whether HUD properly promulgated the regulations within its delegated authority, the Common Pleas Court applied the test articulated by the Supreme Court in *Chevron USA v. Natural Resources Defense Council*.[3] It concluded that:

(1) Congress had enacted no legislation allowing housing authorities to terminate assistance to a Section 8 participant based on criminal activity;

(2) the Section 8 statutory scheme depended, in part, on landlords' termination of leases to exclude violent criminals but that this scheme had a gap since it would be ineffective when a landlord did not live on the premises or was hesitant to evict due to the difficulty of finding a new tenant; and,

(3) that the HUD regulations authorizing housing authorities to terminate assistance due to the violent criminal activity of a household member filled that gap, but impermissibly so, by failing to track the pertinent "crime-based standards" for eviction of the Section 8 and public housing statutes which distinguish, with respect to the location of the violation, between drug-related crime and non-drug-related violent crime.[4]

Accordingly, the court fashioned a remedy by which the applicable regulations were to be read as if they contained the crime-based standards, in this case, the "immediate vicinity" requirement for violent criminal activity.[5] It then remanded the case to the housing authority for further fact-finding on the issue of the location of the criminal activity vis-a-vis the tenant's home.

On remand, the housing authority's hearing officer found that the carjacking, which occurred within a mile of the tenant's home, did occur in the "immediate vicinity" of the Powell residence and that the victim's residence, which was less than .3 miles from the Powell home, was also within the immediate vicinity of the home.

Tenant's Second Appeal Successful

Upon a second appeal to the Court of Common Pleas, the court rejected the hearing officer's conclusion and reinstated Powell's Section 8 assistance. The court held that "immediate vicinity" equated "immediate neighborhood," and based on the facts found through the grievance process, the crime did not take place close enough to the Section 8 residence to "threaten the health, safety, or peaceful enjoyment of residents in the immediate vicinity of the premises."[6]

The housing authority appealed the decision and the Pennsylvania Commonwealth Court, an intermediate appellate court, affirmed the lower court's decision. It upheld the Common Pleas Court's reinterpretation of the HUD regulations and agreed with the lower court's conclusion that

[1]812 A.2d 1201, 2002 WL 31854865 (Pa. Dec. 20, 2002).

[2]24 C.F.R. §§ 982.552(c)(i), 982.551(l) and 982.553 (2002).

[3]467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.2d 694 (1984).

[4]*See* 42 U.S.C. §§1437f(d)(1)(B)(iii) (allowing a landlord to terminate a certificate lease if the tenant or a member of tenant's household commits criminal activity disturbing other tenants or individuals residing in the "immediate vicinity" of the Section 8 premises) and 42 U.S.C. §1437d(*l*)(6) (requiring housing authorities to use leases in public housing stating that criminal activity disturbing other tenants on the premises or drug-related criminal activity *on or off such premises* constitutes cause for eviction).

[5]760 A.2d at 1206.

[6]812 A.2d.at 1207.

"immediate vicinity" means "on the premises or next door."[7] Lastly, it found that the Common Pleas Court's reinterpretation of the definition of "immediate vicinity" was not an erroneous disregard of the hearing officer's factual finding because the question of what constituted the immediate vicinity was a question of law and not a question of fact.[8]

State Supreme Court Decision

The housing authority appealed the decision to the Pennsylvania Supreme Court. It contended that the HUD regulations pass the *Chevron* test,[9] that even if "immediate vicinity" were imported into the regulations, the words referred to the location of the home of those threatened by the criminal activity in relation to the Section 8 tenant's home, and not the location of the criminal activity, and that the lower courts should have given deference to the hearing officer's finding that the carjacking threatened those in the immediate vicinity of the Powells' home. In response, Powell argued that the *Chevron* test was properly applied, that the HUD regulation was unconstitutional, and that the housing authority failed to show that the carjacking impacted residents in the vicinity of her home.

The Pennsylvania Supreme Court viewed the question before it narrowly, namely, whether a housing authority may terminate Section 8 assistance when a family member engages in violent criminal activity without having to satisfy the public housing statutory eviction standard[10] which requires that it establish that the violent criminal activity threatens the health, safety, or right to peaceful enjoyment of its residents or of persons residing in the immediate vicinity of the Section 8 premises.[11]

Like the lower courts, the Pennsylvania Supreme Court turned to the *Chevron* test to determine first, if Congress had directly spoken on the scope of the statute, and, second, if it had not, whether the HUD regulation was within a permissible construction of the statute. Critically, with respect to the second prong of the *Chevron* test, the court found that if Congress had not spoken directly on the issue, the court was not free to substitute its own construction of the statute but instead it was obligated to determine whether the agency's interpretation was reasonable.

The issue before the court was merely whether the HUD regulations were a permissible construction of the statute and that in reaching that conclusion it need not find that the agency's construction was the only one that it permissibly could have adopted.

Although both parties contended that Congress had indeed spoken on the question at issue, the court found otherwise.[12] The housing authority contended that Congress' intent was apparent from other statutes that allow the exclusion and termination of violent criminals from the program. The court found that this theory was not supported by the text of the Certificate Program statutes. The tenant, in turn, argued that Congress had spoken on the issue by creating a system of landlord "lease enforcement" mechanisms, both in public housing and in the Section 8 programs, that terminated the assistance upon the termination of the tenancy and that that mechanism was an exclusive method that was intended to apply to all landlords, whether public or private. The court rejected this theory because it lacked support in the governing statutes. It thus concluded that a gap existed in the Section 8 statutory scheme and that it must proceed to analyze the regulation under *Chevron's* second prong, namely, whether the regulation was a permissible construction of the statute.[13]

In turning to *Chevron's* second prong, the court made it clear that the issue before it was merely whether the HUD regulations were a permissible construction of the statute and that in reaching that conclusion it need not find that the agency's construction was the only one that it permissibly could have adopted. Indeed, it went on to state that when a challenge to an agency construction of a statutory provision really centers on the wisdom of the agency's policy, rather than on whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.[14]

In support of her position, Powell argued that HUD's reasoning for the rule, which was based on the portability

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[7] *Powell v. Housing Auth. of Pittsburg*, 760 A.2d 473, 482 (Comm. Ct. Pa. 2000).

[8] 812 A.2d at 1208.

[9] The Pennsylvania Supreme Court set forth the *Chevron* test as follows: "Under *Chevron,* a reviewing court is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron,* 467 U.S. at 842-43, 104 S.Ct. 2778. But if the court determines that Congress has not specifically addressed the question, the court "does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843, 104 S.Ct. 2778. Where the legislative delegation to an agency to fill a gap is implicit, rather than explicit, a court may not substitute its own construction of a statutory provision for the agency's "reasonable interpretation." *Id.* at 844, 104 S.Ct. 2778. "If a regulation is reasonable, it should not be disturbed, unless it appears from the statute or its legislative history that the agency's construction of the statute is not one that Congress would sanction." *Id.* at 844-45 & n. 14, 104 S.Ct. 2778. 812 A.2d at 1208-1209.

[10] *See* 42 U.S.C. §§ 1437f(d)(1)(B)(iii).

[11] 812 A.2d at 1209-1210.

[12] *Id*. at 1214.

[13] *Id.*

[14] 812 A.2d at 1214.

feature of the Certificate Program, was flawed.[15] She also contended that HUD's regulations had conferred a broader license on housing authorities in administering Section 8 certificates (by failing to implement an "immediate vicinity" requirement) than it conferred on them in the administration and ownership of public housing under 42 U.S.C. § 1437d(*l*)(6) (requiring lease provisions stating that criminal activity on the premises constitutes cause for eviction). The court rejected both of Powell's arguments and held that HUD could reasonably create a greater deterrent to criminal activity in the Certificate Program—by not limiting the location of the violent criminal activity—precisely because the administering housing authorities were not also acting as landlords. It thus held that HUD's regulation was a reasonable choice by which it could fill the gap left by Congress.[16] The court found support for its conclusion in Congress' authorization of housing authorities to exclude violent criminals at the Section 8 application process, and in its failure to amend the Certificate Program statutes after HUD promulgated the regulations at issue in the case. It thus concluded that the lower courts' importation of an "immediate vicinity" requirement into the regulation allowing for a housing authority to terminate a Section 8 certificate on the basis of violent criminal activity of a household member was erroneous. It therefore remanded the case to the trial court for further proceedings.[17]

There were two concurring opinions to the decision, which emphasized the fact that the federal rules do not require PHAs to terminate Section 8 certificate benefits because of the criminal activity of a family member. One of those opinions quoted from the regulations and concluded that "it is incumbent on PHAs to consider 'all relevant circumstances' before terminating a family's assistance based on the errant conduct of less than all of its members."[18] ■

[15]The PHA relied upon statements in the *Federal Register* that a PHA should not be limited to terminating assistance for activities on or near the premises because a family could "lease housing outside the area where the family engages in the proscribed activities." 55 Fed. Reg. 28,538, 28,539-40 (July 11, 1990).

[16]812 A.2d at 1215.

[17]In particular, the Pennsylvania Supreme Court declined to address Powell's contentions that the PHA failed to meet its burden of production and burden of proof at the hearing. *Id*. at 1204 n 4 and 1216 n 17.

[18]*Id*. at 1217 and Justice Saylor concurring.

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.

In Re Marcano, 2003 WL 223461 (Bankr.S.D.N.Y. Jan. 31, 2003). The Volunteers of America (VOA) and a resident association are rental housing landlords. In two separate state court actions, they secured eviction orders against tenants of their housing. In response, the low-income residents filed Chapter 7 bankruptcy proceedings resulting in an automatic stay of the eviction orders. The landlords responded by moving, in the bankruptcy proceeding, for relief from the automatic stay and the court consolidated the two cases for purposes of deciding the landlords' motion for relief from the stay. In opposition to the landlords' motion to lift the stay, the tenants raised a defense based on Section 525(a) of the bankruptcy code, which prohibits a governmental entity from discriminating against a debtor solely because such a bankrupt person has not paid a dischargeable debt. The court, relying on recent precedent,[4] found that Section 525(a) protects debtor-tenants in public housing from eviction on the basis of nonpayment of dischargeable pre-petition rent. However, before it could apply that holding to the present cases, it had to determine whether the two landlords were acting as "governmental units" within the meaning of Section 101(27) of the bankruptcy code. While neither landlord in the consolidated action was denominated as a unit of government, the court found that in the case of the tenant association there existed such pervasive *entwinement* of the local municipality in the workings and composition of a nominally private tenants' association, that the entity should be considered an instrumentality of the city and a governmental unit for purposes of Section 525(a). In the case of the VOA, the court found it did not engage in a *public function* since providing housing is not one of the powers that are "associated with sovereignty" and delegated to private actors. The court therefore upheld the stay of execution against the tenants' association and granted VOA's motion for relief from the stay.

Mount Olive Complex v. Township of Mount Olive, 356 N.J.Super. 500, 813 A.2d 581 (N.J. Super. Ct., App. Div., Jan.

[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.

[4]*In re Stoltz*, No. 01-5048, 2002 U.S. App. LEXIS 26443 (2d Cir. Dec. 20, 2002) (*see* 33 HOUS. L. BULL. 17 (Jan. 2003)).

10, 2003). A development entity brought an action against the Township of Mount Olive seeking to construct housing, at least 20 percent of which would be affordable, under the New Jersey Supreme Court's "builder's remedy" mechanism which is intended to foster the production of affordable housing in accordance with its landmark *Mount Laurel* decision. The action allows a court to permit the construction of housing, of which at least 20 percent is affordable, whenever a municipality has not authorized the construction of sufficient affordable housing to meet its fair share affordable housing obligations.[5] After a bench trial, the superior court entered judgment for the township on a rezoning issue, but ruled in favor of the developer on a lot size issue. Both parties appealed the decision and the appellate division affirmed the denial of the builder's remedy. The builder appealed to the New Jersey Supreme Court, which was considering three other builder's remedy cases at the time. Upon issuing an opinion in those cases, it remanded this case for further proceedings in accordance with its decisions. In its second review of this case, the appellate division found that the plaintiffs did not make the relevant showing required by the New Jersey Supreme Court in *Toll Brothers v. Township of West Windsor*, 173 N.J. 502, 803 A.2d 53 (2002), one of the three cases that it considered during the pendency of this case. The appellate court thus affirmed the trial court's original determination that plaintiff was not sufficient catalyst to change the policies of the township, thus concluding that the partnership was not entitled to a builder's remedy.

McIntyre v. Philadelphia Housing Authority, 2002 WL 31927407 (Pa. Commw. Ct. Jan. 8, 2003). Plaintiff, a minor living in public housing, sued the Philadelphia Housing Authority (PHA) for damages based on negligence related to lead-based paint exposure, the implied warranty of habitability, civil rights violations under 42 U.S.C. §1983, and federal lead-based paint statutes. A jury awarded McIntyre damages for personal injuries arising from exposure to lead-based paint based on PHA's negligence and for PHA's breach of the implied warranty of habitability. On PHA's appeal to the Commonwealth Court of Pennsylvania, the court held that (1) only contract damages, not tort damages, were available for breach of implied warranty of habitability; (2) evidence supported trial court's denial of post-verdict relief for award to minor on the negligence claim; and (3) behavioral neuroscientist was competent to testify at the trial.

Hand v. Gilbank, 752 N.Y.S.2d 501 (N.Y.A.D. 4 Dept. Dec. 30, 2002)(2002 N.Y. Slip Op. 09868). In the tenant's negligence action against the landlord for injuries from owner's alleged failure to remove driveway snow and ice, the trial court denied in part the owner's motion for summary judgment. The owner appealed and the Appellate Division affirmed the lower court. It found that genuine issues of material fact existed as to whether the premises were negligently maintained and constituted a defective or hazardous condition, whether the owner had actual or constructive notice of the alleged defect or hazard, and whether the alleged defect or hazard caused or contributed to the tenant's injuries. In addition, the tenant had claimed that the owner had violated the federal *Fair Housing Act* (42 U.S.C. §§ 3601 *et seq.*) by failing to permit the installation of accessibility features to accommodate the tenant's disability, and that this violation constituted negligence *per se.* The Appellate Division rejected this contention, holding that the *Fair Housing Act*, unlike the state's building and fire code, could not establish the standard of care in negligence litigation. It thus ordered the trial court to grant partial summary judgment to the owner on that portion of the negligence claim.

Patterson v. Piano Craft Guild Associates, No. 01-4376, 2002 WL 31931580 (Mass.Super. Dec. 30, 2002). In tenant's action to stay arbitration pursuant to an earlier agreement between the tenants' association and the owner of a formerly subsidized property that still receives Section 8 voucher assistance for many tenants, the court found that the owner could enforce the agreement to arbitrate. The arbitration clause grew out of an agreement settling a dispute concerning the prepayment of the property several years ago, which had entitled tenants to certain restricted rents (35 percent of income) until 2014, in exchange for their agreement to move to different lower-valued units in the building as requested by the owner, subject to one rejection for each tenant. Disputes under the agreement were made subject to arbitration. The owner requested the tenant move to another unit in the property, the tenant refused, and the owner then sought arbitration. The tenant contended that enforcement of the arbitration provision would violate his rights under state and federal law, including (1) the standard Section 8 Lease Addendum, which limits evictions to those resulting from judicial action; (2) a state anti-discrimination law; and (3) a state statutory provision prohibiting waiver of jury trial in rental agreements. The court found no conflict with the Section 8 lease provision because the arbitrator could only determine whether the settlement agreement was violated, and was not empowered to grant possession, which could only be done by the court. The court found that the tenant could pursue his discrimination claims separately through either judicial or administrative processes, so that those were not within the scope of the arbitration agreement, although the tenant was free to assert them as a defense to the claimed violation being arbitrated if he wished. On the final claim, while the court agreed that arbitration would violate his state law rights to jury trial, it found that the state statute was preempted by the *Federal Arbitration Act* (9 U.S.C. § 2). Thus, the court granted the owner judgment ordering arbitration.

Missouri Child Care Ass'n v. Martin, 2003 WL 184747 (W.D.Mo. Jan. 13, 2003). A trade association for institutional foster-care providers brought a 42 U.S.C. § 1983 action against the directors of the Missouri state Division of Family Services and Department of Social Services, seeking declaratory

[5]For recent cases on the developments of the New Jersey builder's remedy, *see New Jersey Supreme Court Upholds "Builder's Remedy" and Rules on In Lieu Fees in Three Mount Laurel Cases,* 32 HOUS. L. BULL. 220 (Sept. 2002).

and injunctive relief to enforce cost reimbursement provisions of the federal *Child Welfare Act*. In evaluating the trade association's standing to bring its claim pursuant to Section 1983, the district court reviewed the types of federal rights which give parties the ability to seek such redress. Among these rights is the rent-ceiling provision of the *Public Housing Act*, which was upheld by the Supreme Court in *Wright v. City of Roanoke Redevelopment and Housing Authority,* 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987). The district court noted the treatment of federal rights in the *Wright* case and contrasted that decision to three other recent Supreme Court cases, all of which found that the statutes in question did not create federal enforceable rights. Despite the limits of these cases, the court found that the foster-care providers' interest in reimbursement payments is a federal right, analogous to the Supreme Court's ruling in *Wilder v. Virginia Hospital Ass'n,* 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990) that allowed a Section 1983 suit brought by health care providers to enforce a reimbursement provision of the *Medicaid Act*. Noting that its analysis is based on the *Wright* decision, the court further clarified that statutes which explicitly confer monetary entitlements on plaintiffs evinces Congress' intent to create enforceable rights. ■

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

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

[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 Final Rules

68 Fed. Reg. 3,362 (Jan. 23, 2003)
Authority to Waive the Market-to-Market Regulations

Summary: This final rule revises HUD's regulations for the Multifamily Housing Mortgage and Housing Assistance Restructuring Program (Mark-to-Market). The final rule provides that the Assistant Secretary for Housing-Federal Housing Commissioner, and not the Director of the Office of Multifamily Housing Assistance Restructuring (OMHAR), has the authority to waive the Mark-to-Market regulation.
Effective Date: February 24, 2003.

68 Fed. Reg. 3,366 (Jan. 23, 2003)
Office of Inspector General Subpoenas and Production in Response to Subpoenas or Demands of Courts or Other Authorities

Summary: This final rule amends the regulations of the Office of Inspector General (OIG) to implement the statutory requirements concerning the issuance of OIG subpoenas, and responses to subpoenas issued to OIG employees in proceedings where OIG is not a party. This final rule follows publication of a proposed rule on September 20, 2002. No public comments were received in response to the proposed rule. Accordingly, the Department is adopting the proposed rule without change.

Effective Date: February 24, 2003.

HUD Proposed Rules

68 Fed. Reg. 648 (Jan. 6, 2003)
Participation in HUD Programs by Faith-Based Organizations; Providing for Equal Treatment of All HUD Program Participants

Summary: This proposed rule would revise those HUD regulations that impose unwarranted barriers to the participation of faith-based organizations in HUD programs and implement HUD's policy that, within the framework of constitutional church-state guidelines, faith-based organizations should be able to compete on an equal footing with other organizations for HUD funding. HUD supports the participation of faith-based organizations in its programs.

Comments Due Date: March 7, 2003.

68 Fed. Reg. 1,766 (Jan. 13, 2003)
FHA Single Family Mortgage Insurance; Lender Accountability for Appraisals

Summary: This proposed rule clarifies and strengthens HUD's regulations concerning the responsibilities of lenders approved by the Federal Housing Administration (FHA) in the selection of appraisers to perform appraisals on properties that will be the security for FHA insured mortgages. First, the proposed rule provides that lenders are to be held strictly accountable for the quality of appraisals on properties securing FHA-insured mortgages. Further, the proposed rule specifically provides that lenders who submit apprais-

als to HUD that do not meet FHA requirements are subject to the imposition of sanctions by the HUD Mortgagee Review Board. The proposed rule would apply to both sponsor lenders, who underwrite loans, and loan correspondent lenders, who originate loans on behalf of their sponsors. HUD believes these proposed changes will help protect the FHA Insurance Fund, ensure better compliance with appraisal standards, and help to ensure that homebuyers receive an accurate statement of appraised value.

Comments Due Date: March 14, 2003.

HUD Notices

68 Fed. Reg. 1,621 (Jan. 13, 2003)
Housing Counseling Program Announcement of Funding Awards for Fiscal Year 2002

Summary: This announcement notifies the public of funding decisions made by the Department in a SuperNOFA competition for funding of HUD-approved counseling agencies to provide counseling services. This announcement contains the names and addresses of the agencies selected for funding and the amount. Additionally, this announcement outlines various noncompetitive housing counseling awards made by the Department.

68 Fed. Reg. 2,790 (Jan. 21, 2003)
Notice of Certain Operating Cost Adjustment Factors for Fiscal Year 2003

Summary: This notice establishes annual factors used in calculating rent adjustments under Section 524 of the *Multifamily Assisted Housing Reform and Affordability Act of 1997* (MAHRA) as amended by the *Preserving Affordable Housing for Senior Citizens and Families into the 21st Century Act of 1999*, and under the *Low-Income Housing Preservation and Resident Homeownership Act of 1990* (LIHPRHA).

Effective Date: February 11, 2003.

68 Fed. Reg. 2,866 (Jan. 21, 2003)
Funding for Fiscal Year 2002: Capacity Building for Community Development and Affordable Housing

Summary: The Fiscal Year (FY) 2002 *HUD Appropriations Act* provided $31 million in FY 2002 funds for activities authorized in Section 4 of the *HUD Demonstration Act of 1993.* Section 4 authorizes the Secretary to establish by notice such requirements as may be necessary to carry out its provisions. This notice takes effect upon issuance.

68 Fed. Reg. 3,112 (Jan. 22, 2003)
Indian Housing Block Grant Allocation Formula: Notice of Proposed Negotiated Rulemaking Committee Membership

***Summary*:** HUD announces its list of proposed members for its Indian Housing Block Grant Allocation Formula Negotiated Rulemaking Committee, and requests public comments on the proposed membership. The committee will negotiate a proposed rule to revise the allocation formula used under the Indian Housing Block Grant (IHBG) Program. This document follows publication of July 16, 2001, and July 5, 2002, notices advising the public of HUD's intent to establish the negotiated rulemaking committee and soliciting nominations for membership on the committee.

Comment Due Date: February 21, 2003.

68 Fed. Reg. 3,116 (Jan. 22, 2003)
Section 8 Housing Assistance Payments Program—Contract Rent Annual Adjustment Factors, Fiscal Year 2003

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

Effective Date: January 22, 2003.

68 Fed. Reg. 4,018 (Jan. 27, 2003)
Notice of Funding Availability (NOFA) for the Collaborative Initiative to Help End Chronic Homelessness

Summary: This notice announces a $35 million initiative to help end chronic homelessness. The initiative, coordinated by the U.S. Interagency Council on the Homeless (ICH), involves the participation of three Council members: the Department of Housing and Urban Development (HUD), the Department of Health and Human Services, and the Department of Veterans Affairs. The initiative supports the Administration's goal to end chronic homelessness by seeking to create a collaborative and comprehensive approach to addressing homelessness.

68 Fed. Reg. 4,558 (Jan. 29, 2003)
Notice of Regulatory Waiver Requests Granted for the Third Quarter of Calendar Year 2002

Summary: Section 106 of the *Department of Housing and Urban Development Reform Act of 1989* (the *HUD Reform Act*) requires HUD to publish quarterly Federal Register notices of all regulatory waivers that HUD has approved. Each notice must cover the quarterly period since the most recent Federal Register notice. The purpose of this notice is to comply with the requirements of Section 106 of the *HUD Reform Act*. This notice contains a list of regulatory waivers granted by HUD during the quarter beginning on July 1, 2002, and ending on September 30, 2002.

HUD PIH Notices

Notice PIH 2003-1 (HA) (Jan. 6, 2003)
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

Summary: This notice provides Public Housing Agencies (PHAs) with information needed to complete their FFY

2003 operating subsidy eligibility requests to HUD. The information includes local inflation factors, data needed for the recalculation of the Formula Expense Level, and other special notes related to the operating subsidy calculation. A schedule for the submission of operating subsidy calculations is also provided. Once HUD has reviewed all of the submitted calculations from all PHAs, HUD will issue a proration factor to be used to approve subsidy levels. Until the proration level has been established, a PHA will receive operating subsidy funding based on 70 percent of the amount of the last operating budget and/or subsidy calculation approved by HUD for that PHA. The amount obligated by HUD will be scheduled for eLOCCS drawdown by the PHA.

Expires: January 5, 2004.

Notice PIH 2003-2 (TDHEs) (Jan. 30, 2003)
Implementation of Statutory Changes to the *Native American Housing Assistance and Self-Determination Act of 1996* (NAHASDA)

Summary: In calendar year 2000, three laws were enacted which amended NAHASDA: the FY 2001 *HUD Appropriations Act*, Public Law 106-377, approved October 27, 2000; the Omnibus Indian Advancement Act, Public Law 106-568, Title X – Native American Homeownership approved December 27, 2000; and the *American Homeownership and Economic Opportunity Act of 2000*, Public Law 106-569, Title V – Native American Homeownership approved December 27, 2000. With minor exception, the two laws approved on December 27, 2000 contain identical provisions. However, because the two laws enacted on December 27, 2000, cannot both amend NAHASDA, HUD considers the first—the *Omnibus Indian Advancement Act*, Public Law 106-568—to contain the operative amendments.

Expires: Indefinite.

Notice PIH 2003-3 (TDHEs) (Jan. 30, 2003)
Implementation of Statutory Change to the *Native American Housing Assistance and Self-Determination Act of 1996* (NAHASDA) related to Labor Standards

Summary: In calendar year 2000, three laws were enacted which amended NAHASDA: the FY 2001 *HUD Appropriations Act*, Public Law 106-377, approved October 27, 2000; the *Omnibus Indian Advancement Act*, Public Law 106-568, Title X – Native American Homeownership approved December 27, 2000; and the *American Homeownership and Economic Opportunity Act of 2000*, Public Law 106-569, Title V – Native American Homeownership approved December 27, 2000. With minor exception, the two laws approved on December 27, 2000 contain identical provisions. However, because the two laws enacted on December 27, 2000, cannot both amend NAHASDA, HUD considers the first—the *Omnibus Indian Advancement Act*, Public Law 106-568—to contain the operative amendments.

Expires: Indefinite.

Notice PIH 2003-4 (TDHEs) (Jan. 30, 2003)
***Native American Housing Assistance and Self-Determination Act* (NAHASDA) Funding for Tribes or Tribally Designated Housing Entities (TDHE) in FY 2003**

Summary: The Department is concerned that the delay in FY 2003 IHBG funding may have an adverse effect on some tribes. This notice provides instructions to tribes and tribally designated housing entities (TDHE) on the process for requesting an advance of IHBG funds for FY 2003. It also provides instructions to Area Offices of Native American Programs (AONAP) on how to review and process a request.

Expires: January 31, 2004.

Notice PIH 2003-5 (HA) (Jan. 30, 2003)
Deployment of Military Personnel to the Persian Gulf Region

Summary: This notice provides general guidance to Public Housing Agencies (PHAs) administering Public Housing and/or Housing Choice Vouchers and Section 8 Moderate Rehabilitation programs, and owners participating in the Housing Choice Voucher program, on providing support for families and dependents of military personnel (including reservists and guardsmen) who are called to active duty in the Persian Gulf Region.

Expires: Indefinite.

RHS Federal Register Notices

68 Fed. Reg. 1,812 (Jan. 14, 2003)
Notice of Request for Extension of a Currently Approved Information Collection

Summary: In accordance with the *Paperwork Reduction Act of 1995*, this notice announces the intention of the abovenamed Agencies to request an extension for the currently approved information collection in support of the servicing of Community and Direct Business Programs Loans and Grants.

Dates: Comments must be received by March 17, 2003.

68 Fed. Reg. 1,815 (Jan. 14, 2003)
Notice of Request for Extension of a Currently Approved Information Collection

Summary: In accordance with the *Paperwork Reduction Act of 1995*, this notice announces the Rural Housing Service's intention to request an extension for a currently approved information collection in support of Form RD 410–8 "Applicant Reference Letter."

Dates: Comments must be received by March 17, 2003.

68 Fed. Reg. 4,166 (Jan. 28, 2003)
Notice for Requests for Proposals for Guaranteed Loans Under the Section 538 Guaranteed Rural Rental Housing Program (GRRHP) for Fiscal Year 2003; Correction

Summary: The Rural Housing Service (RHS) is correcting a notice published December 27, 2002 (67 FR 79038–79042). This action is taken to add a priority criteria for the selection of projects requesting interest credit assistance and increase the threshold score for the interest credit award. ■

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