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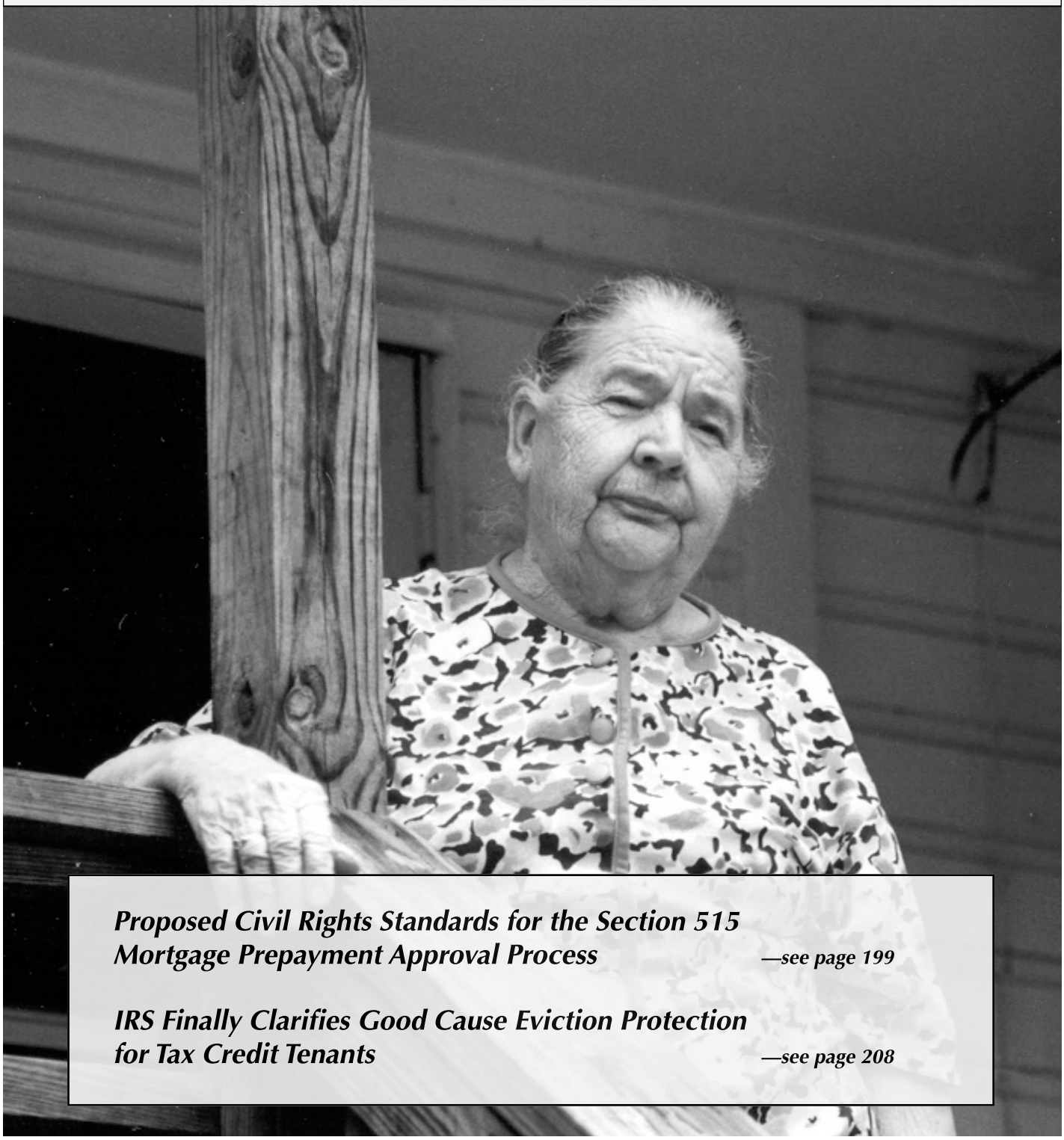

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SPECIAL FEATURE

AN ESSENTIAL RESOURCE FROM THE NATIONAL HOUSING LAW PROJECT

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

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Cover: Pheobe Fields, Little Cowan Creek, KY, in 2000 when she received a RHS Section 504 grant to finance partial rehabilitation of her home, in which she had lived over 50 years. Rehabilitation, assisted by volunteers, conducted by local nonprofit HOMES, Inc. Photo courtesy Housing Assistance Council.

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

Proposed Civil Rights Standards for the Section 515 Mortgage Prepayment Approval Process[1]

Introduction

The Emergency Low-Income Housing Preservation Act of 1987 (ELIHPA), as amended,[2] restricts the right of owners of multifamily housing financed with Rural Housing Service (RHS) Section 515 loans made prior to December 15, 1989,[3] to prepay their loans. Among other requirements, under ELIHPA, Section 515 project owners may not prepay their loans as a matter of right if the prepayment will have a material impact on minority housing opportunities in the community. Instead, owners must either keep the housing in the Section 515 program, or offer to sell the development to a nonprofit or public agency. Only if a nonprofit or public agency does not make an offer to purchase the development can the owner prepay the Section 515 loan in such circumstances. If the prepayment does not have a material impact on minority housing opportunities, the owner may prepay the loan—and cease to operate development as affordable housing—provided that current residents of the development are protected from displacement or alternative affordable housing is available in the community.

Notwithstanding the fact that ELIHPA has been in effect for over seventeen years, RHS has never defined the term "material impact on minority housing opportunities." As a result, local and statewide Rural Development offices, which administer the RHS programs in the states, as well as the RHS National office, essentially make ad hoc decisions with respect to whether any particular proposed prepayment will materially affect minority housing opportunities. Given the fact that hundreds of Section 515 owners apply to prepay their loans annually, such an individualized and undefined decision-making process is not an acceptable method for operating a major housing program or for complying with the civil rights requirements of ELIHPA.

Section 515 prepayments have a widespread impact on people of color and their housing opportunities. In the summer of 2004, National Housing Law Project (NHLP) conducted a study of eighty-nine properties[4] for which

[1]This article was written and is based on an analysis undertaken by Jennifer Taylor, NHLP Policy Intern and third year master's candidate at the University of California at Berkeley's Goldman School of Public Policy and the School of Public Health. The complete report will be available on NHLP's Web site, http://www.nhlp.org.

[2]Codified at 42 U.S.C. § 1472(c).

[3]42 U.S.C.A. § 1485 (West 2003).

[4]Prepayment applications for the eighty-nine properties were filed with

RHS has recently received Section 515 loan prepayment applications and census data for the counties in which those eighty-nine properties were located. NHLP's analysis revealed that people of color in the counties in which the eighty-nine properties were located were, on average, 44% more likely than non-minorities to have "extremely low-incomes" (i.e., 30% of the area median income or less).[5] People of color in these counties are also 22% more likely than whites on average to pay more than *half* of their income towards rent.[6] Regardless of income category, people of color who are eligible[7] for Section 515 housing are 20% more likely on average to experience specified housing problems than eligible whites.[8] Among higher-income eligible renters (i.e., those earning 50–80% of the area median income), people of color are 46% more likely than whites to be identified by HUD as having "housing problems."[9] Overall, people of color are over 58% more likely to be eligible for Section 515 rental housing than non-Hispanic whites living in the same counties.[10]

NHLP's study has shown significant minority impacts related to many of the eighty-nine Section 515 prepayment applications filed with RHS. This is a cause for concern because RHS' current prepayment review practices simply do not adequately take into account impacts on people of color, as required by ELIHPA. In response, NHLP has developed a three-tiered numerical test of census data for determining whether the prepayment of a Section 515 loan will have a "material effect on minority housing opportunity" for the purposes of ELIHPA requirements and RHS prepayment approval.[11] Applying this test to the eighty-nine prepayments analyzed in the study, 53% of the prepayments (forty-seven of eighty-nine) would have been found to pose a material effect on minority housing opportunity.

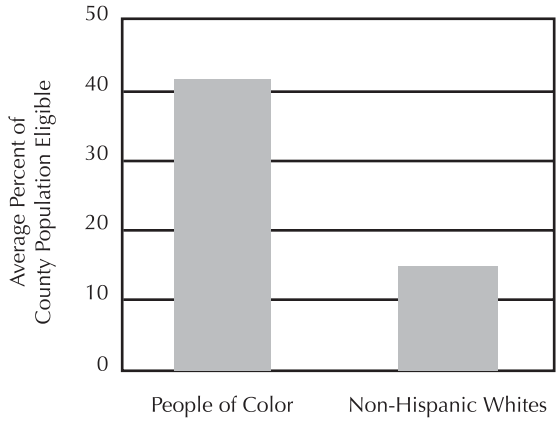
Methodology and Findings

NHLP's data analysis focused on three dimensions of affordable housing need: income and eligibility; housing cost burden; and housing problems. The income analysis examined the disproportionality of people of color in low-, very low-, and extremely low-income categories, as well as the disproportionate likelihood of people of color being eligible for Section 515 housing—that is, being renters earning less than or equal to 80% of the area median income. The housing cost burden indicator assessed the disproportionate likelihood of people of color to pay more than 30% of their income on rent, including utilities. Housing problems, as defined and measured by the CHAS dataset of the Department of Housing and Urban Development (HUD), include overcrowded housing (more than 1.0 person per room), rent overburden (paying more than 30% of income on rent and utilities), and lack of complete kitchen or plumbing facilities. A household experiencing one or more of these problems is classified as having "housing problems."

Income Eligibility

In all but two of the eighty-nine prepayment properties included in this study, counties satisfied the 20% test[12] for disproportionate income eligibility for Section 515 housing.[13] That is to say, in all but two cases, people of color were at least 20% more likely to be eligible for Section 515 housing (renting and earning less than 80% of the area median income) than non-minorities. On average, 42% of people of color were eligible for the subsidized housing, compared to 15% of whites—a 58% difference.

FIGURE A: Disparity in Section 515 Income Eligibility



RHS between September 2003 and July 2004. Not all have been approved by RHS. The eighty-nine properties are located in the following states: Alabama, Connecticut, Georgia, Iowa, Kansas, Massachusetts, Missouri, New Hampshire, North Carolina, Oklahoma, Pennsylvania, Vermont and Wyoming.

[5]Department of Housing and Urban Development (HUD), *Comprehensive Housing Affordability Strategy (CHAS), at* http://socds.huduser.org/scripts/odbic.exe/chas/index.htm.

[6]*Id.*

[7]For purposes of this discussion, "eligible" refers to eligibility for Section 515 housing: non-homeowners with incomes 80% or less of the area median income.

[8]HUD, *Comprehensive Housing Affordability Strategy (CHAS), at* http://socds.huduser.org/scripts/odbic.exe/chas/index.htm.

[9]*Id.*

[10]*Id.*

[11]7 C.F.R. pt. 1965 subpt. E (2003).

[12]The "20% test" is described in a sidebar accompanying this article.

[13]This paper does not measure eligibility of elderly/disabled designated projects, which tend to contain single-bedroom units. It is worth noting that there is authority for the conversion of elderly/disabled projects into family-designated projects upon certain determinations. 7 C.F.R. § 1930.125 (2003).

FIGURE B: Income Eligible Households by AMI and Minority Status

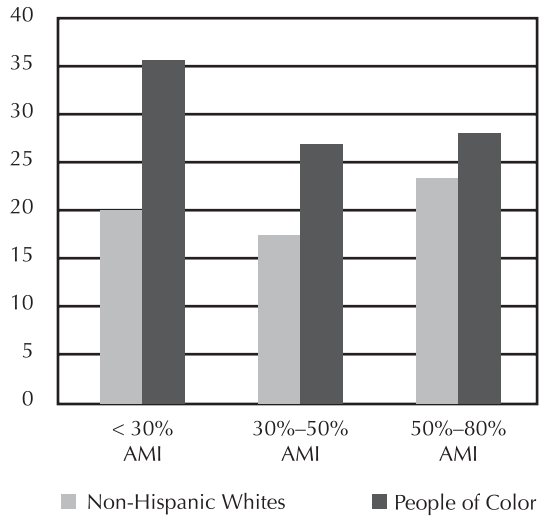
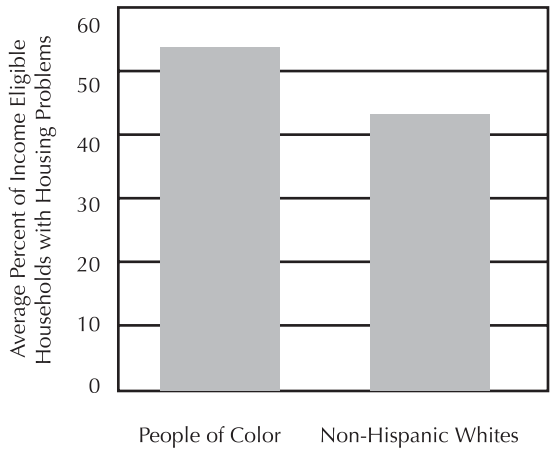


FIGURE C: Disparity in Housing Problems



In addition, on average across the eighty-nine prepayment cases analyzed, people of color in renting households are more likely than non-Hispanic white renters to fall into the poorest income categories (see Figure B).

Housing Cost Burden

Fewer cases demonstrated a disproportionate housing cost burden on people of color at the 20% level—about 37% (thirty-three of eighty-nine). On average, people of color are 14% more likely to pay more than 30% of their income on rent. So although this housing needs indicator is more tightly linked to income than race, the fact that people of color are at least 20% more likely to pay more than 30% of their income on rent in more than one-third of the cases indicates that this is still an area where significant racial disparities exist.

Housing Problems

Similarly, 40% of the prepayment cases were located in counties where income eligible people of color were at least 20% more likely to have housing problems than income eligible non-minority people in the same county. It is significant that even controlling for income and renting status, people of color are much more likely than non-minorities to experience housing problems. The disparity widens as income increases: among eligible renters earning 50–80% of the area median income, people of color were 46% more likely than whites to have problems with their housing.

Overall, racial disparity was evident at different levels for all three housing needs indicators across the prepayment cases. Table 1 demonstrates that significant portions of these counties are faced with housing needs disparities of at least 20% between their minority and non-minority populations:

TABLE 1: Percentages of 89 Section 515 Prepayment Properties with Indicator Disparities of 20% or More

Income Eligibility	97.8%
Housing Cost Burden	37.1%
Housing Problems	40.4%

Proposed Test for "Material Effect on Minority Housing Opportunity"

NHLP proposes a three-tiered test for determining whether approval of a Section 515 prepayment by RHS will have a "material effect on minority housing opportunity." A flow chart outlining this test is presented in Figure D.

Tier One: Eligibility, Cost Burden and Housing Problems Indicators

The significantly greater likelihood of people of color to be eligible for Section 515 housing, experience housing problems, and pay more than 30% of their income on rent indicates that any decrease in the supply of subsidized rental housing in the areas served by the Section 515 housing program would impact this group more seriously than non-minorities. This violates a condition of unrestricted prepayment as specified in the statutes and regulations affecting Section 515 housing. Therefore, it is suggested that if a market area[14] "tests positive" for two of the three

[14]For the purposes of this paper, market area is regarded as the county in which the Section 515 property is located.

indicators of housing need described above (eligibility, rent overburden and housing problems) at a 20% threshold, then the prepayment of Section 515 housing in that area should be found to have a "material effect on minority housing opportunity."[15] If the "material effect" standard is satisfied by finding disproportionality in at least two of the three indicators, then prepayment in 53% of the cases discussed above (forty-seven of eighty-nine) would be found to cause "material effect on minority housing opportunity."

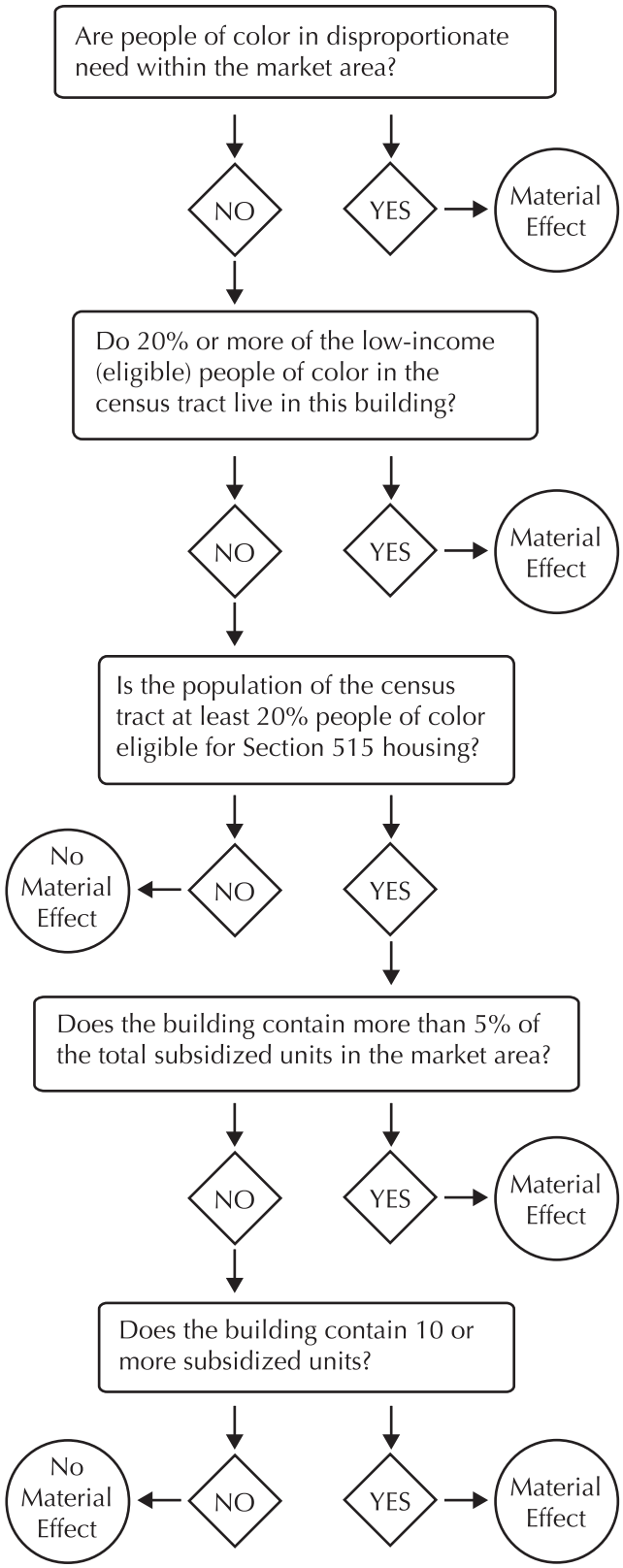
Tiers Two and Three: Alternatives

It is important to note that there are many demographic situations in which the prepayment of affordable housing would have a material effect on minority housing opportunity even if the "20% test" fails to indicate significant disparity. An example of such a case may be in a county in which the population is largely composed of people of color. With such a large population base, the proportion of people of color who have housing needs may not be disproportionate compared to non-minorities, but large numbers of people of color would nevertheless be impacted by prepayment of Section 515 housing stock. To address these and other situations, two additional tiers of tests can be utilized for cases that do not indicate "material effect" at the first tier. The complete test, with the two additional tiers, is described in Figure D.

Conclusion

The analysis that is detailed here is a starting place for discussion about an appropriate material effect test, and describes the results of subjecting a sample of prepayment cases to an experimental example of such a test. This discussion should be further developed through consultation with Section 515 housing recipients, affordable housing advocates, program administrators, social scientists, and others to ensure that any resulting "material effect" standard fully complies with statutory requirements. ■

FIGURE D: Flow Chart for Test of Material Effect on Minority Housing Opportunity



[15]See 7 C.F.R. pt. 1965 subpt. E (2003).

Background:
Section 515 Program and Prepayment Restrictions

The Section 515 Rural Rental Housing Program[1] is administered by Rural Housing Service (RHS), an agency within the Rural Development (RD) division of the U.S. Department of Agriculture (USDA). Section 515 Housing is created by loans made by RHS to nonprofit, for-profit, cooperatives and public entities for the construction of rental or cooperative housing in rural areas, including Indian reservations, for families, elderly persons, persons with disabilities or for congregate living facilities.[2] These loans, usually thirty-year or longer term, are typically subsidized to make the units affordable for low- and very low-income persons and households through two means. The first is interest credit,[3] a shallow subsidy that effectively reduces the interest rate to the owner to 1% and thus reduces the rent charged to the residents. The second is Rental Assistance,[4] a deep subsidy that reduces the rent charged to a household, including utilities, to 30% of household income regardless of the amount of the household's income. These projects may also receive assistance through the Low Income Housing Tax Credit Program,[5] or the Project-Based Section 8 program. Residents of Section 515 housing may also be assisted by the Section 8 Voucher program.

Before the enactment of the Emergency Low-Income Housing Preservation Act of 1987 (ELIHPA), owners of Section 515 housing that was financed prior to December 21, 1979, had no use restrictions that obligated them to operate the housing as affordable housing for any period of time. Owners of Section 515 Rural Rental Housing who entered into Section 515 loans between December 21, 1979, and December 15, 1989, agreed to maintain the rental units as affordable housing for a term of twenty years. Owners who entered into loan agreements after that date may not prepay their loans during the term of the RHS mortgage.

Many owners of Section 515 housing that was financed prior to 1979, as well as owners whose projects were financed after 1979 and whose twenty-year use restrictions have expired, have applied, and continue to apply, to prepay their Section 515 loans. Because prepayment effectively terminates all RHS subsidies, it threatens to displace or overburden residents who rely on the subsidies to make their rents affordable.

When owners of Section 515 housing apply for prepayment with RD, they may accept the financial incentives that RD is required to offer, including equity loans, increased rates of return on investment, and rental assistance for the project's units,[6] if they agree to remain in the Section 515 program for at least an additional twenty years. If they do not accept such incentives, they may proceed with prepayment if the following three conditions are met:

(1) They agree to maintain the housing as affordable housing for the balance of the term of any existing use restriction and to offer the housing for sale to a nonprofit or public agency at the end of that term;

(2) They agree to not displace current residents and RD determines that the prepayment would not affect minority housing opportunities in the community; or

(3) RD determines that the prepayment will not materially affect minority housing opportunities in the community, that there is an adequate supply of safe, decent and affordable housing in the community, and that such rental housing will be made available to tenants upon displacement.[7]

—continued on page 204

[1] 42 U.S.C.A. § 1485 (West 2003) (loan authority for the Section 515 Rural Rental Housing Program).

[2] 42 U.S.C.A. § 1485(a) (West 2003).

[3] 42 U.S.C.A. § 1490a(1)(B) (West 2003).

[4] *Id.* at § 1490a(1)(C) (West 2003); 7 C.F.R. § 1930, subpt. C, exh. E (2003).

[5] 26 U.S.C.A. § 42 (West 2002).

[6] 42 U.S.C.A. § 1472(c)(4)(B) (West 2003); 7 C.F.R. § 1965.213 (2003); 7 C.F.R. pt. 1965, subpt. E, exh. E, ¶ IV.A (2003).

[7] 42 U.S.C.A. § 1472 (c) (West 2003); 7 C.F.R. pt. 1965 subpt. E (2003).

—continued from page 203

If these conditions are not met, the housing must be offered for sale to a nonprofit or public agency for at least 180 days.[8] According to the Housing Assistance Council (HAC), 1,848 units were lost in Fiscal Year 2003 because of prepayment, while fewer than half of that amount (44%) were replenished through new production.[9] Between September 2003, when NHLP began tracking prepayment requests, and July 2004, NHLP had received notice that the owners of over 2,100 units of Section 515 housing had applied to prepay.[10] As more and more Section 515 projects become eligible for prepayment, it is critical that RD determine, as accurately as possible, whether prepayment of specific 515 housing will materially affect the housing opportunities of minorities. More thorough analysis by RD of the second and third conditions of prepayment will keep more units of subsidized housing available to residents and ensure that people of color are not disproportionately affected by prepayment. As existing regulations are insufficient for making this determination, the accompanying article considers a three-tiered standard that can be applied to each prepayment case using widely-available data.

[8]42 U.S.C.A. § 1472(c)(5)(A) (West 2003); 7 C.F.R. § 1965.216(b)(3) (2003).

[9]Housing Assistance Council, *About Rural Rental Housing Prepayment and Preservation*, *at* http://www.ruralhome.org/pubs/infoshts/infopreserv.htm.

[10]While a disproportionate amount of the housing are Iowa projects (thirty-eight of the eighty-nine projects, containing 358 units), removal of all Iowa cases from the data does not significantly alter the results.

The 20% Test for Disproportionality

Disproportionate need was determined by comparing the percentage of the county's people of color who fall into each category of housing need (eligibility, rent overburden and housing problems) to the percentage of the county's non-minorities who are in each need category. If the difference between these proportions was equal to or greater than 20%—in other words, if people of color were at least 20% more likely to have housing needs than non-minorities—then the county was said to have failed the 20% test. The 20% threshold has been used in other civil rights contexts, such as employment discrimination, and for the purposes of this analysis is experimentally applied to housing needs. In the accompanying article, the 20% test refers to this comparison of proportions that reveals racial disparity in housing needs, and to fail the 20% test means that people of color in a county have significantly disproportionate housing needs.

This 20% test is based on the "four-fifths rule" that is used to determine "adverse impact" in employment discrimination. "A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or 80%) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact…"[1] Because the four-fifths rule was established for use in situations where selection is the desired outcome, it was necessary to use the inverse of the rule; in the housing needs context, membership in the group which has higher eligibility, housing problems, or rent overburden is a disadvantage, not the desired outcome. Thus, a disparity greater than one-fifth, or 20%, is the threshold that this article uses to indicate significant disparity and accordingly, "a material effect".

For example, in Gwinnett County, Georgia, where the owner of Buford Apartments has applied to prepay the project's Section 515 loan, 26% of people of color are eligible renters. In the same area, only 9% of non-minority people are eligible renters. There is a 17 percentage point difference between these two proportions, which represents 65% of the eligible proportion of people of color (26%). This percentage (*not* percentage *points*) difference—65% in this case—is what is compared to the 20% threshold.

[1]29 C.F.R. § 1607.4 (2003).

Kellogg Foundation Issues Report on Rural Development Policy Shortcomings

In an effort to examine the current state of rural development policy,[1] the W.K. Kellogg Foundation recently released a report entitled *Federal Investment in Rural America Falls Behind*.[2] The underlying study examines federal spending priorities over the past decade.[3] Using census data tracked by the United States Department of Agriculture's Economic Research Service (ERS) and the Department of Agriculture's (USDA) budget figures, the study compared:

- overall total per-person federal spending in rural areas to total per-person federal spending in metropolitan areas between 1994 and 2001;
- overall per-person federal spending for community and regional development in rural and metropolitan areas between 1994 and 2001; and
- USDA spending for rural development relative to the department's total spending from 1996 through 2001.[4]

The study recognizes a devastating downward spiral that outward migration trends have on rural areas, which includes the consolidation, reduction or closure of locally based businesses and services.[5] Remaining residents and businesses bear the tax burden of maintaining infrastructure and services, while these same taxpayers suffer further quality-of-life declines.[6] Highlights of the study include the following:

- Approximately 80% of the landmass in the U.S. is classified as rural. Fifty-five million Americans live in rural areas, some 22% of the total United States population.
- In rural areas, median family income is 25% lower, and the poverty rate 28% higher, than in metropolitan areas. Rural counties make up 95% of the persistent poverty counties in the United States.
- Congress has given priority to farming support programs over rural development in its funding of the USDA—the one federal department with responsibility for rural development. Funds earmarked for rural development consistently remained at about 2 to 5% of USDA's total actual budget outlays between 1996 and 2002.
- USDA has acknowledged that farm payments are not a substitute for rural economic development policy.
- Roughly one out of every three dollars of federal rural development funding came from other federal departments and agencies. But, in terms of overall federal spending, community development in rural counties accounts for only one-tenth of 1% of total per capita federal funding from 1994 to 2001, significantly less than the population figures warrant.
- From 1994 through 2001 the federal government spent more than two times (and sometimes up to five times) as much per capita on metropolitan community development as it did on rural community development.[7]

Findings Show that Per Capita Funding for Metropolitan Areas Overshadows Rural Areas

Kellogg reports that per person, the federal government spent more on residents of metropolitan areas than rural areas. The largest spending difference is reported to have occurred in 1996 with $720 less being spent per person in rural areas.[8] Factors that have begun to narrow this difference are attributed to increased spending for (1) agriculture and national resources and (2) income security.[9] USDA spending for rural development from 1996 through 2002 ranged from 2 to 5% of the department's total budget.

Non-Agriculture Federal Agencies Fund Rural Development Only Minimally

According to the study, approximately one-third of funding that benefitted rural development in 2001 was

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[1]The study does not define "rural development". However, among the goals of rural development is "to encourage and support rural United States, in order to help make it a better place to live, work, and enjoy life . . . ." 7 U.S.C.A. § 2661(b)(1) (West, WESTLAW through P.L. 108-303). *See also* USDA, *Rural Development Mission Statement*, *at* http://www.rurdev.usda.gov/recd_mission.html (last visited Oct. 15, 2004) (seeking "to increase economic opportunity and improve the quality of life for all rural American"). Led by the undersecretary of rural development, the division's program areas fall under the sub-divisions of the Rural Housing Service (RHS), the Rural Business-Cooperative Development Service and the Rural Utilities Service. 7 C.F.R. § 2003.2 (2004).

[2]W.K. Kellogg Foundation, Federal Investment in Rural America Falls Behind, *at* http://www.wkkf.org/Pubs/Federal_Spending_for_Rural_00376_03977.pdf (2004).

[3]*Id*. at 2.

[4]*Id*.

[5]*Id*. at 1.

[6]*Id*.

[7]*Id*.

[8]*Id*. at 2.

[9]*Id*. at 3. Increased agriculture and natural resources spending is said to have been towards federal farm supports and foreign trade programs. A substantive portion of income security consists of Social Security payments.

provided from federal agencies other than the USDA.[10] "Community resources," although a broad category, accounted for approximately 7 to 9% of total federal per capita spending for 1994 to 2001.[11] The study's comparison between rural and metropolitan funding within this category revealed an approximate $286 per-person spread during 2001, a significant increase since the 1994 $15 per-person difference.[12] When examining the subcategory of community and regional development within the community resources category, the study found that "rural development programs accounted for one-tenth of 1% of all per capita federal spending during the eight-year period."[13] Funding for rural areas in the development subcategory was calculated as one-half to one-fifth of metropolitan funding during the examined period.[14]

Kellogg cites statements by Chuck Fluharty, director of the Rural Policy Research Institute in Columbia, Missouri, that rural policy analysts and advocates believe that federal funding commitments to non-agricultural programs in rural America have declined in the most recent years.[15] In commenting upon the Community Development Block Grant (CDBG) state programs, Fluharty criticized the distribution of the funds as being "woefully inadequate federal commitments to rural community capacity building."[16]

Kellogg Finds that USDA Funding Supports Farming over Rural Development

The foundation reported that USDA spent from 2 to 5% of its total 1996 budget on rural development.[17] This range is compared to actual outlays of 16 to 49% on farm and foreign agriculture service (including commodity price supports) and 43 to 69% on food, nutrition and consumer services (including food stamps).[18] The study suggests that USDA's distribution of funds misplaces heavier spending on farming rather than rural development.[19] According to Chuck Hassebrook, executive director of Nebraska's Center for Rural Affairs, "Congress has profoundly uninvested in rural development while grossly overspending on subsidies to the nation's largest farms that drive smaller farmers out of business. . . the current policy . . . is a lose-lose disaster for small farmers and rural communities."[20] This position considers the fact that of more than 2,000 rural counties in the year 2000, only 420 were farm-dependent.[21]

Significantly, the study quotes a USDA article which is consistent with some of Kellogg's criticisms:

> Government programs that provide payments to farmers can benefit some rural areas. But as economic development policy, they perform poorly. A large part of government farm payments go to areas where they are barely a blip in the local economy. Farming-dependent counties where government payments to farmers play a significant role in the local economy received only 37 percent of farm program payments in 1998, while 19 percent went to metro counties and 44 percent went to non-farm-dependent non-metro counties. . . . In metro and non-farm-dependent metro counties, government payments to farms have no noticeable effect on the local economy because they account for such a small share of the income. In communities with healthy growth prospects, government payments to farms may slow the growth of other economic sectors by driving up land prices and delivering capital away from local businesses.[22]

Bi-Partisan Divestment Frustrates Rural Development

The Kellogg Foundation concludes that low levels of funding for rural development have been the rule since 1996.[23] This situation has persisted regardless of the political party in control of Congress or the White House.[24] "One clear conclusion emerges from the federal spending data: The small level of federal funding for rural development—both in total and from all federal departments and agencies and through USDA—shows that funding for rural development has been a low priority for the federal government."[25]

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[10] *Id*. at 4. Several agencies administer programs that fund community development without regard to where the recipients reside. However, the amount of money spent per person is reportedly very small.

[11] *Id*. at 4.

[12] *Id*. The study notes that this $286 figure may be understated because it takes into account transportation funding which serves more urban commuting residents than rural residents.

[13] *Id*. at 6.

[14] *Id*.

[15] *Id*.

[16] *Id*. Because the ERS data was unable to trace county level figures, some rural funding was excluded. (i.e. CDBG state programs, where funding may be divided among undesignated areas and programs.)

[17] *Id*. at 6. The earmarked rural development spending amount for 2002 totaled $2.76 billion out of $68.7 billion for the entire agency.

[18] *Id*.

[19] *Id*. at 7.

[20] *Id*.

[21] *Id*. The study notes that ERS classifies counties with 15% or more earnings (in 1998 to 2000) or employment (in 2000) from farming as being "farming-dependent."

[22] *Id*. at 8.

[23] *Id*.

[24] *Id*.

[25] *Id*.

Appropriations for USDA's Rural Rental Housing program[26] for the period from 1996 to 2002 support the Kellogg study's conclusion that there has been a divestment of funds for rural development. Although the study does not account for cost-of-living differences between rural and metropolitan locales, it is difficult to argue against its conclusion when considering that many conclude that rural poverty proves more chronic with fewer available resources and services.[27]

While the ERS has acknowledged that farm subsidies often make for a poor rural economic development policy, it supports the subsidies' continuance in locations where alternative uses for farmland are lacking and recognizes it as a means by which to boost local economies and retard population losses, among other things.[28] A similar argument could easily be made for the need to support effective funding for preservation of low-income rental housing in rural areas. In many rural counties, alternatives to Section 515 rental housing are woefully deficient. In these areas, preservation of this affordable housing stock becomes a significant means by which to retain rural populations and provide decent and affordable housing.[29]

For Fiscal Year (FY) 2005, the Senate Appropriations Committee proposed a decrease in funding for the Section 515 housing program with an additional $6 million for a new rental preservation grant.[30] The House's FY 2005 appropriations bill, although near FY 2004's figures, continues to show minimal funding for the Rural Rental Housing Program at $116 million.[31] Overall, the proposed House appropriation pales in comparison to the FY 1996 Section 515 appropriations, which totaled $150 billion. Since 1996, congressional funding for the Rural Rental Housing Program has failed to return to this level.[32] More striking is the fact that within the past eight years, Section 515 funding has averaged less than one-fourth of the level appropriated in FY 1994 and years prior.[33]

The Section 515 housing program must be funded at higher levels in order to preserve urgently needed rural rental housing.[34] Like the problems experienced in urban areas, long-term results of low-level funding of the Section 515 program will not only compromise the future availability of the Section 515 housing stock but will undermine rural areas as places to live, work and enjoy life. In this regard, adequate funding for Section 515 housing would further the national goals of rural development.[35] ■

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[26]42 U.S.C.A. § 1485 (West 2003) (loan authority for the Rural Rental Housing Program *also known as* the Section 515 program). The program is administered at the national level by RHS, an agency within the Rural Development division of the USDA. Daily operation of the program is administered by the USDA Rural Development staff in each state.

[27]Housing Assistance Council, *Information About . . . Rural Poverty and Income, at* http://www.ruralhome.org/pubs/infoshts/poverty.htm (last visited Oct. 15, 2004) (stating that the cost of living in nonmetropolitan areas is lower as are incomes and that rates of housing cost burdens are only somewhat lower in nonmetropolitan areas than metropolitan areas).

[28]Economic Research Service, USDA, *How Important Are Farm Payments to the Rural Economy?*, Agriculture Outlook, Oct. 2000, at 15, 17, *available at* www.ers.usda.gov/publications/agoutlook/oct2000/ao275f.pdf.

[29]Housing Assistance Council, *Information About . . . The Effect of Housing Development on a Rural Community's Economy*, *at* http://www.ruralhome.org/pubs/infoshts/econ.htm (last visted Oct. 15, 2004).

[30]Press Release, U.S. Senate Committee on Appropriations, Appropriations Committee Approves FY05 Agriculture, Rural Development, and Related Agencies Appropriations Bill, *available at* http://appropriations.senate.gov/releases/record.cfm?id=226115 (Sept. 14, 2004); Housing Assistance Council, *Senate Committee Passes FY 2005 Rural Housing Appropriations*, 33 HAC News, Sept. 15, 2004, at 19, *available at* http://www.ruralhome.org/pubs/hacnews/2004/0915.htm. Information about the new rental preservation grant will be reported by NHLP when more details are released.

[31]NHLP, *Housing Appropriations Committee Sets FY 2005 Rural Rental Housing Funding at Last Year's Level*, 34 Hous. L. Bull. 129, 149 (2004).

[32]Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 108 Stat. 3 (Jan. 23, 2004); Consolidated Appropriations Resolution, 2003, Pub. L. No.108-7, 117 Stat. 11 (Feb. 20, 2003); Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-76, 115 Stat. 704 (Nov. 28, 2001); Agriculture, Rural Development, Food and Drug Administration, and Related Agencies–Appropriations, Pub. L. No.106-387, 114 Stat. 1549 (2000); Appropriations, 2000–Agriculture, Rural Development, Food and Drug Administration, and Related Agencies, Pub. L. No.106-78, 113 Stat. 1135 (1999); Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998); Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-86, 111 Stat. 2079 (1997); Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-180, 110 Stat. 1569 (1996); Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-37, 109 Stat. 299 (1995).

[33]The Rural Rental Housing Program was funded at $540,107,000 for FY 1996. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-111, 107 Stat. 1046 (Oct. 21, 1993). This figure does not account for funding of the Rental Assistance program, a deep subsidy that reduces the rent (including utilities) to 30% of household income regardless of the amount of the household's income. 42 U.S.C.A. § 1490a(1)(c)) (West 2003); 7 C.F.R. 1930, Subpart C, Exh. E (2004).

[34]Preservation of Section 515 housing is governed by the Emergency Low Income Housing Preservation Act, which sets out a structured prepayment process intended to protect residents from displacement and limit the conversion of the housing stock to other uses 42 U.S.C.A. § 1472(c)) (West 2003) (amended in 1987 to address Congress' concern about the dwindling supply of low- and moderate-income rural rental housing in the face of increasing prepayments of Section 515 loans); 7 C.F.R. §§ 1965.201 *et seq*. (2003) (RHS regulations governing prepayment of Section 515 housing).

[35]*See* note 1, *supra,* and accompanying text.

IRS Finally Clarifies Good Cause Eviction Protection for Tax Credit Tenants

More than a decade following Congress' passage of amendments to improve tenant protections, the Internal Revenue Service (IRS) has finally issued a formal Revenue Ruling requiring all owners of Low-Income Housing Tax Credit (LIHTC) properties to place good cause eviction requirements in the property's recorded restrictions. IRS Rev. Rul. 2004-82, Q&A 5 (2004). The IRS thus joins a handful of state appellate courts that have held that the tax credit statute[1] requires good cause for all terminations of tenancy.[2] As it does with almost all other federal housing programs with the exception of vouchers, the good cause eviction requirement applies to all terminations of tenancy in the LIHTC program, whether during the term of the lease or at the end of the term.[3] Because the ruling requires state agency tax credit allocators to review their LIHTC inventory to determine the extent of noncompliance and require certain curative actions in order for owners to continue to claim the credits, advocates should become informed about their state's activities and simultaneously take action to protect tenants' rights during this process.[4]

The revenue ruling adopts the position that numerous state agencies and several state appellate courts have already determined—that the LIHTC statute itself requires that every LIHTC property have a recorded "extended low-income housing commitment" (ELIHC), which, among other things, prohibits evictions or terminations of tenancy other than for good cause.[5] This obligation exists throughout and for three years beyond the "extended use period," which begins when the building first becomes part of a tax-credit-qualified property, and ends on the later of the date specified by the state agency in the ELIHC (which varies from state to state), or thirty years.[6] The statute has contained this clarifying language since 1990.[7]

This means that, aside from its impact on the owner's ability to legally claim the tax credit, advocates and tenants can use the statute and the IRS interpretation immediately to defend evictions without cause. In addition, advocates can use the statute to immediately seek negotiations or judicial relief requiring the good cause protection to be expressed in the tenant's lease. The LIHTC statute itself not only requires the language to be included in the project's ELIHC, but also provides the tenant an express right to enforce the prohibition on no-cause evictions.[8]

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Under the ruling, by December 31, 2004, each state credit allocator must review all existing ELIHCs in its jurisdiction to determine whether they contain an explicit "no cause eviction protection."[9] If any ELIHC lacks such a provision, the state agency must make a determination that the ELIHC is invalid and the property is not in compliance, and presumably then notify the owner. Under the Ruling, absent a prompt cure to include such good cause language in the project's ELIHC, a noncompliance determination jeopardizes the owner's ability to claim the credit, which could affect prior, current and future tax years.[10] Hopefully this substantial financial risk

[1]26 U.S.C.A. § 42 (West 2002).

[2]Cimarron Village Townhomes, Ltd. v. Washington, No. C5-98-15671, 1999 Minn. App. LEXIS 890, 1999 WL 538110 (July 27, 1999) (LIHTC tenants may be evicted only for good cause), *on appeal after remand*, 659 N.W.2d 811 (Minn. App. 2003) (upholding finding that good cause existed); Bowling Green Manor Ltd. Partnership v. Kirk, No. 94CVG01059, 1995 Ohio App. LEXIS 2707, 1995 WL 386476 (Ohio App. June 30, 1995) (finding sufficient state action to require good cause for termination of LIHTC and Section 8 tenancy); Bowling Green Manor Ltd. Partnership v. LaChance, 1995 Ohio App. LEXIS 2767, 1995 WL 386496 (Ohio App., June 30, 1995) (same); Carter v. Maryland Mgmt. Co., 2003 WL 22533198, 2003 Md. LEXIS 740 (Md. Ct. App. Nov. 10, 2003) (good cause required for termination of LIHTC/Voucher tenancy, but good cause found). *See also* Marc Jolin, *Good Cause Eviction and the Low Income Housing Tax Credit*, 67 U. CHI. L. REV. 521 (2000). A number of state agencies have previously recognized the requirement.

[3]26 U.S.C.A. § 42 (h)(6)(E)(ii)(I) (West 2002) ("eviction or termination of tenancy (other than for good cause)").

[4]LIHTC projects local jurisdictions can be located through a HUD Web site at http://www.huduser.org/datasets/lihtc.html#data.

[5]26 U.S.C.A. § 42 (h)(6)(B)(i) (West 2002).

[6]Under the statute, the "extended use period" is fifteen years after the close of the compliance period, which is itself fifteen years, for a total of thirty years. 26 U.S.C.A. § 42 (h)(6)(D) (West 2002), which refers to the definition of "compliance period" in § 42(i)(1). The statute also requires the good cause protection to last for three years beyond the termination of the extended low-income housing commitment, which is usually the determinant of the extended use period, as it is often longer than thirty years. 26 U.S.C.A. § 42 (h)(6)(E)(ii) (West 2002).

[7]Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, § 11701(a)(7), 104 Stat. 1388-506 (1990).

[8]26 U.S.C.A. § 42 (h)(6)(B) (i) (establishing the rent limitations and good cause eviction protections) and (ii) (authorizing state court enforcement) (West 2002).

[9]Rev. Rul. 2004-82, at A-5.

[10]26 U.S.C.A. § 42 (h)(6)(J) (West 2002). The ruling allows owners one year from the date of any state agency determination of noncompliance to bring the property into compliance, and preserve the ability to claim the credit for tax year 2004, and all subsequent and prior years. Rev. Rul. 2004-82, at A-5, ¶ 2.

will encourage faster compliance by those owners whose ELIHCs are currently lacking the required language.

Because the method used by various state agencies to implement the statute's ELIHC requirements may vary, agencies are likely to proceed in different fashions to implement the Ruling for any noncomplying properties in their jurisdictions. Hopefully, the task of identifying noncomplying properties can be simplified by an agency's review of any form ELIHCs that it has used over the years for its LIHTC inventory. This would allow an agency to quickly determine any subsets of noncomplying properties.

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Those agencies whose ELIHCs are a single bilateral agreement between the agency and the owner, recorded as a binding restriction on the property, may have to execute a revised ELIHC with the owner, whereas those whose existing agreements expressly require an owner to comply with the LIHTC statute may be able to simply require the owner to execute and record a form unilateral amendment to the ELIHC or other restrictive covenant.

In all cases, it will also be important to obtain amendments to the leases used by project owners, as this is the primary reference point for tenants, managers and local eviction court judges for determining the applicable rules, certainly not the recorded ELIHC. Also important will be more detailed definition of the good cause protection, and what procedural protections, such as the length and content of any prior notice, will be required.[11]

Working with other advocates, NHLP has prepared simple form amendments to project ELIHCs and leases which could be readily adapted to the specific circumstances of any particular jurisdiction or property. Contact Jim Grow at NHLP for more information. ■

[11] *See* NHLP, HUD Housing Programs: Tenants' Rights ch. 14 (3d ed. 2004) (statutes, regulations and cases exploring these issues in other federal housing programs).

New Jersey Responds to Federal Voucher Funding Cuts

On September 9, 2004, the state of New Jersey adopted a "permanent" rental assistance program designed to address the crisis caused in the state by federal cuts to the Section 8 Housing Choice Voucher program. The state's Department of Community Affairs (DCA) will administer this new program, which is patterned after the voucher program. DCA already administers a temporary rental assistance program. The bill enacting the program also provided a $10 million appropriation, of which $3 million is set aside for seniors age sixty-five and over.[1]

Assistance will be available for those low-income families who meet the federal program requirements, but for lack of funding or other reasons are not holders of Section 8 rental assistance vouchers. Payments are to be terminated once the individual or household receives a Housing Choice voucher. The DCA is to draft regulations implementing the legislation.

The Fiscal Year 2005 budget proposed by the Department of Housing and Urban Development cuts an estimated 7,777 New Jersey families from the voucher program.[2] Exacerbating the cuts and lack of access to affordable housing is the fact that the rich, literally, keep getting richer and the poor keep getting poorer in New Jersey, as income disparities increase and the poor lose ground.[3]

In a March 2004 letter, New Jersey Governor James E. McGreevey had urged the President to reconsider cuts to affordable housing programs in the 2005 budget. The governor discussed the dire need in his state, citing as an example the city of Paterson, where "more than 12,900 people applied for one of the 50 available Section 8 vouchers."[4] ■

[1] 2004 N.J. Laws ch. 140 (2004).

[2] Center on Budget and Policy Priorities, Local Effects of Proposed Cuts in Federal Housing Assistance Detailed: New Jersey, *at* http://www.cbpp.org/states/3-17-04hous-nj.pdf (March, 2004).

[3] Economic Policy Institute & Center on Budget and Policy Priorities, Income Inequality Among Families in New Jersey Has Increased Since the 1970s, *at* http://www.cbpp.org/1-18-00sfp-nj.pdf (undated).

[4] Press Release, Governor James E. McGreevey, McGreevey Urges President Bush to Protect Affordable Housing Programs, *at* http://www.politicsnj.com/mcgreevey030804.htm (March 8, 2004).

HUD and DOJ Clarify Reasonable Accommodations

In an effort to clarify the obligations of housing providers and rights of tenants, the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ) in May published a memorandum regarding "reasonable accommodations" for people with disabilities pursuant to requirements of the Fair Housing Act.[1] The Joint Statement provides a fairly complete and accurate picture of what courts and administrative judges have decided on specific issues in the area, while refraining from exploring uncharted territory, so it provides a useful resource for advocates and housing providers alike. The Statement may be especially important for advocates since requesting reasonable accommodations can be particularly helpful in both enabling people with disabilities to have full access to housing and preventing evictions.[2]

The Fair Housing Act requires housing providers to make reasonable accommodations necessary to "afford a person with a disability the equal opportunity to use and enjoy a dwelling."[3] Those housing providers that receive federal financial assistance are also subject to Section 504 of the Rehabilitation Act of 1973,[4] which imposes a similar reasonable accommodation duty, but also potentially greater obligations. The Statement is limited to reasonable accommodation duties affecting rules, policies, practices and services (which are virtually identical under the Fair Housing Act and Section 504), not those involving structural modifications to units, which might be required under Section 504.[5]

Who Must Provide Reasonable Accommodations?

The reasonable accommodation requirements apply to most entities engaged in providing housing and residential lending, including owners, managers, homeowner and condominium associations, lenders, real estate agents and brokers, as well as state and local governments. The Fair Housing Act contains a few specific exceptions for some private, individual owners selling their own homes or owner-occupants of buildings with less than four units.[6]

Who Is Entitled to a Reasonable Accommodation?

The Fair Housing Act defines persons with disabilities (actually "handicaps") to include individuals with a physical or mental impairment that substantially limits one or more major life activities, who are regarded as having or who have a record of such an impairment.[7] The Fair Housing Act covers numerous disabilities, including many diseases and conditions, but specifically does not protect juvenile offenders or sex offenders.[8] Persons currently engaging in the illegal use of controlled substances are not protected either, in contrast to those recovering from substance abuse, who can request reasonable accommodations.[9]

Those whose tenancy would constitute a "direct threat" to the health and safety of other individuals or result in substantial physical damage to the property of others are not entitled to a reasonable accommodation, unless a reasonable accommodation would substantially eliminate the threat.[10] Significantly, the Statement helpfully specifies that a "direct threat" must rely on objective evidence and cannot be based on fear, speculation or stereotype.[11] The Statement specifically states that housing providers must "take

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[1]Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Accommodations Under the Fair Housing Act* (May, 17, 2004) [hereinafter "Joint Statement"]. The Fair Housing Act is codified at 42 U.S.C.A. §§ 3601-3619 (West, WESTLAW through P.L. 108-303 (excluding P.L. 108-293) approved 09-08-04). The "reasonable accommodation" duty is set forth at 42 U.S.C.A. § 3604(f)(3)(B).

[2]For a more thorough discussion on using reasonable accommodations to prevent evictions, *see* Fair Housing Information Sheet #4, *at* http://www.bazelon.org/issues/housing/infosheets/fhinfosheet4.html (last visited June 9, 2004).

[3]42 U.S.C.A. § 3604(f)(3)(B) (West, WESTLAW through P.L. 108-303 (excluding P.L. 108-293) approved 09-08-04); 24 C.F.R. § 100.204 (2003).

[4]29 U.S.C.A. § 794 (West, WESTLAW through P.L. 108-303 (excluding P.L. 108-293) approved 09-08-04).

[5]For more on Section 504, *see* U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, Notice PIH 2003-31 (HA) (www.hud.gov/offices/fheo/disabilities/PIH03-21.pdf) and "Section 504: Frequently Asked Questions," (www.hud.gov/offices/fheo/disabilities/ sect504faq.cfm#anchor272118).

[6]Joint Statement, Q&A2, at 3.

[7]Joint Statement, Q&A 3, at 3-4 (including definitions of "physical or mental impairment," "substantially limits," and "major life activity"); 42 U.S.C.A. § 3602(h) (West, WESTLAW through P.L. 108-303 (excluding P.L. 108-293) approved 09-08-04). The Statement's listing of "major life activities" of central importance to daily life, such as seeing, hearing, walking, breathing, performing manual tasks, self-care, learning and speaking, is not exhaustive.

[8]Joint Statement, Q&A 4, at 4. The Joint Statement defines the term "physical or mental impairment" to include, but not be limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, HIV infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

[9]*Id*.

[10]*Id*.

[11]*Id*. Q&A 5, at 4-5; 42 U.S.C.A. § 3604(f)(9) (West, WESTLAW through P.L. 108-303 (excluding P.L. 108-293) approved 09-08-04).

into account intervening treatment or medication that has eliminated a past direct threat," including a history of overt acts.[12] The precise contours of the direct threat exception and the reasonable accommodation duty will undoubtedly remain the subject of case-by-case negotiation,[13] since the Statement also requires the requester to provide satisfactory assurances that the requested accommodation will in fact be implemented to address the threat.

How and When Are Reasonable Accommodation Requests to Be Made?

Persons with disabilities may make a request for an accommodation at any time, and it is not necessary that the request be made in any particular manner. They need only ask the housing provider for an exception, change or adjustment to a rule, policy, practice or service because of their disability.[14] The Statement recites that they should explain the requested accommodation, and need only explain the relationship between the requested accommodation and the disability if the need is not readily apparent or already known to the provider. The persons with the disability, or someone acting on their behalf, must merely bring the request to the housing provider's attention, in a manner that a reasonable person would understand as a request for an exception or change because of a disability, with no use of specific terminology required. This can be done either in writing or orally, although the Statement naturally recommends written requests. Although a provider may adopt forms or procedures for reasonable accommodation requests, the tenant is under no obligation to follow them.[15] The Statement is clear that the provider's duty to evaluate a reasonable accommodation request is triggered by a request from a qualified individual.

What Is a Reasonable Accommodation and When Is One Required?

Although a request is required, precision about the precise accommodation is not. Cases have imposed a high standard upon the housing provider to "identify and implement a reasonable accommodation, even when one is not proposed by the tenant herself."[16] Nonetheless, demonstrating a close nexus between the requested accommodation and the individual's disability increases the chances for successful resolution of reasonable accommodation requests, especially in court.[17] The Statement offers examples of appropriate relationships. For example, a housing provider must accommodate a deaf person by allowing an assistive hearing dog in the apartment, despite a "no pets" policy, since the requested accommodation is directly related to the individual's disability. Similarly, a tenant who fears leaving her apartment due to a mental disability may not be required to pay her rent in person, even if that is the housing provider's general policy.[18]

Persons with disabilities may make a request for an accommodation at any time, and it is not necessary that the request be made in any particular manner.

Providers can deny requests if the person seeking the accommodation lacks a qualifying disability or if the requested accommodation is not sufficiently related to the disability. In addition, requests that impose undue financial and administrative burdens on the housing provider or fundamentally alter the nature of the provider's operations are unreasonable and need not be honored.[19] The Statement provides little clarification of "undue burden," calling for case-by-case analysis involving several factors.[20] Some cost alone is insufficient to justify denial of a request. Providers cannot just say "no"—even the making or rejection of a request for an unreasonable accommodation does not end the matter, as the Statement indicates that the parties should work together through an interactive process to seek an alternative reasonable accommodation.[21] If agreement concerning an alternative reasonable accommodation still proves unreachable, the tenant may file a complaint.[22]

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[12]Joint Statement, Q&A 5, at 5.

[13]*See, e.g.*, Bazelon Center for Mental Health,.Fair Housing Information Sheet #4, *at* http://www.bazelon.org/issues/housing/infosheets/fhinfosheet4.html (last visited June 9, 2004).

[14]Joint Statement, Q&A 12, at 10.

[15]*Id*., Q&A 12 and 13, at 10-11.

[16]Bazelon Center for Mental Health Law, Fair Housing Information Sheet #4, *at* http://www.bazelon.org/issues/housing/infosheets/fhinfosheet4.html (last visited June 9, 2004) (referencing Roe v. Hous. Auth., 909 F. Supp. 814 (D.Colo. 1995) and Roe v. Sugar River Mills Assocs., 820 F.Supp. 636 (D.N.H. 1993)).

[17]Joint Statement, Q&A 6, at 6. S*ee also* Fair Housing Information Sheet #4, *at* http://www.bazelon.org/issues/housing/infosheets/fhinfosheet4.html (last visited June 9, 2004).

[18]Joint Statement, Q&A 6, at 6.

[19]*Id*., Q&A 7, at 7.

[20]*Id*. at 7. *E.g.*, Citywide Assocs v. Penfield, 409 Mass. Super. Ct. 140, 564 N.E.2d 1003 (Mass. 1991) ($520 not an "undue burden"). The Statement describes a request by a mobility-impaired tenant for transportation and assistance in grocery shopping when the provider has never offered such services as an example of a "fundamental alteration" that is refusable. Joint Statement, Q&A 8, at 8.

[21]*Id*., Q&A 7, at 7. Providers may also offer alternative accommodations to ones that are reasonable, but requesters need not accept them.

[22]*Id*., Q&A 10, at 9.

May Housing Providers Charge Fees or Deposits for Granting Requests for a Reasonable Accommodation?

The Statement reiterates that it is illegal to charge persons with disabilities a fee for providing reasonable accommodations.[23] However, if the reasonable accommodation leads to property damage to the unit or common area, the housing provider may charge the tenant for the cost of repairing the damage. Permissible charges would include charges for an assistive pet that causes damage, or for use of a motorized scooter that scrapes the walls.[24]

How Quickly Must Providers Respond and May They Request Additional Information?

The Statement specifies a general rule that reasonable accommodation requests warrant a prompt response and an undue delay may be deemed a failure to provide a reasonable accommodation,[25] but no other details on the timeliness of responses are provided.

One confusing area has been what information concerning disabilities may legally be requested by housing providers. Current or potential residents are not required to disclose if they have a disability or the severity of a known disability as long as they have not requested an accommodation.[26] Generally, housing providers may not inquire about the disabilities of applicants or their households or associates, including their nature and severity. However, a housing provider may inquire to determine if an applicant: (1) can meet the requirements of tenancy; (2) is a current illegal abuser or addict of a controlled substance; or (3) qualifies for a dwelling legally available only to or on a priority basis to persons with a disability or to persons with a particular type of disability, so long as the provider asks all applicants these questions.

When a tenant or applicant with a qualifying disability requests a reasonable accommodation, a housing provider may request information to determine if a reasonable accommodation is necessary, but may not request such information if the disability is obvious or known and the need for the requested accommodation is readily apparent or known.[27] If only the need for the accommodation is not apparent or known, the inquiry may also seek information necessary to evaluate the disability-related need for the accommodation.[28] Generally, information concerning the extent of the actual disability should be limited to verifying the existence of a qualifying condition and establishing the nexus to the requested accommodation.[29] This information can often be provided by the requester, but third-party verification can also come from both medical professionals (not just doctors) and non-medical persons or agencies in a position to know about the disability. The Statement indicates that generally verification through medical records is unnecessary.[30]

Conclusion

The HUD-DOJ Joint Statement provides a helpful summary of the law concerning reasonable accommodation. By incorporating existing rules and most cases and administrative rulings in the area, the Statement provides more guidance from a relatively vague statute than is generally available to advocates and providers alike. The Statement should significantly advance Congress' intent in adopting the reasonable accommodation duty. ■

[23] *Id*., Q&A 11, at 9.

[24] *Id*. at 9.

[25] *Id*., Q&A 15, at 11.

[26] *Id*., Q&A 16 at 11-12.

[27] *Id*. at 12.

[28] *Id*., Q&A 18, at 13-14.

[29] *Id*. at 13.

[30] *Id*. at 14.

Proposal to Limit Public Housing Authority Voter Participation Programs Is Criticized

Hidden in the Senate HUD appropriations bill for Fiscal Year 2005 is a provision which, if enacted, would prohibit public housing authorities (PHAs) from using any funds or revenues provided under or derived from this Act for any activities (including voter registration, voter identification, or get-out-the vote activities, campaign activities to promote a party or candidate, and communication that promotes or opposes a candidate) related to any Federal, State, or local election.[1]

[1] S. 2825, § 224 (Sept 21, 2004) (proposing to amend Section 9(g) of the United States Housing Act of 1937, 42 U.S.C. § 1437(g)). Section 224 is available at http://thomas.loc.gov/cgi_bin/query/C?c108:./temp/~c108SOuCP1 (make sure to select the "printer friendly display" option).

No justification accompanied this proposal. Several letters have circulated objecting to the proposal.[2] These letters make several key arguments against the proposal, such as:

- The bill unfairly singles out PHAs and low-income families. In contrast, the Department of Defense works to ensure that its employees are registered and to facilitate their participation in the election process.
- The Hatch Act[3] already prohibits public entities such as PHAs from engaging in partisan activities.
- The proposal runs counter to the activities that Congress encourages and sometimes mandates PHAs to engage in—such as housing counseling, job training, literacy and computer instruction. These are all activities that promote self-sufficiency and participatory citizenship.
- Voter registration has long been recognized as a legitimate and valuable public service.[4]
- These letters also raise questions regarding the breadth of the proposal. Would it prohibit establishing polling places in public housing facilities, including those for the elderly and disabled? Would it prohibit PHAs from inviting or responding to requests from public officials for tours and town hall meetings with residents and staff? Would independent get-out-the-vote organizations be banned from PHA property?

Public housing residents and housing advocates should meet with their PHAs and local non-partisan groups such as the League of Women Voters to discuss this proposal and to raise objections. ■

[2]Letter from Timothy Kaiser, Executive Director of PHADA, to Senator Christopher Bond (Oct. 6, 2004) (on file at NHLP); Letter from Senator Maria Cantwell to Senators Christopher Bond and Barbara Mikulski (Oct. 21, 2004) (on file at NHLP); Letter from Sheila Crowley, NLIHC, to Senator Christopher Bond (Oct. 7, 2004) (on file at NHLP).

[3]5 U.S.C.A. §§ 1501-1508 (West WESTLAW through P.L. 108-331 (excluding P.L. 108-311, 108-324, 108-326) approved Oct. 16, 2004); 18 U.S.C.A. section 593 (West WESTLAW through P.L. 108-331 (excluding P.L. 108-311, 108-324, 108-326) approved Oct. 16, 2004). No problems or abuses with respect to enforcement of the Hatch Act have been identified.

[4]None of the letters make the comparison but it is ironic to note the time and money expended by the United States in Afghanistan on voter registration, get-out-the-vote efforts and voter identification. Press Release, United States Consulate, Chennai-India, Elections Take Center Stage in Afghanistan Outreach Initiative US Funded Theater Project Draws 430,000, Sept. 8, 2004 (USAID funds theater project to raise the importance of elections and voting), *available at* http://chennai.usconsulate.gov/wwwhpr040909.html.

Proposed Cuts to Public Housing Remain Unresolved

The 2005 Federal Fiscal Year began October 1, 2004, and there is as yet no Department of Housing and Urban Development (HUD) appropriation for FY 2005. HUD is now operating under a continuing resolution which means that the provisions of the FY 2004 appropriation remain in place and that tentative assumptions are made that the funding levels of FY 2004 will continue until there is an FY 2005 appropriation. Because this is an election year and because the House and Senate appropriation bills are so far apart, it is expected that there will not be a HUD appropriation act until January 2005.

In general, the Senate Bill—S. 2825—provides sufficient funding for the public housing capital and operating subsidy fund.[1] However, the House Bill, H.R. 5041, provided for an across-the-board cut in the capital and operating subsidy fund.[2] It is uncertain how the discrepancy in the proposed funding for public housing will be resolved but full funding for public housing remains at risk. Therefore, public housing residents, Resident Advisory Boards, Public Housing Authorities (PHAs), and housing advocates should continue to advocate for full funding of the operating subsidy fund and the capital fund.

Senate Appropriations Committee

On September 21, 2004, the Senate Appropriations Committee recommended an appropriation of $2.7 billion for the public housing capital fund, which is $25.9 million above the budget request and $3.747 million above what was provided for FY 2004. Up to $55 million is for supportive services for residents of public housing, up to $15 million of this funding is to establish and operate computer centers in and around public housing, and up to $50 million is available for emergency capital needs (of which $15 million may be used for the voucher program to calculate FMRs and assess housing conditions with regard to the use of Section 8 assistance). The committee also recommended appropriating $2.61 billion for public housing operating subsidies. This amount is substantially

[1]S. 2825, Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2005, *available at* http://thomas.loc.gov/cgi_bin/query; S. Rpt. 108_353, Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Bill, 2005, *available at* http://thomas.loc.gov/cgi_bin/cpquery/R?cp108:FLD010:@1(sr353).

[2]H.R. Rpt. 108-674, Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Bill, 2005, *available at* http://thomas.loc.gov/cgi_bin/cpquery/R?cp108:FLD010:@1(hr674).

below the FY 2004 funding level to reflect a requirement that PHAs convert to a calendar-year accounting system. Such a switch will result in a one-time "savings" of a little more than $1 billion because PHAs will be funded only on a calendar-year basis. Generally, all PHAs receive funding for a full twelve months. Thus PHAs with a January 1 fiscal year will receive funds for twelve months, those with an April 1 fiscal year will receive funds for nine months, those with a July 1 fiscal year will receive funds for six months and those with an October 1 fiscal year will receive funds for only three months. There is a risk in creating this "savings" for one year because the HUD budget for FY 2006 will have to be increased or funds transferred from other accounts to allow for a full year of funding for all PHAs. The Senate Appropriations Committee recognized this risk and noted that it "expects the administration to include in the budget request for fiscal year 2006 the necessary funds for all PHA operating costs, as required under the performance funding system or any subsequent funding system which is in place at the time of the budget submission." Such admonitions are important but the budget issue will remain for FY 2006.

House Appropriations Committee

At the end of July 2004, the House Appropriations Committee on the FY 2005 HUD VA Appropriations completed marking up its bill for HUD, the Veterans Administration and Independent Agencies, which provided that there would be cuts in the public housing operating subsidies and the capital fund. In particular, the committee proposed $3.425 billion for the operating subsidy fund and $2.58 billion for the capital fund. This level of funding represents a 4.3% reduction from the funding levels provided for FY 2004.[3] Table 1 shows the amount of funding provided for the operating subsidy fund and the capital fund for FY 2004 and what the House committee proposes for FY 2005. In addition to the funding cuts, it is clear that the FY 2004 and proposed FY 2005 funding levels for the operating subsidy fund and capital fund are far less than what is needed. The Council of Large Public Housing Authorities (CLPHA) states that the true need for operating subsidies is $4.017 billion and for the capital fund is $3.5 billion.[4]

Tables 1 and 2 compare the House proposal for FY 2005 with the appropriations for FY 2004 and the need as identified by CLPHA in a recent letter to Senators Christopher Bond (R-MO) and Barbara Mikulski (D-MD).

TABLE 1: Public Housing Funding, FY 2005
House Proposal vs. FY 2004 Appropriation

	FY 2005 House Proposal (in billions)	FY 2004 Appropriation (in billions)	Shortfall (in millions)
Operating Subsidy Fund	$ 3.425	$ 3.579	$ -1.54
Capital Fund	2.580	2.695	-1.15
Total	6.005	6.274	-2.69

TABLE 2: Public Housing Funding, FY 2005
House Proposal vs. CLPHA Actual Need Estimate

	FY 2005 House Proposal (in billions)	CLPHA Actual Need Estimate (in billions)	Shortfall (in millions)
Operating Subsidy Fund	$ 3.425	$ 4.017	$ -592
Capital Fund	2.580	3.500	-920
Total	6.005	7.517	-1512

For the operating subsidy fund, the House proposal is approximately 4.3% ($154 million) less than what was funded in FY 2004 and funds only 85% of the need identified by CLPHA.

For the capital fund, the House proposal is approximately 4.3% ($115 million) less than what was funded in FY 2004 and funds only 74% of the CLPHA identified need.

Local Impact of the Proposed House Cuts

Advocates can best convey the possible impact of the cuts proposed by the House by translating them into examples based on real-life scenarios. One strategy is to draw from data provided in PHA plans to show how a decrease in capital funds or operating subsidies would affect particular properties. A PHA's plan should provide information on the amount of operating subsidies and capital funds that the PHA had available the prior year, and how much money it is planning to spend for specific capital and management improvements. Advocates may even be able to obtain information not in the plan by requesting it

[3] *Id*. The recommendation of $2.58 billion for the capital fund is a decrease of $116,253,000 below the FY 2004 level of $2,696,100,000 and $94.1 million below the budget request. The operating subsidy request of $3.425 billion is a decrease of $153,760,000 below the FY 2004 level $3,578,760,000 and $148 million below the budget request.

[4] Letter from Sunia Zaterman, Ex-Director CLPHA, to Senators Christopher Bond and Barbara Mikulski (Aug. 16, 2004) (on file with NHLP); the National Association of Housing and Redevelopment Officials (NAHRO) also recommends $3.5 billion for the capital fund and recommends $3.8 billion for the operating subsidy. *See* NAHRO's 2004 Legislative Agenda (Feb. 23, 2004) *available at* http://www.nahro.org/legislative/index.cfm.

from the PHA. Based on that information, advocates can draw logical inferences about the impact of the cuts. For example, if operating subsidies are underfunded, a PHA might have to dip into the capital fund.

For example, the FY 2004 PHA plan for the Housing Authority of the City and County of Denver[5] reports that the planned operating subsidies for the agency are $7,500,000 and the FY 2003 planned capital fund and replacement housing factor is $6,332,241.[6] Approximately 4.3% of the capital fund figure is $272,286 and 4.3% of $7,500,000 is $322,500. The total of these two figures is $594.786. If the Denver Housing Authority's budget were reduced by $594,786, it would have to make some severe cuts in operations and/or programs and plans for capital improvements. Of course, it is impossible to determine exactly where these cuts would be made. But, by looking at the capital fund application attached to the housing authority's plan, it is possible more specifically to quantify the effect of such a cut by applying the 4.3% cut ($272,286) of the capital fund to the projected capital fund expenditures in June 2003 for the FY 2003 Grant.[7] For example, the PHA and Resident Advisory Board (RAB)[8] could be forced to decide that one-half of the plumbing upgrades for the 250 units at Welsh Manor would not be completed (-$150,000) and that Management Improvement Program (MIP) soft costs which totaled $639,869 would have to be reduced by the remaining $122,286 which if applied evenly to all of the listed activities could mean cuts of 19%, the dollar amounts for which are listed in the parenthesis, for items such as security (-$83,575), self sufficiency (-$9,500), Section 3 outreach (-$2,850), employment and training (-$8,550), community service (-$10,210) etc. Obviously, these types of cuts would severely undercut and forestall the capital plans for the Denver Housing Authority.

A PHA annual plan typically does not provide any detail regarding how the operating fund will be spent. Therefore, it is only possible to project the effect of the proposed cut to the operating subsidies by assuming that the full amount of the lost revenue for operating subsidies impacts the capital fund. If the proposed cut to the operating subsidy fund were also applied to the capital fund, additional cuts would have to be made. If the Denver Housing Authority had to cut an additional $322,500 from its capital fund, the housing authority, Denver Board of Commissioners and RAB might be forced to decide that, in addition to the cuts mentioned above, the flooring and exterior finish could not be undertaken at the 131-unit North Lincoln family development ($275,000) and in addition the salaries of the modernization staff would have to be cut, staff terminated or some of the network upgrades would also have to be delayed, perhaps indefinitely.[9]

Advocates are encouraged to demonstrate to residents of public housing, the neighbors of public housing and the public at large the full impact of any proposed cuts in funding.

Conclusion

Advocates are encouraged to demonstrate to residents of public housing, the neighbors of public housing and the public at large the full impact of any proposed cuts in funding. In addition, continuing efforts should be made to demonstrate that public housing is currently and has in the past been underfunded. Any effort to maintain funding for public housing for FY 2005 should recognize the fact that the voucher program should also be fully funded. Currently the House Appropriations Committee justifies the cuts in the public housing program to maintain adequate funding for the voucher program. These two programs primarily serve families with similar characteristics. Full funding for both programs should be vigorously pursued. It is counterproductive to cut one program to fund the other. ■

[5]Housing Authority of the City and County of Denver, PHA Plan 2004, page 25, *available at* http://www.hud.gov/offices/pih/pha/approved/pdf/04/co001v01.pdf.

[6]The financial resources page of the Housing Authority of the City and County of Denver PHA Plan 2004 states that the funds available for the operating fund is $7,500,000 and the funds available for the capital fund is $6,800,000. *Id* at page 25. However, the back-up sheets for FY 2003 allocate only $6,332,241 of capital funds. *Id.* at Annual Statement/Performance and Evaluation Report, Capital Fund Program and Capital Fund Program Replacement Housing Factor (CFP/CFPRHF), Part II: Supporting Pages, Federal FY of Grant 2003. We have used the lower figure to determine the overall operating and capital funding for the Denver Housing Authority, which is $13,832,241.

[7]Housing Authority of the City and County of Denver, PHA Plan 2004, Annual Statement/Performance and Evaluation Report, Capital Fund Program and Capital Fund Program Replacement Housing Factor (CFP/CFPRHF), Part II: Supporting Pages, Federal FY of Grant 2003, page 3 of 3.

[8]Three of the RAB members are residents of Walsh Manor and one is a resident of North Lincoln. *Id*. at Attachment 5. Considering and agreeing to cuts such as described herein would be very difficult for these RAB members.

[9]To show an even more dramatic impact, a similar analysis could be prepared based on assumptions by CLPHA and NAHRO that PHAs' operating subsidies are underfunded by 15% and capital funds are underfunded by 26% because Congress has consistently failed to appropriate adequate amounts.

Recent Cases

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

Housing Choice Voucher Program; Preemption

Seminara Pelham, LLC, v. Formisano, 2004 N.Y. Slip Op. 24369 (N.Y. City Court Sept. 29, 2004). Petitioner landlord initiated a nonpayment of rent proceeding against Respondent tenant. The September 29 decision states that Respondent was renting a unit from Petitioner through the "Section 8 program," apparently referring to the voucher program, but this is not completely clear. Petitioner decided to end its participation in the program. When Respondent continued to pay only the "non-Section 8 portion of her rent," Petitioner initiated a nonpayment proceeding. On cross-motions for summary judgment, the City Court for the City of New Rochelle concluded that the 1996 amendment to Section 8 of the United States Housing Act, 42 U.S.C. § 1437f, preempted the Emergency Tenant Protection Act of 1974 (apparently a state law), which would otherwise have prevented Petitioner from ending its participation in the Section 8 program. The court concluded that Petitioner was entitled to possession.

Multifamily Housing Property Disposition Act

Dean v. Martinez, 2004 WL 2115605 (D. Md. Sept. 21, 2004). Plaintiff residents filed suit to challenge a plan by the Department of Housing and Urban Development (HUD) and local entities to demolish a federally assisted multifamily housing development and replace it with a mix of market-rate and "affordable" units. Plaintiffs asserted that the plan violated the Multifamily Housing Property Disposition Act, 12 U.S.C. § 1701z-11, Fair Housing Act, 42 U.S.C. §§ 3601, 3608(e)(5), and the Uniform Relocation Act, 42 U.S.C. §§ 4601, 4625. On parties' motions for summary judgment, the district court, *inter alia*, granted partial summary judgment to Plaintiffs on their claim that HUD failed adequately to consider factors specified in the Disposition Act and remanded the matter to HUD for further consideration.

Project-Based Section 8 Programs—Opt-Outs

Baker v. Property Investors of Connecticut, 2004 WL 2251848 (D. Conn. Sept. 21, 2004). Plaintiff residents of a project-based Section 8 property filed suit challenging the termination of Section 8 assistance at the property. The district court granted Defendant HUD's motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), Federal Rules of Civil Procedure. In particular, the court concluded that the availability of enhanced vouchers and "the absence of an allegation that HUD denied or diminished Plaintiffs' rights under the section 8 program in any tangible or substantial way" meant that Plaintiffs had not adequately alleged concrete harm sufficient on which to base their claims against HUD. ■

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 September of 2004. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

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

[1]http://www.westlaw.com.

[2]http://www.lexis.com.

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

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

[2]*At* http://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* http://www.rdinit.usda.gov/regs.

HUD Federal Register Proposed Rule

69 Fed. Reg. 56,118 (Sept. 17, 2004)
Disposition of HUD-Acquired Single Family Property; Disciplinary Actions Against HUD-Qualified Real Estate Brokers

Summary: The purpose of this proposed rule is to address real estate broker participation in predatory lending practices targeted at Federal Housing Administration (FHA) borrowers. This rule includes measures to prevent property "flipping," inflated appraisals, falsified gift letters, and fraudulent underwriting. This rule is similar to existing removal rules for FHA appraisers, consultants, and nonprofit organizations, and provides HUD a more expeditious disciplinary procedure for real estate brokers than the suspension and debarment procedures that would otherwise be applicable.

Comment Due Date: November 16, 2004.

HUD Federal Register Final Rules

69 Fed. Reg. 53,558 (Sept. 1, 2004)
Retention of Excess Income in the Section 236 Program

Summary: This final rule amends HUD's regulations governing the Section 236 program of the Federal Housing Administration to establish the terms and procedures by which owners of multifamily housing projects that receive Section 236 rental assistance may retain some or all of their excess rental income. This final rule follows publication of an August 12, 2002, proposed rule, takes into consideration the public comments received in response to the proposed rule, and makes certain changes in response to the public comments.

Effective Date: October 1, 2004.

69 Fed. Reg. 53,978 (Sept. 3, 2004)
Suspension, Debarment, Limited Denial of Participation

Summary: On November 26, 2003, HUD published a final rule adopting the Interagency Suspension and Debarment Committee's 2003 enactment of a Nonprocurement Common Rule for Suspensions and Debarments (NCR). HUD also published agency-specific requirements that, along with the NCR, would best serve HUD's programs. In HUD's agency-specific rule, HUD referenced a definition for the term ultimate beneficiaries, but failed to include the definition in the regulation. This rule corrects this omission by adding the definition of ultimate beneficiaries.

Effective Date: October 4, 2004.

HUD Federal Register Notices

69 Fed. Reg. 57,078 (Sept. 23, 2004)
Notice of Submission of Proposed Information Collection to OMB; Participant Tracking and Data Management for the Moving to Opportunity Demonstration Program

Summary: HUD has submitted an information collection proposal to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. HUD is soliciting public comments on the subject proposal. The proposal is for the clearance of two data collections vital to continued participant tracking and data management for the Moving to Opportunity (MTO) demonstration program. MTO is an experimental research demonstration designed to learn whether moving from a high-poverty neighborhood to a low-poverty neighborhood significantly improves the social and economic prospects of poor families. This data collection is necessary to measure impacts approximately five years after families were randomly assigned to the two treatment groups and the control group.

Comments Due Date: October 25, 2004.

HUD Housing Notice

Notice H 2004-18 (September 2, 2004)
Disaster Recovery Efforts by Multifamily Housing After a Presidentially-Declared Disaster

Summary: This notice is intended to provide background and up-to-date guidance on HUD's policy and procedure regarding disaster recovery efforts by Multifamily Housing after a Presidentially Declared disaster. This notice supersedes all prior directives on this subject. Until rescinded or amended this will be Multifamily Housing's procedure for disaster recovery. However, HUD will tailor future program guidance as dictated by any new Presidential Declaration.

Expires: September 30, 2005.

HUD PIH Notice

Notice PIH 2004-18 (HA) (September 17, 2004)
Verification of Social Security and Supplemental Security Income Benefits

Summary: The purpose of this notice is to inform public housing agencies of the required procedures for verifying Social Security benefits of applicants, participants and household members during mandatory examination of household income.

Expires: September 30, 2005. ■

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