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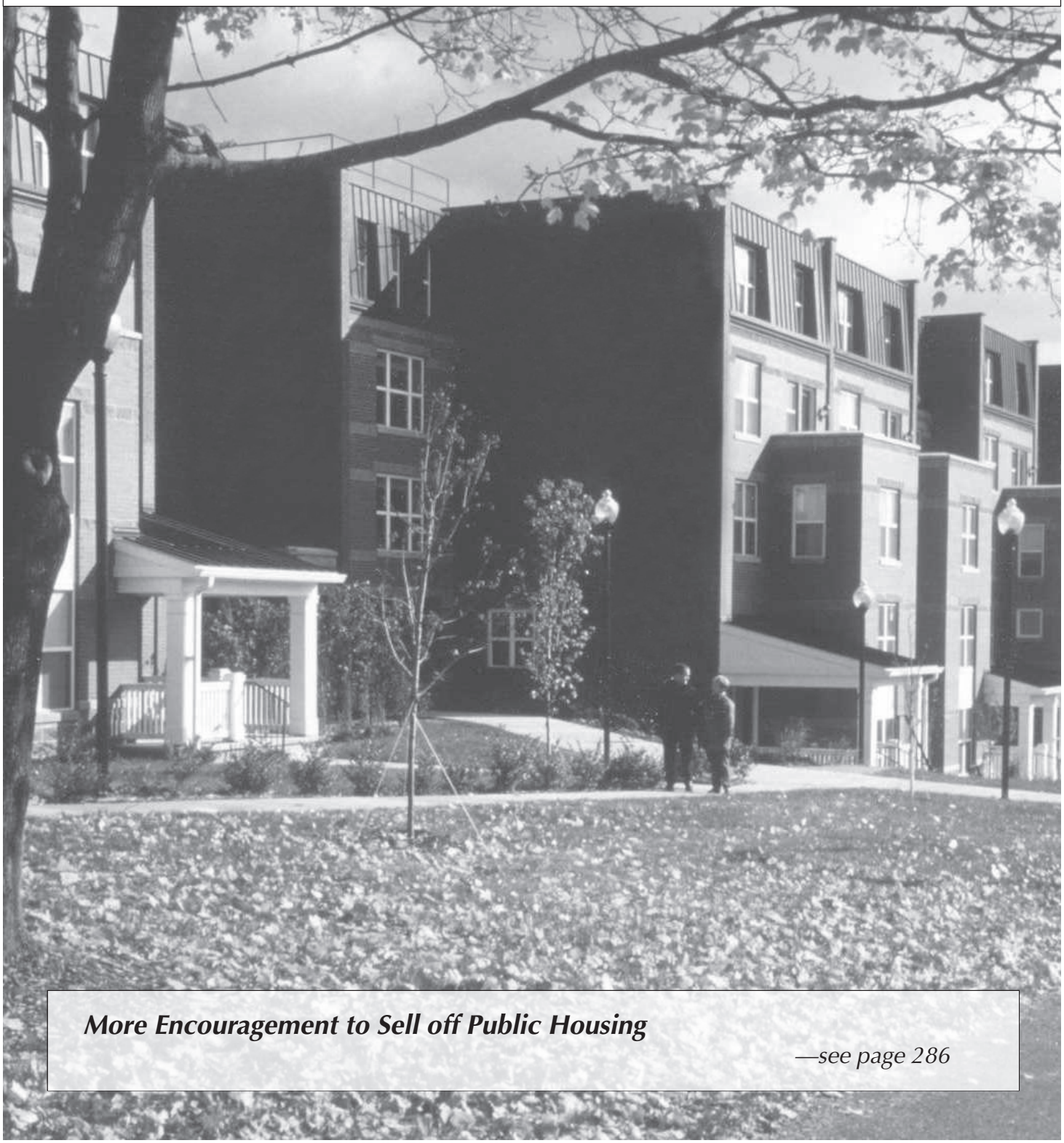

More Encouragement to Sell off Public Housing

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Cover: New Pennley Place, a 174-unit family and elderly affordable rental development in Pittsburgh, PA. Rehabilitated and constructed as an affordable and market rate development by The Community Builders, Inc. Photo courtesy of The Community Builders, Inc.

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Administration's Voucher Block Grant Proposal Threatens Future Benefit Levels

Several components of the Bush Administration's Fiscal Year (FY) 2004 Budget, including the proposed conversion of the housing voucher program into a block grant to the states ("Housing Assistance for Needy Families" (HANF)), threaten program quality or benefit levels under several of the federal housing programs for their current very low-income beneficiaries.[1] A HANF block grant poses serious risks of diminished funds for voucher assistance over time, and consequent pressure on states to shift available resources away from families most in need or special efforts to improve program operation. Some believe that it is but the first step in a grander scheme, harkening back to the Clinton Administrations's 1995 plan to convert all housing assistance to vouchers, in order to block grant other federal housing programs, including project-based Section 8 and public housing. This article summarizes in greater detail the case against the proposed voucher block grant, which would have to be approved by Congress in legislation before becoming effective.

Background on the Voucher Program

Currently the Voucher program is the nation's largest federal housing assistance program, providing about $12 billion in annual rental assistance to more than 2.1 million households and related administrative costs. Almost all of the families served are very low-income (less than 50 percent of area median), and most have extremely low incomes (less than 30 percent of area median). Tenants usually pay between 30 and 40 percent of their incomes for rent, depending on the relationship between the PHA-set local "payment standard" and the specific rent for their unit. More than 2,600 state and local housing agencies administer the program nationwide, approving units and executing housing assistance contracts with owners that are generally supported by annual federal appropriations. Congress, through HUD, provides funding to renew annually expiring voucher contracts directly to PHAs under a formula that currently seeks to reimburse agencies for the actual per-unit costs (within the framework of applicable rules) for the total number of units that they are authorized to make available under their annual contributions contract with HUD.

What Is Known About the Administration's Proposal?

Not much. The administration has released only the general description of the proposal in its FY 2004 Budget documents, but has proposed no legislative language that

[1]The Administration's proposed changes to the federal housing programs were previously reviewed in *Administration's FY 2004 Budget Poses Major Risks for Federal Housing Programs*, 33 HOUS. L. BULL. 55 (Mar. 2003).

would be necessary to actually implement it. Details are sketchy at best. One known feature of the proposal is that states would be required to assist at least the same number of families as are currently served.[2]

Under the proposal, FY 2004 would be a transition period, with the actual block grant becoming effective in FY 2005. During FY 2004 transition, as is currently the case, HUD would provide voucher funding directly to PHAs. During this time, states would be commencing the process of developing their own staff and systems to run the block grant program, funded by about $100 million from a $600 million "central fund" provided by Congress through HUD. HUD could also use this fund to support increases in funding to individual PHAs experiencing increases in the number of unit months under lease or in per-unit costs, or other steps needed to reach their allocated baseline program level. In addition, starting in the transition year, the proposal would give HUD unlimited authority to waive federal voucher statutes and regulations upon state request.[3]

The President's proposed overall reductions in domestic discretionary spending would reduce spending for housing programs by $5 billion below CBO baseline.

In FY 2005, through the block grant, voucher funding would go to the states rather than to the 2,600 state and local agencies currently administering the program. The Budget documents provide no further details, beyond the statement that states must serve the same number of families as are currently assisted.

A vital component of the entire proposal is the requested annual federal appropriation to run the program. In the first year, FY 2004, the budget requests an appropriation of about $11.5 billion to renew prior expiring voucher commitments, $609 million for the aforementioned central fund, $252 million for vouchers primarily for tenants threatened with loss of their public or other subsidized housing units, $72 million for Family Self-Sufficiency coordinators, and $1.2 billion for PHA administrative fees. Renewal funding for project-based Section 8 units and associated expenses for contract administration would receive a separate appropriation of $4.82 billion.

Administration officials have apparently indicated that, after the first year, the authorized voucher block grant funding for annual renewals would be adjusted at best only for general inflation, based on some unspecified index, not for local housing costs or actual program costs within a jurisdiction. The actual amount of funding provided within this authorization ceiling would be determined by the vagaries and uncertainties of the annual federal appropriations process, probably resulting in diminished resources over time under politically inspired domestic spending constraints.

Even in the first "transition year," FY 2004, the Administration has requested insufficient budget authority for vouchers. The Center on Budget and Policy Priorities (CBPP) has recently issued an analysis of the President's FY 2004 budget request,[4] including the FY 2004 request for vouchers, finding that about 137,000 previously authorized vouchers, about 7 percent of the authorized program level, would not be funded, even though a substantial number of these vouchers are likely to be in use in FY 2003 and to require renewal funding in FY 2004. According to CBPP, in calculating the amount of funding needed to renew expiring voucher contracts, the budget uses outdated data (primarily from fiscal year 2001) to estimate the proportion of authorized vouchers currently being used—a key variable in the funding calculation—and thus would effectively nullify recent PHA progress to increase voucher utilization. There is no reason to believe that future budgets would not replicate these erroneous assumptions or contain similar accounting assumptions with serious adverse impacts.

The President's proposed overall reductions in domestic discretionary spending would reduce spending for housing programs such as vouchers, other Section 8, the Public Housing Operating and Capital Funds, and HOPE VI by $5 billion below the Congressional Budget Office's (CBO) baseline.

And apparently Congress is equally capable of perpetrating similar or perhaps greater damage, without any specific pretension that it is doing so, by adopting budget resolutions that result in capping allocations to the various appropriations subcommittees as they go about their job of providing annual funding for programs under their jurisdiction. All of these budget decisions take place without a deliberate analysis of the impact of the budget levels on operating specific programs. According to CBPP, the House budget resolution approved on March 21, in contrast to the Senate's, would have decreased discretionary funding three times as much as the President's already meager budget.[5] The final budget resolution approved by the House and Senate in mid-April assumes the same level of discretionary spending as proposed by the President, rejecting both the additional cuts proposed by the House and the additional funding proposed by the Senate. Thus, the final resolution and the President's budget assumes $2 billion in HUD program cuts for FY 2004, compared with the CBO baseline projections. Of this total, $1.6 billion of the cuts are in public housing and housing vouchers. This budget resolution thus makes it difficult to increase HUD funding above the level proposed by the President later in the actual appropriations process, which moves forward after the spring recess.

[2]The Budget for Fiscal Year 2004, p. 475.

[3]*Id.* at 475-76 (proposed appropriations language for Housing Assistance for Needy Families).

[4]The full report, *President's Budget Requests Insufficient Funding for Housing Vouchers in 2004,* is available at www.cbpp.org/3-27-03hous.pdf. *See also President's Budget Cuts Housing Vouchers for Low-Income Families*, www.cbpp.org/3-27-03hous-fact.htm.

[5]For the full March 31 analysis, *Funding Level in House Budget Would Likely Lead to Cuts to Housing Assistance for Low Income Families More Severe Than Those Proposed in the President's Budget*, *see* www.centeronbudget.org/3-31-03hous.htm.

The Administration's Sales Pitch

The Administration's FY 2004 budget asserts that:

> Administration by states will better assist low-income households to locate decent, safe and affordable housing by allowing them to tailor programs to fit the needs of particular communities. Coordination by states with Temporary Assistance to Needy Families (TANF) programs will be encouraged to better reach families transitioning from welfare to work. States will provide better program administration adapted to their needs, leading to better utilization of funds to help more low-income households secure housing.[6]

The Administration also claims that "[c]onverting the current program to a block grant approach is necessary to improve the delivery of rental and homeownership subsidies for low-income families and eliminate the significant utilization and recapture problems that plague the current tenant-based program."[7] In subsequent March testimony before House and Senate Committees, HUD Secretary Martinez echoed these contentions, arguing not only that the block grant would improve utilization, but also that block grants would better permit states to adjust payment standards to changing local market conditions.

What's Wrong with This Picture?

None of this is true, which lends credence to the claim that the block grant proposal is really a Trojan Horse, whose primary purpose is to cap and then later cut spending for federal housing assistance.

CBPP has provided its customary excellent summaries of the block grant proposal and its impacts,[8] also addressing the Administration's asserted utilization and market responsiveness features of the proposed block grant. While undeniably the Voucher program has been afflicted by utilization and annual budget recapture problems over the past decade from PHA difficulties in adapting the program to changing housing markets, CBPP points out that a block grant would not resolve these problems. Congress has already addressed the recapture problem in the FY 2003 appropriations bill by refunding PHAs only for those vouchers which are actually used, and PHAs had already begun to substantially improve voucher utilization rates due to improved practices and loosening rental markets. In addition, HUD already has authority to reallocate funding to PHAs that can use it.

Concerning the Secretary's asserted need for greater responsiveness to local market rents, PHAs already have authority to establish variable payment standards for submarkets, constrained only by HUD's FMRs (which provide the base figure for the 110 percent cap applicable absent HUD approval for a higher figure), and by the fear that HUD really will not provide renewal reimbursement for such increases (despite the current renewal funding rule). In fact, under a block grant, PHAs will actually have less incentive to increase payment standards to cover higher market rents, since PHAs that do so will not receive any additional federal funds to cover such higher costs. They would have to reduce the number of families assisted, which they would be prohibited from doing under the proposal, or find other funds. Most will therefore obviously do nothing to address higher market rents. Moreover, starting in 2004, HUD will have more accurate data available on local market rents for use in developing the FMRs on which payment standards are based.

Sylvia Brennan Heads NHLP's District of Columbia Office

The National Housing Law Project is delighted to announce that Sylvia Brennan has joined our staff and is heading our District of Columbia office as the Director of Government Relations. Sylvia joined our staff on May 1, 2003.

Sylvia comes to our organization from Legal Services of Northern Virginia (LSNV), where she has worked for over 10 years, most recently as the Managing Attorney. She has extensive subsidized and fair housing experience and is an experienced litigator in both the state and federal courts. She also managed LSNV's Housing Law Program. Sylvia is a graduate of the Columbus School of Law at Catholic University of America. She is admitted to practice in all Virginia courts, the U.S. Federal Court for the Eastern District of Virginia and the U.S. Court of Appeals for the 4th Circuit. She is the chairperson of the Landlord and Tenant Relations Board for the City of Alexandria and a member of the Board of Directors of the Alexandria Bar Association.

At NHLP, Sylvia will be working on our District of Columbia Public Housing initiative, and, with our Oakland staff, on the public housing Earned Income Disregard initiative and other matters. She will also be responsible for legislative and administrative representation before Congress and the Department of Housing and Urban Development.

Sylvia can be reached by phone at (202) 347-8775 and by fax at (202) 347-8776. Her e-mail address is sbrennan@nhlp.org. The address for NHLP's District of Columbia office is 1012 Fourteenth Street, NW, Suite 610, Washington, D.C. 20005. ■

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[6]The Budget for Fiscal Year 2004, p. 475.

[7]*Id.* at 476.

[8]Center on Budget and Policy Priorities, *Administration Uses Misleading Arguments to Justify Proposed Housing Voucher Block Grant* (March 17, 2003); *Block Granting the Housing Voucher Program Would Reduce its Capacity to Help Low-Income Families and Undermine Housing Choice* (March 3, 2003); *Funding Adjustments Under a Housing Voucher Block Grant Would Be Unlikely to Keep Pace with Program Needs* (March 3, 2003), available at www.cbpp.org/pubs/housing.htm. *See also* CBPP's up-to-the-minute compilation of information on the block grant proposal at www.cbpp.org/housingvoucher.htm.

Likely Inadequate Federal Funding to Keep Pace with Rental Housing Costs

Generally block grant funding for low-income assistance has historically failed to keep pace with inflation. The Administration's proposed block grant would be no exception. Although HUD officials have indicated that voucher block grant funding would be adjusted for inflation, any inflation index is unlikely to keep pace with local housing costs. Between 1998 and 2003, when the overall Consumer Price Index increased 12 percent, FMRs rose by 25 percent. In contrast, PHAs are currently reimbursed for actual program costs, based largely on local rents, which change at rates different from general inflation. Under the block grant, any increase in per-unit voucher costs beyond inflation would be borne by the states, which means that few states would authorize such responsiveness. Similarly, states are not likely to be able to use any additional "flexibility" provided under a block grant format to pursue any initiatives that cost any money; instead, flexibility will become a means to more easily reconcile the program with inadequate funding by reducing benefits or redistributing them to higher-income families over time.

Resulting Reductions in Benefit Levels or Supportive Policies

As the block grant detaches federal voucher funding from local housing costs, cuts in assistance are inevitable. While the Administration's proposal does not allow states to reduce the number of households served under the block grant, states would be forced to cut costs by reducing benefit levels, in one of two ways: serving higher-income families that cost less in subsidy, or shifting rent burdens to voucher recipients by increasing their contribution or capping subsidy levels. The block grant would apparently relax the existing federal targeting requirement, which currently requires 75 percent of vouchers that turn over to be reissued to extremely low-income families (below 30 percent of area median). In addition, states could pursue other cost-cutting moves, for example by eliminating support for existing PHA practices that advance other policy goals, such as greater efforts to help families with disabilities find and pay for accessible housing.

No Net Administrative Cost Savings and Little Improved Administration

Currently one layer of administrative costs—the HUD staff used to run the program—is covered elsewhere in HUD's budget. Under a block grant, 50 states would establish their own administrative machinery, at an additional cost to the federal government, likely deducted from the overall appropriation for the Voucher program. PHAs or other contractors would still have to perform specific tasks at the local level where the tenants and the housing are located, so those costs are unlikely to be reduced much. It's hard to see how replacement of the current federal-PHA framework with a state-local administrator setup would significantly cut costs or improve results, especially when 50 different state programs will have to be created.

Under the proposal, because of the funding constraints and other features, states would not have as much flexibility as they might want to operate the program. According to CBPP, several constraints would restrict state flexibility under a housing voucher block grant. Certain options available to PHAs at no additional cost under the current program structure and funding scheme would carry costs under the block grant, including increases in payment standards to address utilization or promote access to jobs, serving special populations such as the homeless or welfare recipients that may be more expensive, and expansions of the Family Self-Sufficiency program. While the federal government currently supports the costs of these options, a block grant would not.

CBPP emphasizes that the practical limitations on state flexibility would stem from the likely erosion of funding compared to need. The welfare block grant TANF experience provides a poor analogy for the voucher proposal, as declining TANF caseloads in the then-rapidly growing economy allowed states to use block grant funds to support new initiatives even though inflation-adjusted funding decreased. Under a voucher block grant, long waiting lists in a non-entitlement program and generally increasing housing costs relative to incomes ensure no reduction in the need for housing assistance. States would probably have to use any increased block grant flexibility to determine how to implement cuts.

Finally, CBPP points out that the federal assessment criteria used to determine whether states would receive full block grant funding would apparently encourage particular policy priorities (like administering programs through faith-based or community-based organizations rather than through PHAs or state employees) instead of just rewarding effective management. So the alleged improved administration remains uncertain.

The Response from the States and Capitol Hill

Although no bill has yet been introduced, the block grant proposal has yet to receive more than tepid support. PHAs are naturally opposed, as states administering the block grant might contract with others to perform their functions. Despite the possibility of gaining control over this substantial housing resource, some states have taken a position in opposition, likely driven by the perceived inadequacy of the funding to properly operate the program. In Congress, Senator Bond (R-MO), Chair of the HUD-VA Appropriations Subcommittee, has expressed concern about shifting the housing cost burden to the states at a time when most states are experiencing substantial fiscal crises and termed the proposal "premature" in light of the new voucher funding structure created by the FY 2003 appropriations bill that should reduce recaptures. While 42 Senators (including 10 Republicans), spearheaded by Senators Warner and Allen (Rs-VA), originally co-signed a letter to Secretary Martinez which cited many of the foregoing policy concerns in opposition to the proposal, that letter was never sent due to reported pressure from the Bush Administration. Instead, 33 Democratic Senators signed and sent it, while Senators Warner and Allen later sent a different version voicing the concerns of Virginia PHAs. The *Bulletin* will keep you informed about any other progress on the block grant. ■

Protections for Military Renter Households Under the Soldiers' and Sailors' Civil Relief Act[1]

The U.S. Department of Defense has activated hundreds of thousands of military personnel to fight the war in Iraq, including National Guard Troops and Reserve troops. Many of those activated are renters and homeowners. This national service extends many benefits and burdens to soldiers. Among the benefits are protection from certain legal proceedings while serving on active duty under the *Soldiers' and Sailors' Civil Relief Act*.[2] The Act has been in place since 1940, but was amended and expanded in 1991 during the Persian Gulf War. The Act temporarily suspends legal proceedings and transactions that may prejudice the civil rights of persons called into active military duty.[3] Military personnel protected under the Act include all persons on active duty in the armed services, beginning upon induction and ending upon death or discharge. The Act applies to both homeowners and tenants. The following are the six major points that advocates should know about tenants who are on active military service.[4] Advocates who represent homeowners are urged to review the Act for protections that may be available to their clients.

1. No Eviction from Primary Residence Where the Rent is $1,200 or Less

A military person cannot be evicted during their period of active military service from any premises with an agreed-upon rent of $1,200 or less per month, where the premises are the primary dwelling for the wife,[5] children or other dependents of the military person.[6]

2. Owner Affidavit Required for Entry of Judgment

An owner seeking eviction at any time is required to submit an affidavit stating that the absent tenant is not a member of the armed services before a judgment can be filed and entered. It is not necessary, though, for the complainant to obtain certificates from the appropriate armed forces authorities stating that the named tenant is not in such armed services since the Act makes no such requirement. However, the owner's affidavit must state sufficient facts upon which a reasonably trustworthy conclusion that the tenant is not in the military service could be based, and such certificates from the armed forces stating that the named tenant is not in active military service would be prima facie evidence. Any person who knowingly submits a false affidavit under the penalty of perjury is guilty of a misdemeanor that is punishable by imprisonment not to exceed one year or by a fine not to exceed $1,000, or both.[7]

3. Legal Proceeding Are Only Suspended During Period of Active Military Service

Legal proceedings against military personnel on active duty are only suspended for the duration of the active military service and three months thereafter. No fine or penalty can accrue against the military person for not complying with the terms of any lease during the period the obligations under the lease are stayed by the Act. If a default judgment is entered against a military person on active duty away from home, that military person may apply to have such judgment reopened. The burden is on the military person to prove that he or she was actually in active military service at the time the judgment was taken and that he or she has a meritorious or legal defense which he or she was prevented from making because of his or her active military service. Additionally, if a tenant who is a military person protected under the Act does not personally appear or is not represented by an authorized attorney, the court may appoint an attorney to represent the military person and may require the owner to post a suitable bond to protect the absent military person.

4. Military Persons Must Be "Materially Affected" by Reason of Military Service

The Act protects only those military persons "materially affected by reason of [active] military service."[8] Thus, the Act does not protect those military persons whose service does not affect their ability to participate in otherwise protected proceedings.

Dependents of military personnel on active duty are entitled to the same benefits that the military person has under the Act upon such dependents' application to the court. However, a court can remove that protection if, in the opinion of the court, the ability of such dependents to comply with the terms of a lease obligation has not been materially impaired by the military person's active duty.[9]

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[1]The original version of this article, which has been edited lightly and footnoted, was written by Richard Michael Price and Ray A. Johnson of the Washington, D.C., office of Nixon Peabody, LLP. The article first appeared in CARH News, a publication of the Council for Affordable and Rural Housing, under the title *Understanding The Soldiers' And Sailors' Civil Relief Act*. It previously appeared in the Nov./Dec. 2001 issue of the HOUS. L. BULL. It is reprinted here with permission.

[2]50 U.S.C.A. App. §§ 501-591 (West 1990 and Supp. 2003).

[3]The Act extends to actions other than evictions (*e.g.* foreclosures). *See Id.* § 533.

[4]The Rural Housing Service (RHS) recently published an Administrative Notice (AN) notifying its staff and owners of RHS rental housing of the *Soldiers' and Sailors' Civil Relief Act. Soldiers and Sailors Civil Relief Act* AN-3846 (April 3, 2003). In its notice, RHS enumerates two additional rights of households eligible for assistance under the Act. First, it makes clear that a guardian may move into the unit in order to take care of minors. Second, it notes that households affected by the Act must be income recertified and makes clear that hazard pay received by active military personnel may not be included in household income for purposes of determining rent.

[5]The Act specifies "wife." Presumably, if the military person is a woman, the spouse was be covered by the provision extending coverage to "other dependents of the military person."

[6]50 U.S.C.A § 530(a)(West 1990 and Supp 2003).

[7]*Id.* § 520.

[8]*Id.* § 530(b).

[9]*Id.* § 536.

5. The Act Applies Only to Contracts Made Before Military Service

The Act does not prevent an agreed-upon modification, termination or cancellation of any contract or lease pursuant to a written agreement with the military person executed during or after the period of active military service. Additionally, the Act does not prevent an owner's repossession of property which has been received under a lease executed during or after the period of active military service. Consequently, the Act applies only to contracts entered into prior to active military service.

6. A Military Person May Terminate the Lease During the Period of Active Military Service

A tenant who has signed a lease prior to entering military service may terminate that lease by delivering written notice to the owner at any time after the military person's active military service period has begun. Termination is effective on the last day of the month following the month in which the military person's notice is delivered to the owner. Any prepaid rent from the military person for the period after the effective termination date must be refunded.[10]

An owner may apply to a court for relief before the termination date. Any owner who knowingly seizes, holds or detains the personal effects, clothing, furniture or other personal property of any military person who has lawfully terminated a lease, or any owner who in any manner interferes with the removal of such personal property from the premises covered by such lease for the purpose of subjecting any such personal property to a claim for rent accruing after the termination date, may be fined $1,000 or imprisoned for a period not to exceed one year, or both.[11]

In sum, the Act makes evictions and lease terminations more complicated for owners and active military personnel. However, it allows military personnel to serve without the worry of eviction, and thereby promotes military service. ■

[10]*Id.* § 534(2).

[11]*Id.* § 534(3).

Injustice anywhere

is a threat to

justice everywhere.

—Rev. Martin Luther King, Jr.

More Encouragement to Sell Off Public Housing– the Section 32 Homeownership Program

In the *Quality Housing and Work Responsibility Act of 1998* (QHWRA), Congress enacted the Section 32 public housing homeownership program to replace the Section 5(h) public housing homeownership program. The Department of Housing and Urban Development (HUD) recently adopted final program regulations, which became effective on April 10, 2003.[1] While sections of the new regulations remain similar to the Section 5(h) regulations, the new regulations further encourage public housing authorities (PHAs) to sell their public housing stock, worsening the housing crisis faced by low and extremely low-income households and possibly even increasing homelessness in the United States. This article briefly reviews the old Section 5(h) program, reviews the new Section 32 regulations and, when appropriate, contrasts the new regulations with the old Section 5(h) regulations.

The concept of public housing homeownership is not new. HUD has experimented with the concept since 1968,[2] trying everything from the sale of entire developments to resident associations as well as the sale of individual units.[3] Generally, these programs have been unsuccessful in terms of selling a significant number of units.

The Section 5(h) homeownership program was the latest of the HUD public housing homeownership programs. It allowed the sale of individual public housing units or entire public housing developments to eligible residents.[4] PHAs interested in implementing the program were required to submit a plan for HUD's approval, which set forth the program's requirements. Eligible participants included those living in the housing that was going to be sold, residents of project-based Section 8 developments, and Section 8 voucher holders, provided they had occupied an assisted unit for a minimum of 30 days.[5] Existing residents had preference in the purchase of their unit. For vacant units, residents of a PHA's other public housing units as well as participants in

[1]*See* 68 Fed. Reg. 11,714 (Mar. 11, 2003). Section 536 of QHWRA (Title V of Public Law 105-276, 112 Stat. 2461, (Oct. 21, 1998)), amended Title I of the *United States Housing Act of 1937*. Section 5(h) of the *United States Housing Act of 1937* was repealed by Section 518 of QHWRA. Section 566 of QHWRA added a new Section 5(h) pertaining to a different subject matter.

[2]The Turnkey III program for building new public housing units for eventual sale to tenants was the first of these. *See* 24 C.F.R., Part 904 (1991).

[3]49 Fed. Reg. 43,028 (Oct. 25, 1984).

[4]The Interim Rule for the program (effective Oct. 21, 1991) was replaced by the Final Rule in 1994. See 59 Fed. Reg. 56,365 (Nov. 10, 1994). Programs under way presently may continue under Section 5(h) or convert to Section 32 program rules. *See* 24 C.F.R. §906.3 (2003).

[5]24 C.F.R. §906.8 (2002).

self-sufficiency programs received a preference.[6] All residents were subjected to an affordability standard in order to ensure their ability to maintain their mortgage payments.

The most critical changes that Section 32 makes to the Section 5(h) program are:

- elimination of the requirement that PHAs replace public housing that is sold; and
- creation of a mechanism to ease use of the Section 8 Homeownership program for the purchase of public housing units.

Section 32 also diminishes resident input into program design by folding the opportunity for resident comments into the more general PHA Plan process.

Eligible Units for Section 32 Sale and Voucher Homeownership

Section 32 does not apply to the sale of newly constructed or substantially rehabilitated units by a PHA. Public housing development and modernization regulations apply to such sales.[7] Thus, for example, it appears that HOPE VI projects that entail new construction or substantial rehabilitation may not be included in a Section 32 plan. Section 32 applies to all other public housing units, as well as non-public housing units acquired by a PHA for homeownership even if some public housing funds have been devoted to the purchase of those units.[8]

It appears that HUD had intended to use the Section 8 Homeownership program to facilitate the sale of public housing units when it originally designed the Section 8 Homeownership program. At the end of last year, HUD published an interim rule that permitted the use of the Section 8 Homeownership program with the Section 5(h) program.[9] When it published that rule, HUD skipped the normal public comment period before the rules went into effect, finding that good cause existed to bypass the comment period because it was in the public interest to hasten the use of the Section 8 Homeownership program for the purchase of PHA-owned units.[10]

Though the final Section 8 Homeownership rule may have already permitted the use of vouchers for this purpose, the phrasing of that permission was ambiguous.[11] The interim rule eliminated any doubt.

There were strictures, however, to combining the Section 8 homeownership program with Section 5(h). The interim rule explained that the PHA had to use an independent entity to:

- review the sales contract;
- conduct Housing Quality Inspections (HQS);
- review the independent inspection report; and
- determine the reasonableness of the sales price and financing.

PHAs were directed to existing Section 8 homeownership rules on the selection of that independent entity.[12]

The Section 32 program takes that "independent entity" concept and runs with it. Unlike Section 5(h), which permitted the sale of public housing only to low-income public housing residents or Section 8 recipients, Section 32 permits sales to additional groups—other low-income families, and "purchase and resale entities" (PREs).[13] In obtaining HUD's approval for use of a PRE, the PHA must attach to its proposed Section 32 homeownership plan a written agreement specifying the rights and obligations of the PHA and PRE.[14] Among those obligations is a requirement that the PRE sell the units to *low-income* families,[15] an obligation that must be recorded in the deed transferring the property to the PRE. The obligation does not extend to very low-income or extremely low-income (ELI) families. Under Section 32, PHAs or PREs are only required to sell a unit to an ELI or very low-income family if the family resides in public housing and has a right of first refusal to purchase a home.

The PHA homeownership plan must show that the PRE has sufficient capability and "legal capacity" (presumably capacity to sell real property, bonding and other insurance, at a minimum) to fulfill its obligations. The PHA must specify what protection it has against fraud or misuse of funds by the PRE. This issue, and all other rights and obligations of the PRE, must be spelled out in a written agreement attached to the PHA's proposed homeownership plan.[16] The reality, however, is that if an improper sale (*e.g.*, to someone over the income limits) were made to a bona fide purchaser for value, retrieval of the unit itself is unlikely. The most that the PHA could hope for is to recover the value of the unit and/or damages. This danger could be limited by a well-drafted and recorded title restriction.

If the PRE fails to sell the property to a low-income family within five years, it must reconvey the property to the PHA. PREs may be required by the PHA to return the proceeds of the property sale to the PHA. They may also be allowed to retain the proceeds, so long as those funds are used for low-income housing purposes.[17] The regulations do

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[6] *Id.*

[7] *Id.* §906.1 (2003).

[8] *Id.* §906.5.

[9] Directive Number FR-47590I-01 (Oct. 28. 2002) Comments were due by December 27, 2002. See also Directive number FR-4759-C-02, stating that this interim rule was codified at 24 C.F.R. §982.628(d).

[10] Directive Number FR-47590I-01, (Oct. 28. 2002), p.2.

[11] 24 C.F.R. §982.628(a)(1) (2002).

[12] 24 C.F.R. §982.352 (b)(2003).

[13] *Id.* §906.1.

[14] *Id.* §906.43.

[15] *See Id.* §906.19(c).

[16] *Id.*

[17] *Id.* §906.31 (2003).

not offer guidance or limitations as to what those purposes might be. With a shrinking supply of affordable rental housing generally, and the reduction in public housing rental units specifically, the need to use the funds for these purposes is apparent. Arguably, however, a PHA could allow the funds to be used to pay the PRE for management and sale of other units that had been transferred to it or for the sale of other public housing.[18] Allowing PREs to retain the funds may create an incentive for the PRE to sell the units at the highest price possible, which would exclude all but the highest-income public housing residents from becoming purchasers. The Section 5(h) program did not have this tension. It allowed PHAs to pay the independent entities handling the sale of PHA units only out of ongoing administrative fee income.[19]

Because Section 8 homeownership voucher holders are not exempt from the Section 32 affordability requirements, they may find themselves unable to comply with both program rules.

On the other hand, because administrative fee income is a more limited resource for PHAs, PHAs have probably been loathe to dip into it except when necessary. Because independent entities are required under Section 5(h) in order for a PHA to sell PHA-owned units to voucher holders, and independent entities could only be compensated from administrative fee income, it may be that PHAs were reticent to sell those units to voucher holders. To the extent that this is true, that disincentive, unfortunately, has been removed under the Section 32 program.

PREs are required to return any unsold units to the PHA at the end of five years. Public housing units that are returned to the PHA must be used for public housing purposes. Units operated under some other program or acquired under a status other than public housing may be sold under the Section 32 program or included in the PHA's public housing stock.[20]

As for whether or not a building or unit must be vacant when transferred to a PRE, the only relevant Section 32 regulation provides that a PHA may not transfer possession of a unit until a resident has relocated.[21] That regulation combined with the five years that PREs have to sell the units could allow for a public housing unit to sit vacant for five years. It is hard to believe that HUD intended that particular consequence. Language in other parts of the regulations suggests that PREs will operate the housing with tenants in occupancy.[22] Thus, there is some uncertainty as to what exactly PREs will do with the housing pending sales.

Affordability and Housing Quality Standards

All units sold under the Section 32 program must meet local building code requirements or, if no local code exists, the federal Housing Quality Standards (HQS).[23] In addition, they must meet lead safety standards.[24] To assure affordability to purchasers, the life expectancy of the housing units must be "sufficient"[25] to ensure that the purchasers will not incur major repair bills in the foreseeable future. In addressing what constitutes sufficiency, market information on units of a similar age should be gathered and a determination made as to whether the sales price takes into account needed repair work. Repairs needed over five to 10 years from the date of purchase should be considered and calculated, not just those needed right away or in the coming year.

Affordability requirements in the form of a stringent maximum debt-to-income ratio for the buyer and a modest downpayment requirement set parameters on who may purchase a unit. PHAs may develop additional eligibility limitations using other criteria such as employment, participation in employment counseling or training, criminal activity, homeownership counseling and evidence of regular income.[26]

Because Section 8 homeownership voucher holders are not exempt from the Section 32 affordability requirements, they may find themselves unable to comply with both program rules. The Section 8 voucher homeownership program does not set fixed debt-to-income ratios, which is one of the reasons that more low-income people should benefit from that program. The secondary market also has products to support more flexible, expansive ratios than those permitted under Section 32. This could become one of the reasons why voucher holders will not want to combine their Section 8 subsidy with the Section 32 program.

Reality Check: Public Housing Homeownership Is for Section 8 Voucher Holders—Not Public Housing Residents

According to HUD's Resident Characteristics Report, 45 percent of public housing residents are ELI, meaning their incomes are 30 percent of AMI or less. Ten percent of residents are very low-income (between 30 and 50 percent of AMI). Five percent are low-income (between 50 and 80 percent of

[18]The Section 5(h) program has a replacement housing requirement. *See* 24 C.F.R. §906.16 (2002).

[19]24 C.F.R. §982.352(b)(iv)(C) (2002).

[20]24 C.F.R. §906.31 (2003).

[21]*Id.* §906.23.

[22]*Id.* §906.40(a)(7)(obligates PREs to operate the units in accordance with public housing laws and regulations).

[23]Referring to those standards set forth in the Section 8 Housing Choice Voucher Program at 24 C.F.R. §982 (2002).

[24]Referring to the *Lead-Based Paint Poisoning Prevention Act* at 42 U.S.C. §§4821-4846, along with the implementing regulations at 24 C.F.R. §35, subparts A, B, L, and R (2002).

[25]24 C.F.R. §906.7 (2003).

[26]*Id.* §906.15 (2003).

AMI). One percent are above low-income (presumably eligible residents whose incomes have risen since moving in).[27] For 39 percent, the income level is unknown. Fifty-five percent of public housing residents receive SSI or some form of pension. Only 30 percent receive wages.[28] The segment of public housing residents most likely to be able to afford homeownership are those who participate in a Family Self Sufficiency (FSS) program. Through this five-year savings program, residents have the ability to save significant amounts of money that may be used for a downpayment and/or closing costs. However, less than half (approximately 1,400) of the almost 4,000 PHAs nationwide even operate an FSS program. Those PHAs that do often limit the program's size and often limit participation to Section 8 recipients.[29] Thus, the number of public housing residents participating in an FSS program is relatively small. Moreover, public housing residents who reside in their units do not, of course, have the benefits of a homeownership voucher to pay for part of their mortgage. PHAs will be allowed to sell their units below market and offer below-market financing, but there will, nevertheless, be very few public housing residents who have the financial capacity to take advantage of this arrangement.[30] Their lack of financial capacity may make their right of first refusal to purchase their units far less meaningful.[31] Thus, it is apparent that the primary group that can benefit from the new program will be voucher holders, not public housing residents.

This scenario has been played out time and again in HOPE VI projects. For example, a 1999 redevelopment award for the Scott and Carver Homes site in Miami touted that residents of these public housing developments would be able to return as homeowners. Yet, according to the Miami-Dade HOPE VI application, the minimum qualifying income levels for these homeownership units all range from *nearly twice to over three times* the income of the average Scott and Carver Homes family.[32] The truth of the matter is that the Scott and Carver Homes residents will not be able to return to the HOPE VI redeveloped site as homeowners. HUD and the PHA developing the project know this fact, even while they are marketing a different message. The 850 units of rental public housing in the Scott and Carver Homes site are to be replaced by only 80 units of rental housing and 382 units of homeownership housing that existing residents will not be able to buy. Similar results are expected under the Section 32 program. Most residents will be permanently displaced from

[27]*See HUD Resident Characteristics Report*, (2001-2003) available at http://pic.hud.gov/pic/RCRPublic/rcrmain.asp.

[28]*Id.*

[29]*The Family Self-Sufficiency Program: HUD's Best Kept Secret for Promoting Employment and Asset Growth*, Center for Budget and Policy Priorities, (Apr. 2001), fn 3, available at www.cbpp.org/4-12-01hous.htm.

[30]24 C.F.R. §906.29 (2003).

[31]*Id.* §906.13. The lease-purchase option is also permitted under Section 32. If structured properly, this could be a helpful option for a few families.

[32]See *False Hope: A Critical Assessment of the HOPE VI Public Housing Redevelopment Program*, National Housing Law Project, PRRAC, ENPHRONT, p. 24 (Jun. 2002), *citing to* Miami-Dade Housing County, *1999 HOPE VI Grant Application,* Att. 20, 26i (May 17, 1999).

HUD Reissues PHA Plan Template with No Changes

In August 2002, HUD circulated proposed revisions to the PHA Plan Template. The revisions were intended to make the document a more useful planning tool by, for example, requiring more financial information and connecting that information to the numbers of participants and tenants served, relating the goals of a public housing authority's (PHA) five-year plan to the activities set forth in the annual plan, and including information on the voucher payment standard and utilization and success rate. It was also anticipated that the new PHA plan template would conform to the published regulations by including, for example, questions on Section 3 and revising the sections on deconcentration, community service and site-based waiting lists.

HUD apparently abandoned its effort to improve the Template. On March 27, 2003, HUD reissued the PHA Plans Template with no changes except that the expiration date on the form was changed from March 31, 2002, to February 28, 2006. See HUD form 50075 (03/2003) and HUD form 50075 Small (03/2003) available from www.hudclips.org. HUD was so reluctant to change any part of the Template that it did not even change the cover to the document, which states that it is the annual plan for Fiscal Year (FY) 2000. It also did not eliminate any references to the Public Housing Drug Elimination Program (PHDEP) which was eliminated in FY 2001. In addition, there is no reference in the Template that the list of Resident Advisory Board (RAB) members is a required attachment, that the deconcentration provisions are not consistent with HUD regulations, and that the pet policy and community service provisions remain in their formative stages.

Advocates engaged in PHA plan work are reminded that the PHA Plan Template has not been updated to include many changes included in the PHA Plan Desk Guide. Therefore, they must review the PHA Plan Desk Guide for a more comprehensive assessment of what HUD requires of PHAs as part of the PHA plan process. For more information on the PHA Plan Desk Guide, *see HUD Issues Comprehensive Guide for the PHA Planning Process*, 31 HOUS. L. BULL. 257 (Nov./Dec. 2001). ■

their homes because they will not be able to become homeowners in their current development.

HUD Homeownership Plan Approval Process

A PHA interested in implementing a Section 32 homeownership program must submit a plan to HUD's Special Applications Center with a copy to the local field office.[33] In evaluating the plan, HUD must consider such factors as the program's potential for long-term success, financial viability, and the ability of buyers "to meet the financial obligations of homeownership."[34] With regard to non-public housing properties acquired for homeownership, the PHA must provide detailed information on a variety of issues, including compliance with Davis-Bacon wage requirements (if applicable), property costs, environmental information, and an analysis of the potential market of eligible homebuyers.[35] The plan may be returned to the PHA for clarification and revision before final HUD approval. As was the case under the Section 5(h) program, once a plan is approved, the PHA executes an "implementing agreement" with HUD, which constitutes HUD's approval of the plan. Any modification of the final plan must be approved by HUD in writing.[36]

Resident Participation in Homeownership Plan Development

The strongly worded resident involvement requirements of the Section 5(h) program have not been extended to the Section 32 program. Under the Section 5(h) program, the PHA was required to consult with residents of the development from which units were to be sold and with any resident organizations. In addition, it was required to permit them to comment on the plan and the PHA was required to consider that input.[37] Under Section 32, PHAs must only obtain a resolution from the PHA's Board of Commissioners in support of the homeownership program and submit a description of any resident input obtained during the PHA Plan adoption process.[38] For PHAs that are exempt from including homeownership information in the PHA plan, such as small PHAs, the PHA must consult with a different entity—the resident advisory board—regarding the homeownership plan and provide documentation of the plan.[39] Thus, residents' opportunity for meaningful input has been limited primarily to commenting on the PHA's annual plan, of which the homeownership program is simply a component.[40]

[33]24 C.F.R. §906.43 (2003).

[34]*Id.* §906.45.

[35]See *Id.* §906.41 (2003) (documentation requirements).

[36]*Id.* §906.49 (2003).

[37]See former 24 C.F.R. §906.5 (2002).

[38]24 C.F.R. §906.40 (2003).

[39]*Id.* §906.39 (2003). *See also* 24 C.F.R. §903.11(b)(1) (2002).

[40]See 24 C.F.R. §906.1 (2003) (referencing the fact that sale of all or a portion of PHA property must be in accordance with the PHA's annual plan, as well as in accordance with a HUD-approved homeownership program).

Financial Assistance for Public Housing Resident Homebuyers

PHAs may use Capital Fund monies, received under Section 9(d) of the *U.S. Housing Act of 1937*, or income earned from other *U.S. Housing Act of 1937* programs, to assist public housing residents in purchasing a home. The types of assistance suggested in the regulations include counseling, closing costs, supplementary downpayment funds, financing and moving assistance. Public housing residents may use these funds to purchase their own unit, another public housing unit, or a non-public housing unit.[41] Because of the tremendous financial strain placed on PHAs by Congress at this time, it is unlikely that any PHA will devote Capital Fund monies for these purposes.

If a PHA chooses to offer financing assistance to non-public housing residents (*e.g.*, homeownership voucher holders), it must use funding from sources other than the *U.S. Housing Act of 1937* programs. Permissible sources, however, include the proceeds of public housing units already sold, as well as other monies.[42]

What Happens to Residents Who Do Not Wish to Buy

Non-public housing residents who are forced to move because of the sale of their unit are entitled to the benefits provided under the *Uniform Relocation Act* (URA). For purposes of Section 32, "non-public housing resident" includes public housing residents admitted under Section 3(a)(5) of the *U.S. Housing Act of 1937*. These persons were not low-income at the time of admission.[43]

Public housing residents, on the other hand, are not offered the same compensation. According to Section 32 regulations, the URA does not apply to them. Public housing residents who choose not to purchase the units in which they live may be forced by the PHA to move out so that the unit may be sold. Undoubtedly, this applies to all public housing residents who do not have a choice because they are financially unable to purchase their respective units. PHAs must provide these households a 90-day notice specifying that the unit will be sold once the resident has relocated, and that the resident will be offered comparable alternative housing along with actual costs of moving and reasonable relocation expenses. PHAs choosing this option must provide comparable alternative housing but must also provide counseling for residents regarding comparable housing. They may also not transfer possession of an occupied unit until the resident has relocated.[44]

The Section 32 regulations appear in conflict with the URA regulations. The URA definition of a "displaced person" clearly applies to public housing residents displaced as

[41]24 C.F.R. §906.5 (2003).

[42]*Id.*

[43]*Id.* §906.24.

[44]*Id.* §906.23 (2003).

a result of Section 32 activity.[45] Since there is no statutory exemption for the Section 32 program, the URA should be deemed to apply.[46] The benefits under the URA program are more generous than those available under Section 32. For example, under the URA a displaced person is entitled to payments sufficient to cover 42 months of rent of a comparable replacement dwelling up to $5,250.[47] Displaced public housing residents are entitled to whatever additional or improved benefits the URA may require, and any conflict between the URA and Section 32 should be resolved in favor of the resident.[48]

Replacement Housing Requirement Abolished Under Section 32

In an enormous departure from the Section 5(h) program, Section 32 does not require PHAs to replace public housing sold off under the program.[49] Under Section 5(h), PHAs were required to submit a replacement housing plan to HUD along with proof of funding commitments for the replacement of all units sold under its homeownership program.[50] Community members, advocates, PHA staff and others who can foresee the devastation to their communities that the permanent loss of public housing units will mean for low-income residents should bear this in mind if considering conversion of a Section 5(h) plan or development of a new homeownership plan under Section 32. Data on the housing needs of extremely low and low-income residents in this country is easily obtainable through census information, homeless shelters and food banks, and a wide variety of other community agencies.

Section 32: Asset-Building for Low-Income at Expense of Extremely Low-Income

Where will the extremely low-income residents of this country live? HUD's purpose is to see to the housing needs of all residents of this country, not just those who are easier to serve. According to HUD's own data, families with the lowest incomes—and virtually *only* families at this income level—are experiencing a dramatic shortage of affordable housing. As of 1999, only 40 units are affordable and available for every 100 extremely low-income households. Low-income families in the next income tier were not facing anywhere near this lack of housing.[51]

Section 32 has been designed in such a way that our country could see the loss of thousands of units of rental public housing that HUD and Congress have no intent to replace. This loss, together with the over 107,000 public housing units that are estimated to have been demolished under the HOPE VI program,[52] will increase the dire housing crisis already faced by extremely low-income households. Despite this massive and well-documented need, Congress has not funded the development of new public housing units since 1980.[53] Though homeownership is an important way for residents of this country, poor or moderate-income, to build an asset base, homeownership requires significant resources and access to financial services, which tens of thousands of public housing residents do not have. Any encouragement or support of homeownership should not come at the expense of this country's desperately needed rental public housing stock. ■

Incomplete Studies Quick to Laud HOPE VI Program

The results of three recent studies put a largely positive spin on the HOPE VI program, drawing broad conclusions of the program's success on a number of fronts. However, the studies, conducted by the General Accounting Office (GAO) and the Urban Institute (UI), are based on data that is admittedly incomplete, drawn from an insufficient sample size, or so site-specific as to be unrepresentative. Also, the conclusions highlighted in the reports are misleading to the uncritical or uneducated reader or not relevant to the policy determinations that need to be addressed.

The GAO Financing Study

The GAO study, released in November 2002, is the first of a series of reports to be generated by the GAO in response to a request by the Senate Subcommittee on Housing and Transportation.[1] The study, conducted over 10 months in 2001 and 2002, seeks to describe the extent to which housing authorities have used HOPE VI grants to leverage funds from other sources, the amount of leveraged funds that have been dedicated to community and supportive services, and whether HUD complied with its public housing development cost limits. The study concludes that leveraging has increased since the inception of the HOPE VI program. But

[45] 42 U.S.C.A. §4601(6)(i)(I) (2002).

[46] Note that for other programs, such as HOPE VI, the statute is explicit about URAs not applying.

[47] 42 U.S.C.A. §4624(a)(2) (2002).

[48] Under Section 5(h), resident qualification for URA and *Real Property Acquisition Act of 1970* relocation benefits was explicit. 24 C.F.R. §906.10 (2002).

[49] 24 C.F.R. §906.35 (2003) (QHWRA removed the replacement housing requirement of Section 18 of the *U.S. Housing Act of 1937*).

[50] 24 C.F.R. §906.16 (2002) The replacement provision could also be satisfied by rehabilitation of vacant public housing owned by the PHA or the use of five-year, Section 8 certificates or vouchers, acquisition and operation of non-public housing units to be operated by a resident or cooperative organization, or use of any other housing program comparable to public housing that would provide a minimum of five years' assistance.

[51] *False Hope: A Critical Assessment of the HOPE VI Public Housing Redevelopment Program*, National Housing Law Project, PRRAC, ENPHRONT, pp. ii-iii (Jun. 2002).

[52] *Id.* at p. 7.

[53] *Id.* at 8.

[1] General Accounting Office, *HOPE VI Leveraging Has Increased, but HUD Has Not Met Annual Report Requirement*, GAO-03-91 (Nov. 2002) (available at www.gao.gov) (hereinafter "GAO 2002 Report").

the significance of the statement and the increase are misleading because the dollars that are leveraged are overwhelmingly federal dollars, of which over 50 percent appear to be from HUD. In addition, the data that HUD made available to the GAO was inadequate, which substantially hampered the analysis and reduced the ability of GAO to draw significant conclusions.

The GAO study disregarded HUD's inclusion of HOPE VI demolition grants and annual capital improvement grants as leveraged funds, and found that the structure of the HUD HOPE VI reporting system exaggerated the amount of leveraged funds.

Leveraging Funds, or Shuffling Them?

It is current HUD policy that the mixed public/private finance approach is the "single most important development tool currently available to PHAs."[2] This policy has serious consequences with respect to the selection of HOPE VI developments that were beyond the scope of the GAO report.[3]

An underlying assumption is that mixed financing will reduce the amount of federal dollars in a development.[4] However, the GAO analysis shows that on average only 12 percent of the non-HOPE VI funds used between 1993 and 2001 came from private sources. In addition, PHAs leveraged 9 percent from state and local sources. Despite the small percentage (21 percent) of nonfederal funds, an analysis of the nonfederal funds actually leveraged by HOPE VI grants would be a useful tool for evaluating the efficacy of the leveraging. However, little is known about these resources "[b]ecause housing authorities do not have to report individually each source included in the nonfederal funding category . . . ."[5]

The vast majority of all funds leveraged—79 percent—were federal monies. Approximately 52 percent were funds from HUD and 27 percent from low-income housing tax credits.[6] Since these federal dollars (excluding the tax credits) are likely to have come from the CDBG, HOME, or Empowerment Zone grant programs, HUD is in reality requiring PHAs to shuffle HUD dollars, rather than leverage nonfederal money for the HOPE VI program.

GAO found that the structure of the HUD HOPE VI reporting system exaggerated the amount of leveraged funds. The GAO study disregarded HUD's inclusion of HOPE VI demolition grants and annual capital improvement grants as leveraged funds. After correcting for this unbelievable inflation in the system, the study found that the average amount leveraged between FYs 1993 and 2001 was $1.85 per HOPE VI dollar received, down from HUD's estimate of $2.07. For FY 2001 the amount leveraged (excluding public housing funds) is anticipated to be $2.63.[7] If the source percentages for FY 2001 are the same as the 1993 to 2001 average, 79 percent ($2.07) is from federal sources (of which 52 percent ($1.67) is from HUD), 9 percent ($0.24) is from state and local government and 12 percent ($0.32) is from private financing.

The GAO reports that PHAs have been successful in increasing the level of leveraged funds, going from $0.58 (excluding public housing funds) in FY 1993 to an anticipated $2.63 (excluding public housing funds) per HOPE VI dollar received in FY 2001.[8] However, the report fails to mention that the average HOPE VI grant decreased from $40 million in 1993 and 1994 to $20.7 million by 1997.[9] As anticipated, there is a direct correlation between the reduction in the HOPE VI grant amount and the leveraging[10] to obtain federal dollars,

[2] *Id.* at 7.

[3] *See* General Accounting Office, *HOPE VI Progress and Problems in Revitalizing Distressed Public Housing*, GAO/RCED-98-187 (July 1998) at 21 (hereinafter "GAO 1998 Report") ("As the HOPE VI program has evolved, its focus has shifted from revitalizing the most severely distressed public housing sites to transforming distressed sites with the capacity to leverage outside resources into mixed-income communities. This shift has led to positive results at sites in economically viable locations, such as Centennial Place in Atlanta and Ellen Wilson in Washington, D.C. However, some severely distressed properties in severely distressed neighborhoods, such as Robert Taylor Homes B in Chicago and Arverne and Edgemere in New York City, may not be able to attract investment partners or leverage the funds needed to transform neighborhoods. Thus, the current HOPE VI funding model may not be adequate to revitalize some of the nation's most severely distressed sites.").

[4] *Id.* at 21. ("The use of leveraged financing may enable sites to stretch limited federal dollars, create opportunities for mixed-income developments, and attract nonprofit and for-profit partners with experience in leveraged financing.").

[5] GAO 2002 Report at 11. The PHA proposals to HUD do list all funding sources and amounts separately but the information is not in the data for HUD's HOPE VI reporting system.

[6] The GAO 2002 Report states that 79 percent of the federal funds are from federal sources of which 27 percent are low-income housing tax credits. GAO 2002 Report at 12. (79-27 = 52) The only examples of sources of federal funding that the report lists are HUD funds and tax credits such as the aforementioned low-income housing tax credits and historic rehabilitation tax credits and Renewal Community/Empowerment Zone/Enterprise Community Initiative (RC/EZ/EC) tax credits. *Id.* at App. II.

[7] The amount is just an estimate because it is based upon what PHAs are reporting to HUD that they anticipate they will be able to leverage. The figures are final on only 15 of the 85 mixed-finance proposals approved through FY 2001. *Id.* at 9. Whether these forecasted funds will actually accrue to the PHAs' coffers is unknown.

[8] *Id.* at 9.

[9] GAO 1998 Report at 3 ("During fiscal years 1993 and 1994, when the HOPE VI grants averaged about $45 million, the program did not emphasize leveraging. But by fiscal year 1997, when the average grant was about $21.6 million, most of the newly selected sites planned to rely on leveraged financing to accomplish their capital improvements.").

[10] *Id.* The GAO 1998 Report anticipated that a reduction in the grant amounts would increase leveraging. It did not form an opinion as to where the funds would come from and in fact anticipated that the leveraged funds would reduce the amount of federal funds in the development.

especially HUD funding. Moreover, because past federal HOPE VI grants were large and were less focused on overall community revitalization, it is possible that the prior leveraging consisted predominantly of state, local and private funds, not federal funds. If that is true, the amount of nonfederal funds leveraged has not increased at all. In FY 1993 it was $0.58 per HOPE VI dollar and in FY 2001 it was $0.56 per dollar.

Funds for supportive services are also reportedly being leveraged at increasing levels, from 22 percent of all supportive services funds budgeted in 1997 to 59 percent in 2001.[11] The GAO attributes this to HUD's consideration of a PHA's ability to leverage supportive service funds as a criterion in making grant decisions. The GAO report provides no information regarding the source of the leveraged community and supportive services funds.

Finally the implication from the GAO Report is that leveraging of funds will continue for the HOPE VI developments. "According to HUD officials, the amounts leveraged by housing authorities should increase over time, as potential investors become more familiar with the HOPE VI program and housing authorities become more sophisticated in seeking and securing other sources of funds."[12] The GAO failed to note that such optimism should be tempered by the fact that the HUD budgets have been increasingly smaller and state and local governments are facing severe budget deficits. Cuts in any government funding sources will severely affect HOPE VI because overall the leveraging from governmental sources (federal, state and local) is a whopping 88 percent (79 percent from federal resources and 9 percent from state and local resources).

Given the lack of data showing that HOPE VI is effective in improving the lives of low-income tenants, the siphoning off of other federal funds to support HOPE VI developments is a cause for concern.

True Cost of the Redevelopment of a HOPE VI Unit

GAO also reported on whether there was compliance with "HUD's funding limits for developing public housing units and budgeted additional funds not subject to those limits."[13] The GAO affirmed and found that PHAs have complied. Therefore, the average amount of public housing funds (including HOPE VI funds, capital funds and other public housing development funds) budgeted per public housing unit subject to HUD's funding limits was $98,097, while the average amount of total funds budgeted per unit was $171,541.[14]

HUD's Failure to Comply with the Annual Reporting Requirement

Undoubtedly based on its frustrated attempts to extract adequate data from HUD's reporting system, the GAO went beyond its assessment of HOPE VI's financing structure to highlight that HUD has failed to report leveraging and cost information to Congress. It noted that the *Quality Housing and Work Responsibility Act of 1998* requires HUD to submit an annual report on HOPE VI. Curiously however, GAO failed to note that the identical reporting obligation had been in effect since October 28, 1992. Section 24 of the *United States Housing Act*, which was the initial authorization for the HOPE VI program, had an annual congressional reporting requirement. HUD was directed to report on the "amount and type of financial assistance provided under and in conjunction with this section."[15]

The study notes that "neither HUD's most recent budget justification nor its most recent performance and accountability report contains detailed information on leveraging or the cost of units developed under the program."[16] Ultimately, the study's only concrete recommendation was for HUD to comply with its annual reporting requirement. The study made no comment on, or recommendations for, alternative methods of collecting data that would provide a more accurate analysis of HOPE VI's leveraging ability. Significantly, HUD promised that it would submit the annual HOPE VI report for FY 2002 by December 31, 2002. As of the writing of this article, HUD does not appear to have complied with its commitment.

Urban Institute's Longitudinal Study

The Urban Institute (UI), a non-partisan economic and social policy research organization, began a study of original residents of five developments whose revitalization is being done with HOPE VI grants.[17] With baseline data gathered early in 2001, UI will administer follow-up surveys in 2003 and 2005, ostensibly to measure the effect of HOPE VI with regard to housing, neighborhood, socioeconomic and health outcomes, social integration, child education and behavior outcomes, and experiences with relocation and supportive services.[18]

Current findings from the baseline study, released in November 2002, were largely unsurprising: both adults and children studied experienced more physical and mental health problems than the population at large;[19] crime and lack of community cohesion were problems in their current neighborhoods;[20] "confusion, suspicion, and mistrust" of the

[11]GAO 2002 Report at 13.

[12]*Id*. at 9.

[13]*Id* at 4.

[14]*Id.* at 5.

[15]Compare 42 U.S.C. § 1437v(l) (2002) with the note following that section, which sets forth the prior provision at § 1437v(i).

[16]GAO 2002 Report at 16.

[17]Susan J. Popkin, *HOPE VI Panel Study: Baseline Report (Final Report),* UI 07032 (Urban Institute, Sept. 2002) (available online at www.urban.org/UploadedPDF/410590_HOPEVI_PanelStudy.pdf). The five sites selected for the baseline study are Shore Park/Shore Terrace (Atlantic City, NJ); Ida B. Wells Homes/Wells Extension/Madden Park Homes (Chicago, IL); Few Gardens (Durham, NC); Easter Hill (Richmond, CA); and East Capitol Dwellings (Washington, D.C.).

[18]*Id.* at ii (Executive Summary).

[19]*Id.* at v-vi.

[20]*Id.* at iv.

housing authorities was a factor at all sites studied;[21] and the proportion of residents who are 50 or older is significant, fully 25 percent of those studied.[22]

The study promises to focus on these older residents, on health issues affecting all residents, and on the "resiliency" of resident children who succeed despite many health, social and environmental obstacles. No actual longitudinal data will be available until 2003-04.

Urban Institute's Tracking Study

UI has also recently released the results of a retroactive tracking study seeking to describe changes in the lives of original residents from eight revitalized HOPE VI sites.[23] In a "policy brief" dated December 2002 summarizing the findings of the tracking study and the baseline study, UI stated that "the studies paint a mixed picture, but on balance the story is generally positive." Whether the data collected justifies this optimistic conclusion is unclear.[24]

Tracked Residents Likely not Representative

UI's report, *The HOPE VI Tracking Study: A Snapshot of the Current Living Situation of Original Residents from Eight Sites,* defines the study's objective as "obtain[ing] systematic information on the post-relocation housing conditions and overall well-being of original residents."[25] This is significantly qualified, however, by disclosure of the fact that because few HOPE VI sites have been substantially reoccupied, the study cannot accurately predict outcomes for original residents at the end of the revitalization process. In the aggregate, the eight sites chosen may not reflect the population impacted by HOPE VI.[26] The study sought a mix of older and more recent grantees; however, the program's evolution towards an exclusive focus on mixed-income projects means that residents of properties that received HOPE VI grants more recently are much less likely to benefit from the revitalization than those residents living in projects receiving the initial HOPE VI grants. For example, three sites[27] with older HOPE VI grants had high rates of returning residents, between 44 and 49 percent of original residents, where nationally the average return rate is 15 percent. Thus the findings deriving from the three older grant sites may bear no relationship to the current and future impact of the program on residents.

In addition, the study aimed for 100 responses from each site, regardless of the site's population. So while half of San Francisco's Hayes Valley site's original 200 residents were surveyed, 44 percent of whom were able to return to a revitalized site, only one-tenth of Louisville's Cotter & Lange 1,116 residents' opinions were gathered, where only 3 percent returned to the site. This method of data collection may skew the results, reflecting more accurately the opinions of returning residents as opposed to all residents affected by HOPE VI revitalization.

Of the families who were surveyed, data shows former residents continue to struggle to find and pay for decent housing.

Residents who left before the award of the HOPE VI grant but who lived in the property during the application phase were not included in the study. This group may have particular concerns or hardships not reflected in the results. UI conducted the study for only those residents for whom they had an address and telephone number. PHAs would be less likely to have a current address or telephone number of an unsubsidized family. The study reports that 18 percent of the original residents are unsubsidized completely, neither living in public housing nor using a voucher; however, this statistic is skewed by the underrepresentation of harder-to-find former residents, many of whom may be transient, doubled-up with another family, or homeless. The study acknowledged that these unsubsidized families were not adequately represented.[28]

Summary of Some of the Findings

Of the families who were surveyed, data shows former residents continue to struggle to find and pay for decent housing. To determine the changes in original residents' housing conditions, the study's brief telephone interviews relied on self-reports of current living situations basically as "better than" or "worse than" their prior housing. Even from this standardless method, the data indicated that residents who do not return to revitalized sites have only a fifty-fifty chance of living in better conditions than the severely distressed public housing unit from which they were forced to relocate.[29] Of those who did return to the revitalized site, 24 percent stated that the housing was in worse condition

[21] *Id.* at vii.

[22] *Id.* at vii-viii.

[23] Urban Institute, *The HOPE VI Resident Tracking Study: A Snapshot of the Current Living Situation of Original Residents from Eight Sites* (Nov. 2002) (available online at www.urban.org/UploadedPDF/410591_HOPEVI_ResTrack.pdf) (hereinafter "UI Report on Tracking"). The sites selected are Quigg Newton, Denver, CO; Walsh Homes, Newark, NJ; John Jay, Springfield, IL; Hayes Valley, San Francisco, CA; Cotter & Lange, Louisville, KY; Connie Chambers, Tucson, AZ; Christopher Columbus, Paterson, NJ; Edward Corning, Albany, NY.

[24] *See generally* Sherwood Research Associates, *The Urban Institute "Tracking Study" of HOPE VI Residents, A Review by Wayne Sherwood* (January 2, 2003) (hereinafter "Sherwood Review").

[25] UI Report on Tracking at 1.

[26] *Id.* at viii.

[27] Quigg Newton, Denver, CO; Walsh Homes, Newark, NJ; Hayes Valley, San Francisco, CA.

[28] UI Report on Tracking at 7.

[29] *Id.* at iii.

(10 percent) or similar (14 percent) to the conditions prior to revitalization. UI could not fully explain this finding. Questions concerning quality of life indicators reveal that relocated residents continue to face nearby drug trafficking and gang activity, few interactions with neighbors, and few job opportunities in their neighborhood. The sheer proportion of residents who report negative housing situations accompanied by the same neighborhood problems as before HOPE VI should alarm the program's supporters.[30] Only 46 percent of the residents who now use vouchers found their current living situation better than their public housing.[31] The voucher tenants and unsubsidized tenants also describe acute difficulty in meeting increased rent and utility burdens,[32] and half have trouble affording enough food.[33]

To the extent that HOPE VI seeks to deconcentrate poor families the findings are better but not overwhelmingly positive. About 40 percent of the families who do not return to the HOPE VI site reside in low-poverty census tracts with poverty rates of less than 20 percent but the same percentage still reside in high-poverty areas where more than 30 percent of the residents are poor. More troubling is the fact that only the residents from two of the eight sites now live in substantially less segregated neighborhoods, while at five sites the current neighborhoods are slightly less segregated. In one site the nonreturning families live in a community that is more segregated.[34]

The survey also failed to collect data by which the various supportive services could be analyzed, save brief questions about relocation (which, for some residents, had occurred seven years earlier). No question elicited responses to the HOPE VI process itself and the relative amount of input or investment residents felt they had in the revitalization plans. The data therefore fails to address advocates' concerns that the support goals of the HOPE VI program are subordinated to the acquisition and development of real estate.

Implications for Policy

Despite the concerns raised by the report, UI did make some policy recommendations that confirm the experience of housing advocates.[35] The recommendations of the report are:

1. "Careful well thought out relocation plans and procedures can help promote good outcomes for original tenants."[36] In particular, PHAs should consider staged relocation and provide one-on-one counseling. The report also noted that "[R]esidents cannot make fully informed choices about their housing unless screening criteria for returning to the revitalized HOPE VI site are communicated prior to relocation."[37]
2. Supportive services should be provided prior to relocation.
3. Voucher recipients need early and sustained assistance when choosing neighborhoods.
4. Target sources of crime as a part of revitalization.
5. Issues related to utility costs should be addressed in the voucher program. ■

[30]Sherwood Review.

[31]UI Report on Tracking, at 109-110.

[32]*Id.* at 4 and 114.

[33]Urban Institute, *HOPE VI Helps Many in America's Worst Public Housing, but Vulnerable Families Face Significant Barriers,* at 2 (December 10, 2002).

[34]UI Report on Tracking at 110.

[35]*Id.* at 114-115.

[36]UI Report on Tracking at 114.

[37]*Id.*

NIMBY Report Urges Use of Civil Rights Laws to Advance Affordable Housing

The NIMBY Report is a bi-annual publication of the National Low Income Housing Coalition that supports inclusive communities by sharing news of the NIMBY[1] syndrome and efforts to overcome it. The Fall 2002 NIMBY Report[2] consists of six articles dedicated to a discussion of the intersection between NIMBYism and civil rights and of the use of civil rights laws to further the development of affordable housing. The following is a brief overview of the report.

Zoning Restrictions Used to Thwart Development of Affordable Housing

Many of the report's articles center around the power of zoning practices to exclude low-income residents, specifically localities' ability to rely on legitimate or pretextual uses of exercises of local control such as regulating density, traffic patterns and neighborhood character.[3] The report encourages developers to invoke the protections in the *Fair Housing Act* (FHA) or the *Americans with Disabilities Act* (ADA) in order to overcome obstacles to construction of low-income housing or other services utilized by the poor, such as shelters or group homes.[4] Arguments based on these federal statutes can place much greater pressure on local governmental decision-makers than the more typical appeals of land-use decisions, because of both their moral grounding as well as

[1]Not In My Back Yard.

[2]The semi-annual NIMBY Report is available at www.nlihc.org/nimby. Monthly updates are also available on the NLIHC Web site.

[3]*See, e.g.*, Allen, *The Fair Housing Act: An Essential Civil Rights Law in the Affordable Housing Toolbox*, in *NIMBY Report* (National Low Income Housing Coalition, Fall 2002) (hereinafter "NIMBY Report") at 4.

[4]Evans, *Oldsmar: Using Civil Rights Laws to Build Affordable Housing*, NIMBY Report at 10; *see generally* Citrino, Allen and Schaffer, *Buckeye Goes to the Supreme Court*, NIMBY Report at 8.

the specter of large awards and attorney's fees.[5] Suits have been successful in challenging zoning decisions that generally serve to exclude the poor by focusing on their impact on protected classes, such as particular racial groups or the disabled, even if that captures only a subset of the affected class.[6] The success of advocates of the disabled in using constitutional and statutory protections to strike down adverse zoning rules and decisions is contrasted with the relative frustration in using similar tactics to combat current discrimination based on race or national origin.[7]

The report acknowledges developers' hesitation to use civil rights litigation to move their projects forward, despite the prohibition of discriminatory zoning practices by civil rights laws.

Strategies for Developers of Affordable Housing

Despite the prohibition of discriminatory zoning practices by civil rights laws, the report acknowledges developers' hesitation to use civil rights litigation to move their projects forward.[8] Developers are frequently dependent upon localities or other governmental entities for funding and permits, often on multiple projects, and are understandably apprehensive about engaging in litigation with a municipality that may jeopardize current and future relationships. The report encourages "management" of local opposition apart from litigation, by using the law to educate decision-makers such as city attorneys or councilmembers as to their legal obligations; by providing a legal "excuse" for decision-makers who are reluctant to act in opposition to community members; and by using tactics short of litigation, such as demand letters, to obtain compliance.[9] A case study of a Florida community highlights the success of a developer in using the FHA and state fair housing laws to overcome discriminatory zoning rules. Litigation filed in that instance was settled soon after the case was filed. Besides the FHA, the suit relied on Florida's state law which prohibits discrimination on the basis of the source of financing for a project, and included claims against "obstructionist" city council members in their individual as well as official capacities.[10]

Other Means of Enforcement of Civil Rights Guarantees

Besides the discriminatory use of zoning laws, the report addresses localities' selective enforcement of housing code violations to the disadvantage of people of color or low-income families.[11] A case study examines the District of Columbia government's attempts to condemn affordable housing largely populated by Latinos and Vietnamese families. Rather than accede to the order to have their admittedly dilapidated housing condemned, the tenants used a disparate racial impact theory under the FHA to demand that the government use a less discriminatory means to accomplish the public safety goals embodied in the local housing code.[12] As a result of the claims against the city and public pressure, the city negotiated with the owner to drop charges against him in exchange for his sale of the building to the tenants for $1 and a "donation" of $300,000 towards rehabilitation.[13]

Besides using private lawsuits to overcome opposition to the construction of affordable housing, the report sees the duty to affirmatively further fair housing by recipients of CDBG, HOME and LIHTC funds as another critical component in advancing fair housing objectives.[14] However, HUD's present strategies for deconcentrating poor and minority populations through dispersal of new subsidized housing are deemed ineffective because the families served tend to be those who already reside in the community.[15] An article examining tenant-based programs, such as Moving to Opportunity, HOPE VI and Gautreaux relocation efforts, to sites other than the original site finds that displaced families tend to move to units close to their prior residence or into other very low-income census tracts.[16] The report documents how these programs inadequately address the ability of low-income families to lease in more affluent neighborhoods.[17] Overall, these programs cannot achieve desegregation because they have the capacity to affect only a relatively small number of families.[18] As a response to this, the article suggests using transportation and infrastructure funding to encourage inclusionary patterns of development.[19]

The report includes an article that uses the New Jersey Supreme Court's series of *Mount Laurel* decisions to show how a state constitution can be used to require the construction of affordable housing.[20] The *Mount Laurel* decisions held

[5]*See* Allen, *supra* note 1, at 7 (sidebar: "Land Use Discrimination Does Not Pay").

[6]Haag, *Using Civil Rights Laws to Provide Supportive Housing and Prevent Homelessness,* NIMBY Report at 16.

[7]Allen, *supra* note 1, at 5.

[8]Evans, *supra* note 2, at 12.

[9]Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY,* NIMBY Report at 27-29.

[10]Evans, *supra* note 2, at 12.

[11]Colfax, *1418 W Street: Using Civil Rights Laws to Preserve Affordable Housing*, NIMBY Report at 14-15.

[12]*Id.* at 14.

[13]*Id.* at 15.

[14]Allen, *supra* note 1, at 6.

[15]Goetz, *Federal Policies to Disperse Subsidized Housing: Not a Satisfactory Remedy for Local Exclusionary Land Use Policies*, NIMBY Report at 24-26.

[16]*Id.* at 24.

[17]*Id.* at 24-25.

[18]*Id.* at 25.

[19]*Id.*

[20]Walsh, Mount Laurel *Then and Now: Using the State Constitution to Further Affordable Housing*, NIMBY Report at 20-23.

that localities' failure to provide housing opportunities for the poor while creating opportunities for the affluent violated the state constitution's requirement that zoning powers be used to advance the general welfare.[21] Where communities do not provide a "realistic opportunity" for development of their fair share of affordable housing, they are subject to a builder's remedy of a "density bonus"—essentially allowing the development of more homes than the affordable-rate ratio normally allows. The article points to the development of thousands of affordable units constructed in the wake of *Mount Laurel*.[22] However, another author points out that most of the beneficiaries of the affordable housing built as a result of *Mount Laurel* are white families who previously lived in the suburbs.[23]

The NIMBY Report's championing of the use of civil rights laws is accompanied by cautions that efforts to counter community opposition may cross paths with protected First Amendment activities.

First Amendment Concerns

Finally, the NIMBY Report's championing of the use of civil rights laws is accompanied by cautions that efforts to counter community opposition may cross paths with protected First Amendment activities.[24] These arguments are more fully fleshed out in *City of Cuyahoga Falls v. Buckeye Community Hope Fdn.*,[25] a suit by an organization attempting to develop homes for low- and moderate-income familes. The development was repeatedly delayed by community opponents and city officials, who used, among other obstructionist tactics, a referendum to require public approval of zoning decisions.[26] Unfortunately, in the recently announced Supreme Court decision, the developers claims for damages were rejected.[27] Housing advocates must plan carefully to overcome opposition to fair housing and affordable housing development that involves protected speech or the public's right to vote. ■

[21]*Id.* at 21.

[22]*Id.*

[23]Goetz, *supra* note 12, at 25.

[24]Allen, *supra* note 1, at 5.

[25]2003 WL 1477301, ___ U.S. ___ (March 25, 2003). For a summary of Cuyahoga Falls, *see* p. 301, *infra*.

[26]Citrino et al, *supra* note 2, at 8.

[27]2003 WL 1477301, ___ U.S. ___ (March 25, 2003).

Housing Benefits for Qualified Aliens Who are Battered Still in Question

Introduction

On February 20, 2003, the President signed into law the Fiscal Year (FY) 2003 omnibus appropriations act, which included appropriations for the Department of Housing and Urban Development (HUD).[1] Accompanying the law was a congressional report directing the Justice Department and the Department of Housing and Urban Development (HUD) to reconcile Section 214 of the *Housing and Community Development Act of 1980* ("Section 214"),[2] which restricts federal housing assistance to certain immigrants, with other laws expanding the groups of immigrants that are eligible for public benefits.[3] Originally, language reconciling the laws was part of the appropriations bill. However, at the last minute the language was removed from the bill and report language substituted.

Section 214 lists seven categories of non-citizens who are eligible to receive federally assisted housing.[4] Other legislation addressing immigrant restrictions in public benefit programs sets forth a definition of a *qualified alien* that includes three additional categories of eligible immigrants: battered immigrants who are spouses or children of lawful

[1]Consolidated Appropriation Resolution, 2003, Pub. L. 108-7, 117 Stat. 11, (Feb 20, 2003).

[2]42 U.S.C.A. § 1436a (West Supp. 2002) (hereinafter Section 214).

[3]H.R. 108-10, 108 Cong. 1st Sess. 476, 1495 (Feb. 12, 2003).

[4]Section 214 is applicable to applicants for and residents of public housing, Section 8, Section 236 (below-market rent only), rent supplement, Section 235 and Housing Development Grant Programs. 24 C.F.R. § 5.500 (2002). Technically, it is also applicable to Rural Housing Service (RHS) programs; however, RHS has not yet adopted regulations implementing Section 214. Section 214 defines a resident alien as

> (1) an alien lawfully admitted for permanent residence as an immigrant as defined by section 1101(a)(15) and (20) of Title 8, excluding, among others, alien visitors, tourists, diplomats, and students who enter the United States temporarily with no intention of abandoning their residence in a foreign country;
>
> (2) an alien who entered the United States prior to June 30, 1948, or such subsequent date as is enacted by law, has continuously maintained his or her residence in the United States since then, and is not ineligible for citizenship, but who is deemed to be lawfully admitted for permanent residence as a result of an exercise of discretion by the Attorney General pursuant to section 1259 of Title 8;
>
> (3) an alien who is lawfully present in the United States pursuant to an admission under section 1157 of Title 8 or pursuant to the granting of asylum (which has not been terminated) under section 1158 of Title 8;
>
> (4) an alien who is lawfully present in the United States as a result of an exercise of discretion by the Attorney General for emergent reasons or reasons deemed strictly in the public interest pursuant to section 1182(d)(5) of Title 8;
>
> (5) an alien who is lawfully present in the United States as a result of the Attorney General's withholding deportation pursuant to section 1231(b)(3) of Title 8;

residents, and Cuban and Haitian immigrants.[5] Advocates had sought to get HUD to include these three categories of immigrants in its Section 214 regulations. Because they were unsuccessful, they tried to address the issue through corrective legislation. Unfortunately, the report language is all that they secured.

Background

Certain undocumented immigrants seeking legal permanent residency status may do so through a United States Citizen (USC) or a Lawful Permanent Resident (LPR), as long as the two are related or married. The USC or LPR files a visa petition on behalf of a spouse or child so that the individual may remain in, or immigrate to, the United States. The petition can only be filed by the petitioner (USC or LPR) on behalf of a beneficiary (spouse or child). This process essentially entitles new immigrants, or those seeking to come to the United States, rights through another eligible individual. Unfortunately, some citizens and LPRs have misused their control of the process by physically abusing members of their family and precluding them from reporting the violence by threatening to withhold participation in the petition process. In response, Congress passed the *Violence Against Women Act* (VAWA) in 1994, which enabled a battered spouse and/or child to self-petition for lawful permanent residency.[6] Unfortunately, it remained unclear if applicants with pending self-petitions and visa applications, classified as *qualified aliens* under immigration legislation, were eligible for low-income housing benefits independent of their abuser.

PRWORA and IIRAIRA

The *Personal Responsibility and Work Opportunity Reconciliation Act of 1996* (PRWORA) states that certain federal "public benefits" including "public and assisted housing" are only available to "qualified" immigrants, as defined in the statute.[7] PRWORA applies to public and Section 8 housing but it is not clear if it applies to other HUD programs.[8] The *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRAIRA) amended PRWORA to expand the list of groups eligible for assistance to include three groups that were originally omitted: certain battered immigrants and Cuban and Haitian immigrants.[9] According to VAWA, if an abused spouse or child meets the self-petition eligibility requirements she or he is considered a *qualified alien* for the purpose of receiving public benefits.[10] To qualify, the battered immigrant must make a *prima facie* showing to support her or his eligibility for public benefits. This includes, *inter alia*, a showing of status as a spouse or child of a USC or LPR, a demonstration of being battered or subject to extreme cruelty, evidence of suspension of deportation, or cancellation of removal, and a showing of a substantial connection between the battery and the need for the benefits.[11]

HUD's Contrary Interpretation

Notwithstanding the clear intent of these laws to include battered immigrants and Cuban and Haitian immigrants as *qualified aliens*, HUD's General Counsel's office interpreted Section 214 to exclude battered immigrants from access to public or assisted housing. The language deleted from the omnibus appropriations bill was meant to address HUD's restrictive interpretation and would have guaranteed all immigrants who are classified as *qualified aliens* under PRWORA and IIRAIRA eligibility for public and assisted housing.[12] It would have done so by amending Section 214 to state that "a *qualified alien* includes all immigrants who fit the definition as stated in PRWORA as amended by any subsequent legislation."[13]

While removing the legislative change, the conferees, in the report accompanying the appropriations, directed HUD

> to work with the Department of Justice to develop any necessary technical corrections to applicable housing statutes with respect to qualified aliens who are the victims of domestic violence and Cuban and Haitian immigrants to ensure that such statutes are consistent with the Personal Responsibility and Work

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(6) an alien lawfully admitted for temporary or permanent residence under section 1255a of Title 8; or

(7) an alien who is lawfully resident in the United States and its territories and possessions under section 141 of the Compacts of Free Association between the Government of the United States and the Governments of the Marshall Islands, the Federated States of Micronesia (48 U.S.C. § 1901 note) and Palau (48 U.S.C. § 1931 note) while the applicable section is in effect: *Provided,* That, within Guam any such alien shall not be entitled to a preference in receiving assistance under this Act over any United States citizen or national resident therein who is otherwise eligible for such assistance.

[5]8 U.S.C.A § 1641 (b) and (c) (West Westlaw 03-11-03).

[6]8 C.F.R. § 204.2, et. seq. (2003). When Section 501 of IIRIRA amended PRWORA, Congress added a new Section 431(c) to PWORA, which provides that the term "qualified alien" shall include such immigrants. Section 431(c) was subsequently amended by Section 1508 of the VAWA of 2000. *See also* the *Immigration and Nationality Act* on the INS Web site at www.ins.gov.

[7]8 U.S.C.A. § 1611 (West Westlaw 03-11-03).

[8]To date, HUD has not defined which of its currently unrestricted housing programs are covered by PRWORA and has directed recipients of those funds not to consider immigration status. 61 Fed. Reg. 60,535, 60,537 (Nov. 29, 1996); NOW Legal Defense and Education Fund, Immigrant Women Program. Legislative Update, February 14, 2003.

[9]*See* Section 501 of *the Illegal Immigration Reform and Personal Responsibility Act of 1996*.

[10]8 U.S.C. A. § 1641(c) (West Westlaw 03-11-03).

[11]*Illegal Immigration Reform and Personal Responsibility Act of 1996*, 8 U.S.C. § 1641(c)(1) (West Westlaw 03-11-03).

[12]NOW Legal Defense and Education Fund, Immigrant Women Program. Legislative Update, February 14, 2003.

[13]HJ2 EAS, Department of Veterans Affairs and Housing and Urban Development, and *Independent Agencies Appropriations Act*, 2003.

Opportunity Act of 1996 and the Illegal Immigration Reform and Personal Responsibility Act of 1996.[14]

What This Means for Advocates

While this report language should be helpful, the removal of the language directly amending Section 214 will likely prolong the struggle for battered immigrants and Cuban and Haitian immigrants who are seeking assisted housing. On the national level, advocates will have to work with HUD and the Department of Justice to obtain an interpretation of Section 214 that is consistent with the other laws affecting immigrants and receipt of public benefits. Advocates will hopefully convince the two departments that no further technical amendments are necessary and that there is nothing to prevent the Secretary of HUD from interpreting Section 214 consistently with the other laws affecting immigrants and eligibility for benefits. Alternatively, Congress will need to amend Section 214 in accordance with future HUD and Department of Justice findings.

Until HUD or Congress act, advocates can encourage PHAs, as part of the PHA plan process, to adopt a more expansive reading of Section 214 to include immigrants subject to domestic violence and Cuban and Haitian immigrants. Advocates can also urge PHAs not to take adverse action against individually affected immigrants and urge PHAs or project-based Section 8 owners to rely upon PRWORA. Absent intermediate corrective action, the impacts on battered immigrants' access to housing will continue to be severe.[15] Haitian and Cuban entrants will also continue to be excluded.

Regardless of any corrective action, advocates should remember that under Section 214 not *all* members of the household nor the head of household or spouse need to be eligible for housing assistance in order for the household to qualify for assistance.[16] A single individual, such as a child, who is an eligible immigrant can qualify the entire household for public housing, project-based Section 8, or the voucher program. A household composed of eligible and ineligible immigrants is considered a "mixed family" that is eligible for housing assistance. Such a family will, however, have to pay a prorated rent based on the proportion of eligible members to total household members.[17] If, however, there are no eligible family members in the household, the family will most likely not be accepted for public or federally assisted housing and such a family may be evicted or lose its housing subsidy.[18] ■

[14]H.R. 108-10, 108 Cong. 1st Sess 476, 1495 (Feb. 12, 2003), Making Further Continuing Appropriations for Fiscal Year 2003, and for Other Purposes.

[15]www.ins.usdoj.gov/graphics/howdoi/battered.htm.

[16]24 C.F.R. § 5.508 (2002).

[17]*Id*. § 5.520.

[18]NOW Legal Defense and Education Fund, Immigrant Women Program. Legislative Update, February 14, 2003.

Round Up of Recently Introduced Housing Legislation

As the 108th Congress enters its fifth month, several bills have been introduced that affect existing federal housing programs or propose new programs. Several of these new initiatives, including the National Housing Trust Fund, an anti-predatory lending measure, and the Department of Housing and Urban Development (HUD) Fiscal Year (FY) 2004 Budget proposal, were described in the March 2003 *Housing Law Bulletin.* This article highlights some of the remaining measures. A complete list of housing bills that have been introduced and their current status can be found at the National Low Income Housing Coalition Web site.[1]

Income Verification. The process of determining family income for tenants of HUD-subsidized housing is often plagued by errors, causing tenants to be undercharged or overcharged for rent. Representative Pete Sessions (R-TX) has introduced H.R. 1030 that would require HUD to match assisted tenants' incomes against a Directory of New Hires maintained by the Department of Health and Human Services (HHS), the purpose of which is to check for wage withholding, child support and eligibility for income-tested programs.[2] H.R. 1030 would require matching the incomes of households assisted under most HUD programs, including public housing, Section 8 vouchers, project-based Section 8, Section 221(d)(3), Section 236 and Section 202/811, against the HHA list. The need for this bill is not apparent because HUD already requires independent wage matching against information maintained by the Department of Labor[3] and it is not clear why HHS data would be more reliable or useful. H.R. 1030 also does not contain procedural protections that would enable tenants to dispute alleged discrepancies through a hearing process as is allowed under the current HUD matching program. In 2001, HUD developed an administrative proposal known as the Rental Housing Integrity Improvement Project (RHIIP) to correct a wide range of errors in rent determination.[4] H.R. 1030 does not appear to build on that administration proposal, but instead seeks to introduce an additional data source.

Repeal of Community Service Requirements. The *Quality Housing and Work Responsibility Act of 1998* requires certain tenants of public housing to perform at least eight hours per month of community service in addition to their regular rent

[1]www.nlihc.org/news/legupdate.htm.

[2]42 U.S.C. § 653a (West, Westlaw, 2003).

[3]24 C.F.R. § 5.236 (2002).

[4]For more information on RHIIP, *see HUD Proposes Another Initiative to Improve the Income Verification and Rent Determination Process*, 31 HOUS. L. BULL. 202 (Sept. 2001).

payment.[5] The community service obligation was suspended during FY 2002 by a provision added to the *2002 Appropriations Act* by Representative Charles Rangel (D-NY).[6] Unfortunately, the suspension was not extended to FY 2003 because no similar provision was included in the *FY 2003 Appropriations Act*.[7] This year, Rep. Rangel introduced H.R. 1431, the *Public Housing Tenants Respect Act of 2003*, which would permanently repeal the community service requirement. Because most housing authorities have yet to implement the community service requirement, H.R. 1431, if enacted, could eliminate the community service requirement before it is ever implemented. H.R. 1431 also proposes to repeal a statutory provision that disallows any rent decrease when a resident's income is reduced because of welfare sanctions or the failure to comply with self-sufficiency or work requirements.[8]

"One Strike" Fix for Domestic Violence. In the wake of the U.S. Supreme Court's *Rucker* decision,[9] which permits "innocent tenants" to be evicted for drug-related criminal activity of a household member, Representative Barbara Lee (D-CA) and others tried unsuccessfully to reverse the decision in the 107th Congress.[10] Last year's legislative effort sought to restrict so-called "one strike" evictions for any tenants who did not know or could not have foreseen the criminal conduct of a household member. This year, Rep. Lee and 51 co-sponsors introduced H.R. 1429, which takes a more narrow approach. It states that good cause for eviction does not exist when the household member is a victim of domestic violence who could not control the conduct of her or his abuser. To eliminate any doubt that abusers can be excluded from a family that remains in public housing, the measure explicitly allows eviction of individuals who commit acts of criminal violence against family members or others.[11]

HOPE VI Reauthorization. Authorization for the HOPE VI program is scheduled to expire on September 30, 2004, and the President's proposed FY 2004 Budget includes no funds for the program. H.R. 1077, introduced by Melvin Watt (D-NC), extends authorization for the program to September 30, 2005, and proposes to add four new criteria that give funding priority to projects that:

(1) are able to commence and complete the revitalization plan expeditiously;

(2) minimize displacement of current residents who wish to remain or return to the revitalized community;

(3) sustain or create more project-based housing units in markets where there is demand for such units; and

(4) give priority to existing tenants in the revitalized community. These criteria respond to some of the concerns and criticisms of the HOPE VI program by housing advocates.[12]

Another bill, H.R. 1614, introduced by Rep. Leach (R-IA), would also extend the program to September 30, 2005, and authorize the provision of assistance under the program to "main street" revitalization projects in historic or traditional commercial areas of small communities with populations under 30,000.

Small Agency Exemption from PHA Plan. Currently, all Public Housing Authorities (PHAs) are required to complete a five-year and annual plan that sets policy on admissions, rents, self-sufficiency programs, capital repair budgets and other issues. These plans must be developed in consultation with tenants. H.R. 27, introduced by Representative Doug Bereuter (R-NE), would exempt small PHAs from the obligation to prepare and submit a PHA plan. The measure defines small PHAs as those administering less than 100 public housing dwelling units, provided they have not been designated as a troubled agency.[13] The bill revives a similar measure proposed in 2002.[14] HUD also has made administrative moves to broadly deregulate small PHAs, and issued proposed regulations for this purpose in August 2002. Those regulations have not been finalized as of this writing.[15]

Rural Rental Housing Production. Representative Rubén Hinojosa (D-TX) introduced H.R. 1722, which authorizes a new program for construction, acquisition and rehabilitation of rural rental housing affordable to low-income families for not less than 30 years. The bill places the program at HUD (most rural housing is now subsidized through the Rural Housing Service at the U.S. Department of Agriculture), and allows the agency to delegate the award of funds through state, local or private nonprofit intermediaries with rural

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[5]42 U.S.C.A. § 1437j(c)(West, Westlaw 2003). For a more extensive discussion of the public housing community service requirement, *see Public Housing Community Service Policies: Requirements and Advocacy Tips*, 31 HOUS. L. BULL. 135 (June 2001).

[6]*See* Pub. L. No. 107-73, § 432, 115 Stat. 651, 699 (Nov. 26, 2001); *Public Housing Community Service Requirement Suspended*, 32 HOUS. L. BULL. (Jan 2002).

[7]Pub. L. No. 108-7, ___ Stat. ___ (Feb. 20, 2003).

[8]42 U.S.C. 1437j(d) (West, Westlaw, 2003).

[9]*Department of Housing and Urban Development v. Rucker,* 122 S.Ct. 1230, 1236 (2002).

[10]Rep. Lee sought to amend H.R. 3995 in 2002.

[11]On a related note, a measure was recently introduced in the California state legislature that would limit the discretion of California public housing authorities to evict residents for criminal activity to cases in which the tenants could have reasonably foreseen the criminal activity, failed to takes steps to prevent it, and were not the victims of the crime. S.B. 345 (Kuehl). The bill is available online at www.sen.ca.gov.

[12]*See False HOPE: A Critical Assessment of the HOPE VI Public Housing Redevelopment Program*. Available online at www.nhlp.org/html/pubhsg/FalseHOPE.pdf.

[13]Available data shows nearly 40 percent of PHAs nationwide would fall into this category.

[14]H.R. 3995, § 503 (2002).

[15]67 Fed. Reg. 53,276 (Aug. 14, 2002), *see HUD Proposes to Deregulate Small PHAs*, 32 HOUS. L. BULL. 206 (Sept. 2002).

housing development experience. The bill authorizes appropriations for the program at $250 million for each fiscal year beginning in 2004 and ending in 2008 and provides that the funds be disbursed to states based on rural housing need with a minimum of $2 million going to each state. If the bill is enacted, appropriations would be required to actually fund the program. ■

Supreme Court Rejects Claims for Damages Arising from City's Approval of an Allegedly Discriminatory Housing Referendum

In another setback for efforts to fight housing discrimination, the Supreme Court recently held that a low-income housing developer has not stated a *Fair Housing Act*, due process or equal protection cause of action against the city of Cuyahoga Falls, Ohio, based upon the city's submission to its voters of a referendum petition calling for the repeal of an ordinance authorizing the construction of a low-income housing complex. *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*.[1]

The unanimous Supreme Court decision has a somewhat convoluted factual history. Buckeye Community Hope Foundation (Buckeye), a nonprofit housing developer, sought to construct a low-income housing tax credit multi-family housing complex in the city of Cuyahoga Falls. Residents of the city and its mayor opposed the development and at various city council and other meetings expressed concerns that the development would cause crime and drug activity to escalate and that it would attract a population similar to that in the city's only African-American neighborhood. Notwithstanding, after Buckeye agreed to various conditions, the city council approved the development because it met all of the city's zoning requirements. Thereafter, a group of citizens filed a referendum petition, which, under the city's charter, gives voters the right to approve or reject at the polls any ordinance or resolution passed by the city council. Buckeye responded by filing a state suit seeking to enjoin the referendum on the ground that the Ohio Constitution does not permit referenda on administrative matters. The state common pleas court denied the injunction and the city refused to issue the building permit pending the voter referendum. Buckeye appealed the decision to the Ohio Supreme Court and at the same time filed a federal action against the city seeking an injunction ordering the city to issue the building permit. In the federal suit, Buckeye alleged that the city and its officials violated the Equal Protection and Due Process clauses of the Fourteenth Amendment and the *Fair Housing Act* when it failed to issue the permit.

While the federal suit and the state appeal were pending, the voters reversed the city's approval of the development. Thereafter, the federal district court denied the city's summary judgement motion on the equal protection and due process claims concluding that genuine issues of fact existed as to both claims. Next, the Ohio Supreme Court invalidated the voter referendum, forcing the city to issue the building permit and allowing Buckeye to construct the development. Buckeye's federal lawsuit was thus reduced to a claim for damages for the delay in the construction of the development. The city again filed for summary judgement, which the district court now granted. Buckeye appealed that decision to the Sixth Circuit, which reversed. With respect to the equal protection claim, the Sixth Circuit found that Buckeye had produced sufficient evidence to go to trial on the allegation that the city, by allowing the referendum petition to stay the building permit, gave effect to the racial bias reflected in the public opposition. Further, it held that Buckeye stated a valid *Fair Housing Act* claim on the theory that the city's actions had a disparate impact based on race and familial status. Lastly, it also held that a genuine issue of material fact existed as to whether the city engaged in arbitrary and irrational government conduct in violation of substantive due process. The city filed a petition for certiorari that the Supreme court granted. In an opinion by Justice O'Connor, with a concurring opinion by Justice Scalia, in which Justice Thomas concurred, a unanimous Supreme Court reversed the Sixth Circuit.

In its Supreme Court argument, Buckeye alleged that by submitting the petition to the voters and refusing to issue the building permit, the city and its officials violated the Equal Protection Clause. The Court disagreed. It found that Buckeye lacked the proof of racially discriminatory intent or purpose that is required to show a violation of the Equal Protection Clause. Finding that Buckeye's injury claim was predicated on the referendum petitioning *process* and not the referendum itself, the Court held that the city and its officials performed nondiscretionary and ministerial acts when it placed the referendum on the ballot and refused to issue the building permit pending voter approval or rejection of the referendum. Thus, it found that Buckeye had pointed to no evidence that the city's acts were motivated by racial animus. It rejected Buckeye's efforts to establish discriminatory intent by relying on evidence of discriminatory voter sentiment by refusing to attribute to the city private individual statements made in the course of a citizen-driven petition drive for the purpose of showing a violation of the Fourteenth Amendment. According to the Court, neither private statements nor motives can fairly be attributable to the city. Indeed, the Court cloaked the city's action as advancing First Amendment interests because it enabled public debate on the referendum.

The Court also rejected Buckeye's substantive due process claim by summarily concluding that the city engineer's

[1]1123 S.Ct. 1389 (March 25, 2003).

refusal to issue a building permit while the referendum was pending did not constitute egregious or arbitrary government conduct. It found that in light of the city's charter provision prohibiting an ordinance from going into effect until approved by the voters, the city's actions constituted an "eminently rational directive." In so finding, the Court refused to draw a distinction, as was made by the Ohio Supreme Court, between legislative and administrative referenda for the purpose of finding a per se violation of due process. According to the Court, citizens retain the power to govern through referendum with respect to any matter, whether legislative or administrative, and while the results of a referendum may be invalidated because it is arbitrary and capricious, the referendum process itself is not subject to such a challenge. Accordingly, the Court reversed the Sixth Circit and remanded the case with instructions to dismiss.

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Justice Scalia's concurring opinion pointed out that even if the city's actions were arbitrary and capricious, they would not give rise to a substantive due process claim. According to Justice Scalia, the substantive due process component of the Due Process clause protects fundamental liberty interests from deprivation by the government unless the infringement is narrowly tailored to serve a compelling state interest. In this case, Justice Scalia wrote, the property interest that Buckeye sought to protect is not a fundamental liberty interest.

The full impact of the decision is not clear. On the one hand it clearly signals the Court's unwillingness to follow several circuit court decisions that have held public entities liable for private discriminatory remarks and actions when the public bodies have acted favorably in response. On the other hand, the fact that the development was constructed and that the claims before the Court were exclusively for damages resulting from the delay in issuing a building permit, it is difficult to assess whether the decision stands for any major proposition other than the Court's unwillingness to hold a public body liable for damages caused by a potentially discriminatory process. It may be that the Court will rule differently when a project is not constructed as a result of private discriminatory actions. ■

Recent 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.

Community Housing Trust v. Department of Consumer and Regulatory Affairs, 2003 WL 1,887,958, ___ F.Supp.2d ___ (D.D.C. April 16, 2003). The District of Columbia's zoning regulations, which require five persons with mental disabilities who choose to live in one house to qualify as a Community Based Residential Facility (CBRF) while allowing five other non-related individuals to live in a house as a family, was found to discriminate against persons with disabilities in violation of the *Fair Housing Act*. Moreover, the District of Columbia's Zoning Administrator was found to have violated the *Fair Housing Act* when he chose not to characterize the house as a family home and instead characterized it as a CBRF, obligating the home's sponsors to comply with the District's occupancy permit process. The case was initiated by two nonprofit organizations that are working to prevent homelessness in the District of Columbia. They purchased a house in the District of Columbia in which they intended to house five persons with mental disabilities as well as a resident manager. Under the District's zoning ordinance, six unrelated persons can live in a single family home without special zoning requirements and the nonprofit organizations intended to take advantage of the ordinance. When, however, neighbors learned of their intention, they pressured the District's zoning department to consider the house a CBRF and to require the organizations to go through an occupancy permit process, which the nonprofit organizations refused to do. Initially, the District fined the sponsors $500 for failing to comply, but eventually it rescinded the fine and permitted the occupancy as a family. The nonprofits brought suit against the District for violations of the *Fair Housing Act* and prevailed over the District's claim that the case was moot because the District had rescinded the requirement that they apply for an occupancy permit. The court rejected the District's position because its initial decision was taken for improper reasons and because the District's actions did not preclude it from acting illegally in the future when the sponsors may seek to purchase another home for residents with mental disabilities. The nonprofit organizations also prevailed over the District's claim that the occupancy permit requirements were warranted by the fact that the units

[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.

were to be occupied by persons with disabilities and therefore justified. The court found no rational basis for the additional requirements imposed on the house because the persons who were to occupy it possessed a disability. It therefore granted the organization's motion for summary judgement.

Nelson v. Roberts, 2003 WL 1823267 (N.Y.A.D. 1 Dept.), 2003 N.Y. Slip Op. 12812 (April 8, 2003). Interest income accumulated by a resident of a project-based Section 8 development in his retirement accounts must be included in household income notwithstanding the fact that the income is tax-exempt and that the resident, due to his investment decisions, is not actually receiving that interest. The plaintiff resident sought review of an administrative decision to include in household income interest that the resident accumulated in his retirement account. Upon moving into the unit, the resident reported the retirement account but did not report that he was earning between 4.55 percent and 6.25 percent on the account. Accordingly, the landlord imputed 2 percent earnings on the account when calculating the household income for purposes of determining rent. Upon recertification, the landlord learned that the accounts were earning interest and accordingly increased the household income by those earnings. The resident appealed the landlord's decision to the New York Department of Housing and Preservation and Development (HPD), the local Section 8 administrator, which upheld the landlord's position. Thereupon, the resident took the matter to New York's Supreme Court, which, relying on a *de novo* analysis of the applicable law, found in the resident's favor by ruling that only income actually received by the resident should be included in household income for the purposes of determining rent. The Supreme Court's appellate division reversed. It found that the lower court did not give appropriate deference to HPD's interpretation of its and HUD's rules by failing to review HPD's decision under the arbitrary and capricious standard of review. It proceeded to review the rules and found that under appropriate HUD regulations and handbook all income earned by residents was to be included in household income and that it did not matter that the income was tax-exempt or not actually distributed to the resident. The fact that the resident chose, through his investment decision, to accumulate the interest in the account did not prevent its inclusion in household income. Accordingly, the court found that HPD did not act arbitrarily and capriciously when it increased the resident's rent in accordance with his increased income.

Vandenbosch v. Daily, 785 N.E.2d 666 (Ind. App., 2003). The court upheld a lower court's denial of landlord liability for the severe injuries suffered by a Section 8 voucher holder when he slid from a second story window to escape an apartment fire. The lower court held that the landlord did not have a duty to provide an escape ladder and that the landlord's failure to provide a working escape ladder was not the proximate cause of the injuries because the resident made no effort to use the ladder. The appellate court found that the landlord did have a duty to provide an escape ladder because the local housing authority made it a condition of the Section 8 voucher contract. However, the court upheld the finding that the injuries were not proximately caused by any defects the ladder may have had because the resident made no effort to use the ladder to escape the apartment.

United States v. Southland Management Corp., 2003 WL 1711940, ___ F.3d ___ (5th Cir., April 1, 2003)(en banc). A unanimous court upheld the district court's dismissal of a HUD *False Claims Act* action against the owner of a project-based Section 8 development contending that the owner, upon submitting monthly payment requests, falsely certified that the units in the development were decent, safe and sanitary. A majority of the court held that HUD's remedy for the owner's failure to maintain the development was under the Housing Assistance Payments contract, which required HUD to provide the owner with notice of the deficiency and allowed it to abate the subsidy payments until the units were brought up to standard. A concurring minority found that the certifications were not material and that they were not knowing because the government knew of the condition of the units.

***Powell v. District of Columbia Housing Authority*, 818 A.2d 188** (D.C. Ct. App. 2003). The District of Columbia Housing Authority's decision to terminate a recipient's rental subsidies under its Tenant Assistance Program (TAP) for fraudulently underreporting her household income was reversed because of the authority's hearing officer's failure to make findings with respect to each contested material allegation of fact as required by due process. The court, after finding that it had jurisdiction to review the administrative decision, concluded that a TAP recipient had a right under the District of Columbia's *Administrative Procedure Act* to a decision that, *inter alia*, stated findings of fact with respect to each contested material issue of fact. The court found that the hearing officer made no such findings and therefore reversed the decision and remanded the case for further proceedings.

Albany Apartments Tenants' Association v. Veneman, 2003 WL 1,571,576 (D.Minn. March 11, 2003). Tenants in a rental project that was formerly financed and subsidized by the Rural Housing Service (RHS) under its Section 515 program were unsuccessful in their effort to stop the development's new owner from increasing rents. The tenants argued that the former owner and RHS violated the *Emergency Low Income Housing Preservation Act* (ELIHPA) by failing to place use restrictions against the property when RHS accelerated the prior owner's loan and the prior owner, in response, paid the loan in full. When the development was still under the RHS Section 515 program, the former owner stopped making loan payments in an apparent effort to force RHS to accelerate the loan and thereby circumvent the ELIHPA prepayment restrictions. RHS, which suspected the owner's motivation, nonetheless accelerated the loan and the owner paid off the over $180,000 loan balance. RHS reconveyed the property to the owner restricting the owner's

right to increase rents for 180 days. No other long-term restrictions to protect the low-income residents from displacement were placed on the owner. The owner then sold the 24-unit development to a new entity which raised the rents after the tenants' 180-day long leases expired. Residents of the development, individually and through a tenants' association, brought an action against RHS claiming that it violated ELIHPA when it accepted the owner's prepayment in response to the acceleration without imposing long-term use restrictions. After ruling in favor of the residents on two procedural matters, the court rejected their substantive claim on the ground that RHS regulations specifically permitted the agency to accelerate Section 515 loans without placing use restrictions against the defaulting owner. The court found that ELIHPA only addresses prepayments and not payments made in response to an acceleration, which it differentiated, and, therefore, held that the RHS regulations were within the agency's reasonable or permissible interpretation of the statute. The court also rejected the residents' equal protection claim under which they argued that an RHS regulation, which allowed it to place use restrictions on post-1979 loans that were accelerated within one year of an owner's effort to prepay a loan but did not apply to pre-1979 loans or loans where the owner sought to prepay more than one year prior to the acceleration, was irrational. The court concluded that the distinction had a rational basis because it differentiated between borrowers whose loans were originally restricted and those that were not and thus was consistent with Congressional efforts to restrict prepayment activity. Lastly, the court also rejected any claims against the current owner of the development on the ground that the plaintiff's claims, if any, were against the prior owner and because of the RHS regulations, the owner was not bound by any ELIHPA restrictions.

Riverview Towers Associates v. Bateman, 358 N.J.Super. 85, 817 A.2d 324 (N.J. Sup. Ct. App. Div. 2003). The appeals court reversed a judgment for possession in favor of the Section 236 landlord for lack of jurisdiction because the landlord failed to append the eviction notice to the complaint for summary dispossession. Under federal rules governing the Section 236 program, a landlord must provide residents specific written notice of the reasons for the eviction. The appellate court ruled that federal regulations govern the eviction of residents from Section 236 housing and that the landlord's failure to append the notice to the complaint deprives the court of jurisdiction because the complaint does not disclose that the landlord extended to the resident all pre-eviction statutory and regulatory required notices and protections. Accordingly, the landlord's eviction action for nonpayment of rent was dismissed.

In re Moore, 290 B.R. 851 (Bkpcy, N.D. Ala., 2003). The bankruptcy court held that two Alabama Section 8 voucher holders, whose lease was terminated by the landlord for failure to pay rent that was due retroactively because the tenants under-reported their household income, could not assume their leases in the bankruptcy proceeding, which was commenced after their leases expired in accordance with Alabama law. Accordingly, the court granted the landlord's motion for relief from the automatic bankruptcy stay in order to permit the landlord to complete its unlawful detainer action against the residents. In an extremely lengthy analysis of Alabama and bankruptcy law, the court concluded that under Alabama law a tenant's lease expires at the end of the landlord's notice period and not at some later time, such as when a court grants possession to the landlord. Accordingly, it reasoned that at the time the bankruptcy petition was filed, the leasehold was no longer a part of the bankrupts' estate and could not be assumed in the bankruptcy proceeding. The court also concluded that it had no equitable or other authority under the Bankruptcy Code to reinstate the resident's lease. ■

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

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

HUD Final Rules

68 Fed. Reg. 10,160 (Mar. 4, 2003)
HOME Investment Partnerships Program; Correction

Summary: On October 1, 2002, HUD published a final rule making several streamlining and clarifying amendments to the regulations for the HOME Investment Partnerships Program. The final rule inadvertently removed the 36-month time frame for purchasing a home under lease-purchase programs assisted with HOME funds. This document makes the necessary correction to the final rule.

Effective Date: October 1, 2002.

[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.

68 Fed. Reg. 11,714 (Mar. 11, 2003)
Public Housing Homeownership Program

Summary: This rule states the requirements and procedures governing a new statutory homeownership program to be administered by public housing agencies (PHAs). Under this rule, a PHA makes public housing dwelling units, public housing developments and other housing units available for purchase by low-income families as their principal residences.

Effective Date: April 10, 2003.

68 Fed. Reg. 12,792 (Mar. 17, 2003)
Mortgage Insurance Premiums in Multifamily Housing Programs

Summary: This final rule adopts, without change, the prior interim rule published in the Federal Register on July 2, 2001, which revised Federal Housing Administration (FHA) regulations to permit the Secretary to set mortgage insurance premiums by program, within the full range of HUD's statutory authority, through notice. Premiums for Fiscal Year (FY) 2003 were announced in an August 30, 2002, Federal Register notice.

Effective Date: April 16, 2003.

HUD Proposed Rules

68 Fed. Reg. 11,448 (Mar. 10, 2003)
Manufactured Housing Installation Program: Standards, Training, Licensing, and Inspection; Advance Notice of Proposed Rulemaking

Summary: This document requests comments on issues related to the development of a national manufactured housing installation program. By December 2005, HUD is required to establish and implement an installation program that includes installation standards, the training and licensing of manufactured home installers, and inspection of the installation of manufactured homes. HUD's program will be implemented in states that do not have their own qualifying installation program.

Comment Due Date: April 24, 2003.

68 Fed. Reg. 11,452 (Mar. 10, 2003)
Manufactured Housing Dispute Resolution Program; Advance Notice of Proposed Rulemaking

Summary: This document requests comments on issues related to the development of the manufactured housing dispute resolution program. Under the *Manufactured Housing Improvement Act*, HUD is required to establish a program for the timely resolution of disputes among manufacturers, retailers and installers of manufactured homes regarding responsibility for defects in manufactured homes, and the issuance of appropriate orders for the correction or repair of defects in manufactured homes.

Comment Due Date: April 24, 2003.

68 Fed. Reg. 11,730 (Mar. 11, 2003)
Eligibility of Adjustable Rate Mortgages

Summary: Pursuant to a recent statutory revision, this rule makes available new adjustable rate mortgage products for single-family homes tailored to the needs of borrowers. This rule also makes provisions for the frequency and amount of interest rate changes for these new products.

Comment Due Date: May 12, 2003.

HUD Notices

68 Fed. Reg. 13,941 (Mar. 21, 2003)
Notice of Proposed Information Collection: Study of the Primary Prevention Effectiveness of the Milwaukee Lead Hazard Control Ordinance

Summary: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review. The Department is soliciting public comments on the subject proposal. The information is needed because, despite dramatic reductions in blood-lead levels over the past 15 years, lead poisoning continues to be significant health risk for young children. The Third National Health and Nutrition Examination Survey suggests that the greatest risk exists for children under the age of 2. The development of a viable national strategy for the primary prevention of lead poisoning in these young children is a difficult task. The City of Milwaukee has enacted an ordinance requiring owners of pre-1950 rental properties in two target neighborhoods to carry out specified essential maintenance practices and standard treatments by April 30, 2000. The purpose of this information collection activity is to evaluate the feasibility, costs and effectiveness (in terms of reducing residential dust-lead levels and preventing elevated blood-lead levels in children under 2 years of age) of the comprehensive primary prevention program being conducted in the two target Milwaukee neighborhoods. The collection information will be used as vital input for developing a viable national strategy for the primary prevention of childhood lead poisoning.

Comments Due Date: May 20, 2003.

68 Fed. Reg. 13,941 (Mar. 21, 2003)
Credit Watch Termination Initiative

Summary: This notice advises of the cause and effect of termination of Origination Approval Agreements taken by HUD's FHA against HUD-approved mortgagees through its Credit Watch Termination Initiative. This notice includes a list of mortgagees which have had their Origination Approval Agreements (Agreements) terminated.

68 Fed. Reg. 14,834 (Mar. 26, 2003)
Notice of Funding Availability (NOFA) for the Research on the Socio-Economic Change in Cities, Fiscal Year 2002

Summary: The purpose of the program is to fund empirical research projects on trends in urban areas, that is, social, economic, demographic and fiscal change in cities. Research grants of up to $40,000 each would allow HUD to

commission a variety of in-depth and high-quality research projects. For example, the release of the Census 2000 long-form data presents an excellent opportunity to inform us on the long-run dynamics of population, housing, income and transportation in urban areas. Research using other current data sets, such as the County Business Patterns Special Extracts, FBI Crime Statistics, or Building Permits Data found in the State of the Cities Data Systems 1, or concerning other topics such as the fiscal condition of cities, crime, poverty or economic development would also be encouraged. These research projects would provide HUD with a basic understanding of how cities are changing, what factors are driving change, and the impact of public policy on change. $300,000 from HUD's FY 2002 research and technology appropriation are available. HUD anticipates funding seven to 10 studies on these topics; studies will be funded through cooperative agreements, up to a maximum of $40,000. Academic and not-for-profit institutions located in the Unites States, state and local governments, and federally recognized Indian tribes, are eligible to apply. For-profit businesses also are eligible; however, they are not allowed to earn a fee *(i.e.*, no profit can be made from the project).

Application Deadline. May 27, 2003.

68 Fed. Reg. 15,217 (Mar. 28, 2003)
***Privacy Act of 1974*; Proposed Amendment of Routine Uses Applicable to Systems of Records**

Summary: The Office of Inspector General (OIG) is giving notice that it proposes to amend the routine uses applicable to its systems of records, which are published at 57 Fed. Reg. 25,069 (June 12, 1992) and 65 Fed. Reg. 50,904 (August 21, 2000). The OIG proposes to add a new routine use to the routine uses currently applicable to OIG's systems of records to permit disclosure of five systems of records for purposes of internal and external peer reviews of the Office of Audit and Office of Investigations, specifically HUD/OIG–1, Investigative Files of the Office of Inspector General; HUD/OIG–2, Hotline Complaint Files of the Office of Inspector General; HUD/OIG–3, Name Indices System of the Office of Inspector General; HUD/OIG–5, AutoAudit of the Office of Inspector General; and HUD/OIG–6, AutoInvestigation of the Office of Inspector General. This notice also proposes adding a new routine use to the same five systems of records to allow disclosure of these records to the President's Council on Integrity and Efficiency (PCIE) and other federal agencies, when these entities or the OIG conducts an audit or investigation pursuant to Executive Order 12993.

Effective date: This proposal shall become effective without further notice on April 28, 2003, unless comments are received on or before that date which would result in a contrary determination.

Comment Due Date: April 28, 2003.

HUD Housing Notices

Notice H 2003-02 (Mar. 5, 2003)
Allowable Closing Costs Paid by HUD Single Family Property Disposition

Summary: This notice supersedes Notice H 2001-13 which identified allowable closing costs paid in connection with the sale of a HUD-owned single family property. The effective date of this notice is 30 days from the date of issuance. The allowable closing costs will be in effect for sales contracts executed on or after the effective date of this notice. Sales contracts executed prior to the effective date will be held to the allowable closing costs identified by Notice H 2001-13.

Expires: March 31, 2004.

Notice H 2003-03 (Mar. 6, 2003)
Reinstatement and Extension of Notice H 00-27, Single Family Property Disposition Sales Program for Public Safety Employees

Summary: This notice reinstates and extends Notice H 00-27 which was issued December 12, 2000, and expired December 31, 2001. The notice pertains to the Single Family Property Disposition Program for Public Safety Employees.

Expires: March 31, 2004.

Notice H 2003-04 (Mar. 6, 2003)
Extension of the Teacher Next Door (TND) Initiative

Summary: The purpose of this housing notice is to advise that a Single Family Property Disposition Waiver extending the Teacher Next Door Initiative until September 30, 2004, was executed on March 6, 2003. This waiver extends authority to continue direct sales of properties in revitalization areas to teachers with discounts of 50 percent. In addition, it extends authority for direct sales of insurable properties in revitalization areas to governmental entities and private nonprofit organizations for resale to teachers.

Expires: September 30, 2004.

HUD PIH Notices

Notice PIH 2003-07 (HA) (February 25, 2003)
Reinstatement - Notice PIH 2001-26 (HA), PHA Plan Guidance; Further Streamlining of Small PH Plan; Early Availability of Capital Formula

Summary: This notice reinstates Notice PIH 2001-26 (HA), except for paragraph II.B.1, Early Availability of Funds for Obligation, until February 28, 2004. It expired August 31, 2002.

Expires: February 28, 2004.

Notice PIH 2003-08 (HA) (March 27, 2003)
Public Housing Development Cost Limits

Summary: The purpose of this notice is to explain procedures for establishing public housing development cost limits consistent with the *Quality Housing and Work Responsibility*

Act of 1998. Transmit the updated schedule of unit Total Development Cost (TDC) limits. This notice does not apply to Native American housing.

Expires: March 31, 2004.

Notice PIH 2003-09 (HA) (March 27, 2003)
Demolition/Disposition Processing Requirements Under the 1998 Act

Summary: This notice updates Notice 99-19 to reflect changes to the requirements for demolition and disposition processing, as well as revisions made to the associated application form HUD-52860 in 2002. The purpose of the notice is as follows: (1) to clarify the applicability of Section 18 to a HOPE VI related demolition; (2) to inform Public Housing Agencies (PHAs) of the changes to Section 18 of the *United States Housing Act of 1937*, as amended by Section 531 of the *Quality Housing and Work Responsibility Act* (QHWRA) of 1998, (P.L. 105-276); (3) to provide guidance on the criteria HUD will use to process demolition/disposition applications; and (4) to discuss the new certification required under QHWRA, which was signed on October 21, 1998.

Expires: March 31, 2004.

RHS Federal Register Policy Statement

68 Fed. Reg. 14,889 (Mar, 27, 2003)
Policy Statement for Direct Final Rulemaking

Summary: The Rural Housing Service (RHS) is implementing a new rulemaking procedure to expedite making noncontroversial changes to its regulations. Rules that RHS determines to be noncontroversial and unlikely to result in adverse comments will be published as "direct final" rules. "Adverse comments" are those comments that suggest a rule should not be adopted or that a change should be made to the rule. Each direct final rule will advise the public that no adverse comments are anticipated and, that unless written adverse comments or written notice of intent to submit adverse comments are received within 60 days from the date the direct final rule is published in the Federal Register, the rule will be effective 75 days from the date the direct final rule is published in the Federal Register.

Dates: Effective March 27, 2003.

RHS Notices

68 Fed. Reg. 12,032 (Mar. 13, 2003)
Notice of Request for Collection of Public Information with the Use of a Survey

Summary: This notice announces the Rural Housing Service's (RHS) intention to request clearance for a new information collection to measure the quality of service provided by the RHS Centralized Servicing Center (CSC).

Dates: Comments on this notice must be received by May 12, 2003, to be assured of consideration.

RHS Administrative Notices

RD AN No. 3836 (1924-A)(March 26, 2003)
MFH Lead-Based Paint Risk Assessment Schedule

Summary: This administrative notice provides guidance to Rural Development staff on implementation of Subpart D–"Project-Based Assistance Provided by a Federal Agency Other Than HUD" of HUD's Final Rule on Lead-Based Paint Hazards in Federally Owned Housing and Housing Receiving Federal. This clarifies the Agency's schedule for conducting lead-based paint risk assessments on multi-family residential complexes constructed before 1978. The complex must receive more than $5,000 annually in project-based assistance, which includes rental assistance, to be covered by these requirements.

RD AN No. 3840 (1944-D)(March 26, 2003)
Processing Off-Farm Labor Housing (LH) New Construction Loan and Grant Requests Fiscal Year 2003

Summary: The purpose of this administrative notice is to provide guidance on processing Section 514 loan requests and Section 516 grant requests for Off-Farm Labor Housing units in accordance with the RD Instruction 1944-D and the Notice of Timeframe for Section 514 Farm Labor Housing Loans and Section 516 Farm Labor Housing Grants for Off-Farm Housing for FY 2003 that was published in the Federal Register on December 27, 2002 (67 Fed. Reg. 79,030).

RD AN No. 3838 (1924-A) (March 26, 2003)
Housing Preservation Grant Program Lead-Based Paint Requirements

Summary: This administrative notice provides guidance to Rural Development staff on implementation of Subpart J-"Rehabilitation" of the Housing and Urban Development's (HUD) Final Rule on Lead-Based Paint Hazards in Federally Owned Housing and Housing Receiving Federal Assistance as it relates to the Housing Preservation Grant Program. Subpart J sets out the requirements for the Agency's programs, which provide assistance for housing rehabilitation. This notice clarifies the Agency's and the grantee's responsibilities under Subpart J.

RD AN No. 3835 (1980-D) (March 25, 2003)
Eligibility of Non-U.S. Citizens for Single Family Housing Guaranteed Loan Program Assistance

Summary: This administrative notice is intended to furnish guidance concerning what documentation non-U.S. citizens must supply in order to be considered for a loan note guarantee under the Single Family Housing Guaranteed Loan Program. ■

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