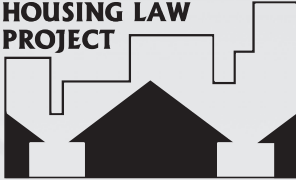


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advancing housing justice

Housing Law Bulletin

Volume 40 • February 2010

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HUD and States Protect Tenants in Foreclosed Properties —see page 43

Neighborhood Stabilization Program 2 Grants

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ADVANCING HOUSING JUSTICE

A Decent, Safe, & Affordable Home for All

Housing Justice Network National Meeting

SUNDAY & MONDAY, MARCH 7 & 8 8:30 am – 5:00 pm

The National Meeting of the Housing Justice Network is a dynamic two-day event that brings together low-income housing allies—public interest attorneys, affordable housing advocates, policy analysts, organizers, and residents—from across the nation. Attendees participate in sessions on current developments in the federal housing programs, discuss strategies for representing the interests of low-income residents, and exchange ideas on litigating, advocating, and organizing. The meeting will feature high-profile keynote speakers and general sessions will provide discussions on foreclosure issues and the new models which HUD envisions within its federally assisted housing programs.

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SATURDAY, MARCH 6 9:00 am – 5:00 pm

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See pages 69-70 for more information and a registration form.

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Cover: Mercy Housing's East Leland Court in Pittsburg, California, is a 63-unit family property for low- and very low-income families.

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HUD, States Take Additional Steps to Protect Tenants in Foreclosed Properties*

An article in the October issue of the *Bulletin* described how agencies have begun to implement the Protecting Tenants at Foreclosure Act (PTFA),¹ the new federal law giving tenants at least 90 days to move after foreclosure.² Since then, the Department of Housing and Urban Development (HUD) has issued a new Notice instructing public housing agencies (PHAs) on how to implement the PTFA. Additionally, the Office of the Comptroller of the Currency (OCC) issued a bulletin outlining new procedures for its examiners to use in grading banks on PTFA compliance. Further, a number of states, including New York and Illinois, have enacted laws to give additional protections to tenants and promulgated court rules to ensure compliance with the PTFA in their judicial foreclosure procedures. This article will describe these developments affecting the rights of tenants in foreclosure.

HUD Notice PIH 2009-52

On December 15, 2009, HUD issued a Notice³ implementing the tenant protection provisions in the Neighborhood Stabilization Program (NSP) of the American Recovery and Reinvestment Act⁴ and Section 703 of the PTFA.⁵ Like a previous Notice issued in June,⁶ the new Notice informs PHAs that purchasers of foreclosed properties with existing Section 8 tenants take title subject to both the lease between the owner and the tenant and the Housing Assistance Payments (HAP) contract between the owner and the PHA. Further, these purchasers cannot evict tenants except for good cause.⁷ The Notice emphasizes that the HAP contract must be interpreted in accordance with the new laws and that the contract incorporates by reference the new federal laws and the HUD implementing notices.⁸

HUD states in the Notice that it will revise the Section 8 lease addendum and HAP contract to reflect the change

*The author of the Illinois section of this article is Samantha Tuttle, a housing staff attorney at the Sargent Shriver National Center on Poverty Law.

¹Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, tit. VII, §§ 701-704, 123 Stat. 1632, 1660-62 (2009).

²NHLP, *Agencies Begin Implementing the Protecting Tenants at Foreclosure Act*, 39 Hous. L. BULL. 249, 249-252 (Oct. 2009).

³Protecting Tenants at Foreclosure Act – Guidance on New Tenant Protections, PIH 2009-52 (Dec. 15, 2009).

⁴Pub. L. No. 111-5, tit. XII, 123 Stat. 115, 218-219 (2009).

⁵Pub. L. No. 111-22, tit. VII, §§ 701-704, 123 Stat. 1632, 1662. (2009).

⁶Protecting Tenants at Foreclosure: Notice of Responsibility Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property, 74 Fed. Reg. 30,106 (June 24, 2009).

⁷PIH 2009-52, at 2.

⁸*Id.* at 3.

in law.⁹ Once these forms are issued, PHAs must use them for new lease-ups, but they are not required to revise existing contracts that already have been executed.¹⁰

More significantly, PIH 2009-52 imposes new responsibilities on PHAs to implement the tenant protection provisions in the PTFA and NSP. PIH 2009-52 instructs PHAs to be proactive to protect the rights of voucher holders during foreclosure. For every rental unit that receives voucher assistance, PHAs must give information about the tenant protection provisions of the PTFA and NSP to all participants.¹¹ Participants include: (1) existing landlords; (2) heads of households that currently receive voucher assistance; (3) voucher applicants who have been issued vouchers and are searching for new homes; and (4) prospective voucher landlords.¹² The HUD Notice encourages PHAs to use sample notices prepared by the National Low Income Housing Coalition (NLIHC) and the National Housing Law Project (NHLPL).¹³ PHAs may also notify local courts and sheriff's offices about these new tenant protection laws.¹⁴

The Notice requires that once a PHA learns that a property receiving voucher assistance is in foreclosure, it must take further steps to ensure that tenants' rights under the PTFA are enforced. These steps include:

- Making all reasonable efforts to determine the status and ownership of the property. The Notice encourages PHAs to review legal notices in newspapers or local government websites to monitor whether assisted properties are foreclosed upon.
- Continuing to pay the original owner under the existing HAP contract until ownership is legally transferred.
- Attempting to obtain from the successor in interest a written acknowledgment of assignment of the HAP contract.¹⁵
- Informing the tenant to pay rent in accordance with the lease and to pay rent into escrow if the successor in interest refuses to accept rent.¹⁶ The PHA must also inform voucher holders that failure to pay rent may

constitute an independent ground for eviction. While nonpayment of rent may be an adequate ground for a successor in interest to evict, this language should not be interpreted to allow PHAs to terminate the voucher holder's subsidy in a situation where the successor in interest refuses to take the voucher holder's rent and the nonpayment of rent is not the tenant's fault.¹⁷

- Informing the family if the PHA is unable to make HAP payments to the successor in interest because the successor in interest refuses to accept payments, the property fails Housing Quality Standards inspections or the PHA cannot identify the successor in interest. The PHA must also give the family a referral to legal services to ensure that the family's rights are protected.¹⁸

The Notice also requires PHAs to determine whether a voucher-assisted unit will receive or has received NSP funds.¹⁹ For these units, PHAs are authorized to use funds to pay for utilities that are the landlord's obligation and moving costs, including new security deposits.²⁰ PHAs should also determine whether tenants in foreclosed properties may be entitled to relocation assistance under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.²¹

Finally the Notice reminds PHAs that the PTFA does not preempt any state or local law that provides additional protections for tenants.²²

OCC Instructs Examiners to Grade Banks on PTFA Compliance

On January 9, 2010, OCC issued a bulletin outlining new procedures for its examiners to use in evaluating banks on compliance with the PTFA.²³ This bulletin follows a bulletin issued last year advising national banks to adopt policies and procedures to ensure compliance with the PTFA.²⁴ The new bulletin sets out guidelines for OCC examiners to follow in grading banks on their performance.²⁵ Under the examination procedures attached to the new bulletin, examiners must grade banks on whether the bank has (1) provided a tenant with at least a 90-day notice to vacate; (2) assumed residential property subject to the tenant's right to remain in the premises until the

⁹*Id.*

¹⁰*Id.*

¹¹*Id.*

¹²*Id.*

¹³*Id.* The notices are posted on NLIHC's website at <http://www.nlihc.org/template/page.cfm?id=227> and on NHLPL's website at <http://nhlp.org/node/763>. See also Letter from Boston Housing Authority to Tenants in Foreclosure, <http://www.povertylaw.org/poverty-law-library/research-guides/foreclosure-webinar/bha-letter.pdf>.

¹⁴PIH 2009-52, at 4.

¹⁵See, e.g., Boston Housing Authority, Assignment of Housing Assistance Payment Contract upon Foreclosure of Property, <http://www.povertylaw.org/poverty-law-library/research-guides/foreclosure-webinar/HAP-assignment.pdf>.

¹⁶"Escrow" means different things in different jurisdictions, and advocates should work with their local voucher processing entities to reach an understanding of how this would work in their jurisdiction.

¹⁷While not discussed in the HUD Notice, advocates should be aware that tenants may also be evicted for material lease violations.

¹⁸PIH 2009-52, at 4.

¹⁹*Id.* See Pub. L. No. 111-5, tit. XII, 123 Stat. 115, 218-219 (2009).

²⁰PIH 2009-52, at 5.

²¹*Id.*

²²*Id.*

²³OCC Bulletin 2010-2, Protecting Tenants at Foreclosure Act of 2009, Jan. 8, 2010, <http://www.occ.gov/ftp/bulletin/2010-2.html>.

²⁴OCC Bulletin 2009-28, Helping Families Save Their Homes Act of 2009—Title VII Tenant Protections, Aug. 13, 2009, <http://www.occ.gov/ftp/bulletin/2009-28.html>.

²⁵*Id.*

end of an existing lease; and (3) assumed residential properties occupied by Section 8 tenants subject to both the lease and the HAP contract.²⁶

New York Enacts Foreclosure Law

On December 15, 2009, New York Governor David Paterson signed into law S66007, a comprehensive foreclosure bill.²⁷ Like the PTFA, S66007 gives tenants the right to remain in their homes after a foreclosure sale for 90 days or the remainder of their lease, whichever is longer.²⁸ Also similar to the PTFA, S66007 allows a purchaser who intends to reside in the property as his or her primary residence to evict the tenant with a 90-day notice, even if the tenant has more than 90 days remaining on the lease.²⁹

S66007 also grants tenants new protections in addition to those in the PTFA. Specifically, S66007 covers tenants in properties that were disposed through other means, such as a short sale or deed in lieu of foreclosure, if the property is transferred during the pendency of a foreclosure proceeding.³⁰

The law also ensures that tenants receive notice that the building is being foreclosed on at the beginning of the foreclosure process. Under the new law, the foreclosing party must notify tenants of the impending foreclosure through a notice delivered by both certified and first-class mail.³¹ If the tenants cannot be identified, the foreclosing party must send the notice via first-class mail addressed to the "occupant."³² This notice must inform tenants that they may not be evicted until at least 90 days after they are served by the successor in interest to the property with an eviction notice.³³ For tenants with longer fixed lease terms, the notice must tell them that they may stay until the end of the lease term.³⁴ Unless the foreclosing party states compliance with the notice requirement in the complaint, the party will not be able to commence a foreclosure proceeding on the property.³⁵ Receiving notice at the very beginning of the foreclosure process enables tenants to plan ahead, lessening the potential disruption that a foreclosure on the home may cause.

S66007 also addresses the problem of foreclosed buildings falling into disrepair when the prior owner fails to maintain the building during the pendency of the foreclosure proceedings. To address this habitability issue,

the law imposes a statutory duty on lenders to maintain foreclosed properties during the time period between the entry of judgment of foreclosure and sale and the transfer of title at a foreclosure sale.³⁶ Finally, unlike the PTFA, which expires at the end of 2012,³⁷ S66007 does not contain a sunset provision.

A recent state court decision gives the new law added meaning. In *Collado v. Boklari*, a New York trial court, in dicta, applied the statutory canon of constitutional avoidance and limited the scope of the PTFA to foreclosures on federally related mortgage loans, despite the PTFA's clear language to the contrary.³⁸ While there are reasons to question the court's reasoning,³⁹ S66007 adds the PTFA's tenant protections to state law and alleviates concerns that tenants could be denied the PTFA's protections if other courts follow *Collado's* reasoning.

New Protections for Illinois Tenants in Foreclosed Homes

On July 31, 2009, Illinois Governor Pat Quinn signed into law HB 3863, amending the Illinois Mortgage Foreclosure Law to provide additional protections for tenants living in properties facing foreclosure.⁴⁰ The central provisions of HB 3863 regard notice. Prior to the new amendments, Illinois tenants were not entitled to notice when ownership of the property in which they live changed as a result of foreclosure. Consequently, Illinois tenants affected by foreclosure faced only confusion, unaware of information that would help them navigate safely through the process.

Under HB 3863, a lender or purchaser who, as a result of the foreclosure, takes title at the confirmation of sale must, within 21 days, make a good faith effort to identify everyone who lives at the acquired property.⁴¹ During that same 21-day period, the lender or purchaser must also provide written notice by personal service or first-class mail to each known resident of the property informing him or her that control of the property has changed.⁴² The notice must include: (1) the name and case number of the foreclosure case, and the court where the foreclosure case was pending; (2) the name, address, and telephone number of an individual or entity whom residents may contact with concerns about the property or to request repairs; and (3) the following language, or language that is substantially similar: "This is NOT a notice to vacate the premises. You

²⁶OCC Bulletin 2010-2, *supra* note 23.

²⁷2009 N.Y. Laws 507, 2009 N.Y. Consol. Laws Adv. Legis. Serv. 507 (Lexis Nexis).

²⁸2009 N.Y. Consol. Laws Adv. Legis. Serv. 507, at *4. The law also clarifies that New York's judicial foreclosure process cannot take away the tenant's right to stay in his or her home until at least 90 days after title is transferred through foreclosure.

²⁹*Id.*

³⁰*Id.*

³¹*Id.* at *1.

³²*Id.*

³³*Id.*

³⁴*Id.*

³⁵*Id.*

³⁶*Id.* at *6.

³⁷Pub. L. No. 111-22, tit. VII, § 704, 123 Stat. 1632, 1662.

³⁸2009 NY Slip Op. 29447, at *6 (Suffolk Dist. Ct. Nov. 9, 2009).

³⁹For example, the court only looked at the Spending Clause of the U.S. Constitution and failed to analyze the PTFA's constitutionality under the Commerce Clause. *Id.* at *3-4.

⁴⁰2009 Ill. Laws 111, available at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?name=096-0111&GA=96&SessionId=76&DocTypeId=HB&DocNum=3863&GAID=10>. Illinois is a primarily judicial foreclosure state.

⁴¹735 ILL. COMP. STAT. § 5/15-1508.5(a)(1) (2009).

⁴²§ 5/15-1508.5(a)(2).

may wish to contact a lawyer or your local legal aid or housing counseling agency to discuss any rights that you may have.”⁴³

The lender or purchaser is under a continuing duty to serve this written notice on any tenant that it learns is occupying the property, even if the tenant is discovered after the initial 21-day period.⁴⁴ A truncated version of this notice must also be posted at the premises.⁴⁵

If a receiver (or mortgagee in possession) is appointed to operate and manage the subject property while the foreclosure case is pending, the receiver also has the duty to identify residents and serve them with a similar notice.⁴⁶ In sum, under HB 3863, whenever control of the property changes during or as the result of a foreclosure, tenants must be notified and given contact and foreclosure case information.

Finally, HB 3863 provides some additional protections for tenants throughout the foreclosure process. A receiver appointed by the court may not raise the rent of a month-to-month tenant without leave of court.⁴⁷ Further, a receiver or mortgagee in possession must accept rental payments from tenants and HAP payments on behalf of voucher holders or other third-party rental assistance payments during the foreclosure case.⁴⁸ Finally, tenants who are evicted by petition as a part of the foreclosure case must be given at least 30 days to move after the hearing on that petition.⁴⁹

Maryland and Florida Courts Amend Rules in Response to the PTFA

While the New York and Illinois legislatures enacted new protections for tenants in foreclosure, the judicial branches in Maryland and Florida have taken the lead in protecting tenants. In Maryland and Florida, foreclosures are primarily conducted through a judicial process. Both states have amended their court rules to ensure that successors in interest have complied with the PTFA before they are awarded possession of residential property.

Maryland amended its court rules to require compliance with the PTFA before a purchaser at a foreclosure sale can take possession of a residential property.⁵⁰ If a tenant resided in the foreclosed property, the purchaser must give proof that a proper eviction notice has been given and that the tenant has no further right to possession before a court can entertain a motion to grant a judgment of possession.⁵¹

⁴³§ 5/15-1508.5(a)(2).

⁴⁴§ 5/15-1508.5(c).

⁴⁵§ 5/15-1508.5(e).

⁴⁶§ 5/15-1704(f).

⁴⁷§ 5/15-1704(g).

⁴⁸§ 5/15-1704(c)(2.5).

⁴⁹HB 3863 passed out of both houses prior to the PTFA's effective date. Until the PTFA expires, much of Illinois' supplemental petition procedure is likely preempted. See 735 ILL. COMP. STAT. § 5/15-1701(h).

⁵⁰Md. R. 14-102 (2009).

⁵¹*Id.*

Advocates in Florida were successful in getting local courts to ensure that successors in interest comply with the PTFA. The Eleventh Judicial Circuit, a court that covers Miami-Dade County, issued an administrative order to prohibit judges from granting possession after a foreclosure sale of a residential property unless the purchaser has proved compliance with the PTFA after the court conducts a hearing.⁵² In addition, the order makes clear that writs of possession must make reference to the PTFA.⁵³

Conclusion

As the foreclosure crisis deepens, federal regulators and states have begun to realize the impact on tenants and the need to minimize unnecessary displacement. Consequently, they have moved to implement stronger protections for tenants through various mechanisms. HUD and OCC have used their administrative powers to seek greater compliance with the PTFA. Maryland and Florida courts have more vigorously enforced PTFA provisions. New York and Illinois have gone even further in enacting state laws that expand upon the PTFA's protections. These developments are encouraging for housing advocates, as they indicate that tenants' concerns are being addressed. As the 2010 legislative sessions open across the country, advocates hope to continue building on these achievements to mitigate the burdens of foreclosure on tenants. ■

⁵²The Eleventh Judicial Circuit, Miami-Dade County, Florida, Administrative Order No. 09-09 A1.

⁵³*Id.*

HUD Announces Neighborhood Stabilization Program 2 Grants

On January 14, the Department of Housing and Urban Development (HUD) awarded \$2 billion in Neighborhood Stabilization Program 2 (NSP2) funds to 56 grantees that included states, local governments and nonprofits.¹ Grantees can use NSP2 funds to buy foreclosed or abandoned homes to be rehabilitated, sold or demolished in order to stabilize neighborhoods.² At least 25% of the funds must be used to house families at or below 50% of Area Median Income (AMI).³

Unlike the original NSP1 program,⁴ which awarded nearly \$4 billion in formula funds to entitlement jurisdictions, NSP2 grants were awarded through a competitive process. The NSP2 program was funded by the American Recovery and Reinvestment Act of 2009. NSP2 applications were submitted to HUD in July 2009.

Most of the grantees applied as regional consortiums made up of local governments, nonprofits and for-profit entities. The grants ranged from \$223.9 million for the Michigan State Housing Department Authority to \$5 million for the city of Reading, Pennsylvania. The states receiving the largest allocations of NSP2 funds included California, Florida, Illinois, Michigan and Ohio. Cities receiving at least \$40 million in NSP2 funds included Phoenix, Los Angeles, Chicago and Philadelphia, with Los Angeles receiving \$100 million. Several local housing authorities received NSP2 funds, including housing authorities for the cities of Prichard, Alabama; Tampa, Florida; Camden, New Jersey; and Reno, Nevada. Additionally, four national applicants—Chicanos Por La Causa, Center for Community Self-Help, The Community Builders, Inc. and Habitat for Humanity International—received substantial awards and will carry out activities in target areas throughout the country.

Proposed Uses of NSP2 Funds

In addition to releasing the list of grantees, HUD also provided brief summaries of each grantee's proposal for using the NSP2 funds. Several of these proposals seek

to increase the supply of affordable rental housing. For example, the Cuyahoga County Land Reutilization Corporation plans to provide 134 rental units with developmental assistance specifically for households at or below 50% of AMI. In East Chicago, Indiana, The Community Builders, Inc. plans to work with the local housing authority and the Hispanic Housing Development Corporation to develop 75 rental townhouses for families below 60% of AMI, with half targeted to families under 50% of AMI and 15% for public housing families. The city of Los Angeles plans to use its NSP2 funds to acquire, rehabilitate and resell 947 multifamily rental units.

Several of the grantees plan to use green building and energy efficient strategies in their use of NSP2 funds, including the city of Chicago, Housing Authority of the City of Prichard, city of North Little Rock, Pima County, Arizona and the National Housing Trust Community Development Fund. Further, some of the grantees plan to use NSP2 funds to integrate redevelopment with accessibility to public transit, including the Denver Office of Economic Development and the city of Philadelphia.

Vast Majority of Applications Unfunded

Competition for the grants was fierce. HUD received approximately 500 applications for the NSP2 funds requesting a total of \$12 billion in funding.⁵ All applications were reviewed by teams of two, who presented score recommendations to two panelists who made final score decisions.⁶ The major criteria that were used to evaluate NSP2 applications included the extent of foreclosure needs in the targeted geographic area; the applicant's recent experience in purchasing and rehabilitating at least 75 homes; the applicant's proposed strategy for stabilizing the target geography; and the applicant's ability to purchase and rehabilitate or demolish at least 100 homes and use at least 25% of the funds awarded to serve very low-income households.⁷ In explaining why only 56 grants were awarded, HUD noted that grantees were selected based on expertise in activities that will not only stabilize the foreclosure crisis, but will also leverage other resources to promote community revitalization.⁸

HUD's award announcement was controversial in some jurisdictions. Officials in Youngstown, Ohio, expressed shock and disappointment that the city's consortium application was not funded, especially since the application had been cited as a model by the Brookings Institution.⁹ Similarly, Senate Majority Leader Harry

¹The complete list of grantees is available on HUD's website. See HUD, Press Releases, 2010, HUD Secretary Donovan Announces \$2 Billion in Recovery Act Grants to Stabilize Neighborhoods, Rebuild Local Economies (Jan. 14, 2010), http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2010/HUDNo.10-012. An overview of the NSP2 program is available at the National Housing Law Project's (NHLP) website. See NHLP, Resource Center, Neighborhood Stabilization Program (NSP2) Under the Recovery Act, <http://nhlp.org/files/1.%20NSP2%20under%20the%20Recovery%20Act.pdf>.

²NOFA for NSP 2 under the American Recovery and Reinvestment Act (May 4, 2009), <http://www.hud.gov/recovery/nsp2-nofa.pdf>.

³*Id.*

⁴For background information on NSP1, see NHLP, *HUD Issues Regulations Implementing the Neighborhood Stabilization Program*, 38 HOUS. L. BULL. 215 (Oct. 2008).

⁵HUD, Neighborhood Stabilization Program Grants, FAQs on NSP2, http://www.hud.gov/offices/cpd/communitydevelopment/programs/neighborhoodspg/nsp2_quest_answers.pdf.

⁶*Id.*

⁷*Id.*

⁸*Id.*

⁹George Nelson, *HUD Snubs Valley Bid for Neighborhood Funds*, BUS. J. DAILY (Jan. 15, 2010), <http://www.business-journal.com/default.asp?sourceid=&smenu=1&twindow=&mad=&sdetail=15463&wpage=1&sk>

Reid (D-NV) issued a statement that he was “extremely disappointed” that southern Nevada was denied funding given the severity of the region’s foreclosure crisis.¹⁰ However, Reid acknowledged that HUD indicated that applicants in southern Nevada did not meet eligibility requirements, and that several agencies receiving NSP1 funds were not spending them in a timely fashion.

According to HUD, unsuccessful applicants may make a written request for a debriefing on their applications.¹¹ Information provided during a debriefing will include, at a minimum, the final score the applicant received for each rating factor; final evaluator comments for each rating factor; and a final assessment indicating the basis on which assistance was denied.¹²

Conclusion

The NSP2 funds offer unprecedented opportunities for communities to create long-term affordable housing for low-income families. Advocates in jurisdictions receiving NSP2 funds should ask grant recipients for copies of their NSP2 applications in order to familiarize themselves with the recipient’s plans for using the NSP2 funds. Advocates should also consider meeting with grantees to discuss issues affecting low-income communities,¹³ such as how the grantee plans to meet its obligation to use 25% of the funds to house families at or below 50% of AMI; how the grantee intends to maintain long-term affordability of NSP-2 assisted units; how the grantee will affirmatively further fair housing choice in NSP2-funded programs; and how the recipient intends to prevent unnecessary displacement of tenants in foreclosed properties that are being purchased or rehabilitated with NSP2 funds. Advocates should also monitor the quarterly performance reports that NSP2 grantees are required to prominently post on their websites.¹⁴

Additionally, all advocates, regardless of whether their jurisdictions received a second round of NSP funds, should monitor local expenditure of NSP1 funds to ensure that jurisdictions are spending their funds in a timely fashion and are meeting their obligation to serve families at or below 50% of AMI. NSP1 recipients submitted quar-

terly reports to HUD in July 2009, October 2009 and January 2010 and were required to post these reports on their websites. The National Housing Law Project has compiled a list of jurisdictions that have posted their quarterly reports¹⁵ and has created an advocates’ guide for reviewing the reports.¹⁶ ■

¹⁵NHLP, NSP1 Quarterly Reports, <http://nhlp.org/node/1198>.

¹⁶NHLP, Advocates’ Checklist: NSP1 Quarterly Reports, <http://nhlp.org/node/1214>.

HUD Issues Final Rule on Disclosure of Social Security Numbers

In recent months, the *Bulletin* has reported on a pending final rule by the Department of Housing and Urban Development (HUD) regarding disclosure of Social Security numbers (SSNs) by applicants and participants in certain federally subsidized housing programs.¹ The rule would require each member of every applicant or participant household to produce both a valid SSN card issued by the Social Security Administration (SSA) and independent documentation containing corroborative data. The stated purpose of the rule is to reduce overpayments by requiring public and assisted housing operators to use HUD’s Enterprise Income Verification (EIV) system to verify employment and income of program participants.²

HUD published a final rule regarding SSN disclosure on January 27, 2009,³ but delayed the effective date of the rule in response to concerns raised by resident, advocacy, policy and civil rights organizations.⁴ After months of review, HUD issued a proposed rule on October 15, 2009.⁵ The final rule was published on December 29, 2009.⁶ This

¹NHLP, *HUD Reissues Social Security Number Rules*, 39 HOUS. L. BULL. 275 (Nov-Dec. 2009); NHLP, *HUD Delays Effective Date of Social Security Number Rule*, 39 HOUS. L. BULL. 223, 226 (Sept. 2009); NHLP, *Delayed HUD Rule Would Alter Social Security Number Requirements*, 39 HOUS. L. BULL. 71, 80 (Mar. 2009).

²Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs: Implementation of the Enterprise Income Verification System—Amendments; Final Rule, 74 Fed. Reg. 68,924 (Dec. 29, 2009) [hereinafter December 29 Final Rule].

³Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs: Implementation of Enterprise Income Verification, Proposed Rule, 74 Fed. Reg. 4,832 (Jan. 27, 2009) [hereinafter January 27 Final Rule].

⁴Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs; Delay of Effective Date, 74 Fed. Reg. 44,285 (Aug. 28, 2009).

⁵Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs: Implementation of Enterprise Income Verification, 74 Fed. Reg. 52,931 (Oct. 15, 2009) [hereinafter October 15 Proposed Rule].

⁶December 29 Final Rule, 74 Fed. Reg. 68,924 (to be codified at 24 C.F.R.

word=&siteid=&ccat=&ccatm=&restate=&restatus=&reoption=&retype=&repmid=&repmid=&repmid=&rebed=&rebath=&subname=&pform=&sc=1711&hn=business-journal&he=.com.

¹⁰Reid Statement on the Denial of Southern Nevada’s Request for Foreclosure Assistance (Jan. 14, 2010), http://www.reid.senate.gov/newsroom/pr_011410_snvhuddeny.cfm.

¹¹HUD, Neighborhood Stabilization Program Grants, FAQs on NSP2, http://www.hud.gov/offices/cpd/communitydevelopment/programs/neighborhoodspg/nsp2_quest_answers.pdf.

¹²*Id.*

¹³For an overview of NSP2 issues that are of particular interest to low-income housing advocates, see NHLP, Resource Center, Neighborhood Stabilization Program (NSP2) Under the Recovery Act, <http://nhlp.org/files/1.%20NSP2%20under%20the%20Recovery%20Act.pdf>.

¹⁴NOFA for NSP2 under the American Recovery and Reinvestment Act 71 (May 4, 2009), <http://www.hud.gov/recovery/nsp2-nofa.pdf>.

article addresses the differences between the October 15, 2009 proposed rule and the December 29, 2009 final rule, as well as the rule's impact on provisions regarding family income and households with mixed immigration status.

Final Changes to Rule

The December 29 final rule made very few changes to the SSN disclosure requirements set forth in the October 15 proposed rule, which were described in detail in the November/December *Bulletin*.⁷ The final rule requires that all applicants for and participants in the specified assisted housing produce the complete and accurate SSN assigned to the applicant and to each member of the applicant's household, together with corroborating documentation. Participants and their household members need not disclose their SSNs if they have previously done so and neither HUD nor SSA has determined the SSN to be invalid.

The final rule slightly modifies the proposed rule's language regarding participants age 62 or older as of January 31, 2010, whose initial determination of eligibility was begun before that date. Such participants need not disclose a SSN even if they have not previously disclosed a valid SSN. The final rule deleted the phrase "under the program involved" to clarify that such a participant may move to a new HUD-assisted property without having to produce a SSN for any future eligibility or income examination.

The final rule also clarifies disclosure of SSNs for new household members under age 6. Household members under 6 years of age who have been assigned SSNs must immediately disclose them. Members under age 6 who do not have assigned SSNs have 90 days to comply.⁸

In three situations, a 90-day extension of the compliance deadline may be available. For new household members under 6 years of age⁹ and participants admitted to a Section 8 Moderate Rehabilitation Single Room Occupancy Program for Homeless Individuals,¹⁰ the processing entity "shall" grant an extension of 90 days in addition to the original 90-day compliance window available for each of these categories of participants if, in its discretion, it determines that the "failure to comply was due to circumstances that could not have reasonably been foreseen and were outside the control of the participant."¹¹ A processing entity "may" grant a 90-day extension in cases of impending termination of assistance or tenancy if it reaches a similar determination.¹²

pt. 5). For in-depth discussions of the changes and related advocacy issues, see the *Bulletin* articles cited in note 1.

⁷See NHLP, *HUD Reissues Social Security Number Rules*, 39 HOUS. L. BULL. 275 (Nov-Dec. 2009).

⁸December 29 Final Rule, 74 Fed. Reg. 68,933 (to be codified at 24 C.F.R. § 5.216(e)(2)(ii)(A)).

⁹*Id.* (to be codified at 24 C.F.R. § 5.216(e)(2)(ii)(B)).

¹⁰*Id.* (to be codified at 24 C.F.R. § 5.216(h)(2)).

¹¹*Id.* (to be codified at 24 C.F.R. §§ 5.216(e)(2)(ii)(B), 5.216(h)(2)).

¹²*Id.* (to be codified at 24 C.F.R. § 5.218(c)(2)). PHAs are instructed to terminate participants who do not comply within the prescribed time

Unfortunately, HUD did not make changes in response to some advocates' comments. To obtain the discretionary 90-day extension, the participant must demonstrate both that the circumstance was not reasonably foreseeable *and* that it was outside of the participant's control. Housing Justice Network members and others suggested that HUD require proof of one or the other of these circumstances, but not both. Many circumstances, after all, are beyond an individual's control and for that very reason are not reasonably foreseeable. Conversely, circumstances may be reasonably foreseeable but outside of the participant's control, such as where the processing occurs within a governmental bureaucracy. Advocates should certainly consider arguing this point if a participant is denied an extension.¹³

Finally, while not a change from the proposed rule, it should be noted that any participant who is issued a new SSN must disclose and document that number.¹⁴

On January 20, 2010, HUD issued a notice regarding implementation of the final rule. Among other issues, the notice addresses the following:

- Requirements of and processes for disclosure of applicant and participant SSNs.
- Allowable corroborating documentation.
- Verification of SSNs through computer data matching with SSA databases.
- The inapplicability of SSN requirements for persons not claiming lawful immigrant status.
- The generation of alternate identification for persons without SSNs.
- How applicants and participants who do not have SSNs but are eligible for them can obtain them.
- How PHAs should protect the confidentiality of SSNs.

Additionally, the notice identifies specific categories of persons who are and are not eligible for SSNs, some of whom are lawfully in the country.¹⁵

periods. According to the regulations, an applicant "may retain its place on the waiting list for the program but cannot become a participant until it can comply." *Id.* (to be codified at 24 C.F.R. § 5.216(h)(2)). HUD issued a notice contradicting this provision, stating that "[t]he PHA should prescribe in its policies, the maximum time the family may remain on the waiting list, pending disclosure of requested information." Guidance - Verification of Social Security Numbers (SSNs), Social Security (SS) and Supplemental Security Income (SSI) Benefits, PIH 2010-3 (Jan. 20, 2010).

¹³HUD provides the following examples of circumstances warranting the 90-day extension: "delayed processing of SSN application by SSA, natural disaster, fire, death in family, etc." PIH 2010-3 (emphasis added).

¹⁴December 29 Final Rule, 74 Fed. Reg. 68,933 (to be codified at 24 C.F.R. § 5.216(e)(1)(i)(C)). Persons qualifying under the age 62 exemption are also exempt from this provision. *Id.*

¹⁵Beyond the scope of this article, the notice also addresses third-party verification by PHAs of income and benefits through the Enterprise

Continuation of Benefits to Mixed Households

The pre-January 27, 2009 rules allowed for proration of assistance in direct proportion to the number of household members with eligible and ineligible immigration status.¹⁶ To enable households with mixed immigration status to continue to receive prorated assistance, the October 15 proposed rule and the December 29 final rule state that the new 24 C.F.R. § 5.216 “is inapplicable to individuals who do not contend eligible immigration status under subpart E of [part 5] (see § 5.508).”¹⁷ HUD takes the position that under this provision, “[i]ndividuals who do not contend legal immigration status for HUD subsidized housing may reside in HUD subsidized housing... as members of a family who contend and are confirmed to be U.S. citizens or have the legal immigration status required by the Housing and Community Development Act of 1980.”¹⁸ It would seem, therefore, that household members who do not contend eligible immigration status would not need to disclose a SSN and could continue to be part of the household.¹⁹

Notwithstanding HUD’s explanation²⁰ and the insertion of a clause exempting persons not contending eligible immigrant status from § 5.216,²¹ HUD did not alter the rules’ blanket requirement for SSN disclosure. Both the pre-January 27, 2009 language and the December 29 final rule state that SSNs and documentation are required from the applicant and “each member of the assistance applicant’s household.”²² Further, the December 29 final rule adds language to the penalty section stating that if a participant fails to meet the SSN disclosure, documentation and verification requirements, the processing entity must terminate the assistance or tenancy (or both) of a participant “and the participant’s household.”²³ No statement is made in either of these sections indicating that non-claimants are not, for this purpose, members of the assisted household. If it arises, advocates should argue that this apparent ambiguity does not exist and HUD should be taken at its word that mixed eligibility families are protected by the rule.

Income Verification (EIV) system and SSA computer database matching.

¹⁶24 C.F.R. §§ 5.508, 5.516, 5.518, 5.520 (2009).

¹⁷December 29 Final Rule, 74 Fed. Reg. 68,932 (to be codified at 24 C.F.R. § 5.216(a)). This language was not included in the January 27 final rule.

¹⁸*Id.* at 68,929.

¹⁹Thereby engaging the proration rules of § 5.508 et seq.

²⁰*Id.*

²¹*Id.* at 68,932.

²²24 C.F.R. § 5.216(a)(1)(i); December 29 Final Rule, 74 Fed. Reg. 68,932 (to be codified at 24 C.F.R. § 5.216(b)(1)).

²³December 29 Final Rule, 74 Fed. Reg. 68,933 (to be codified at 24 C.F.R. § 5.218(c)(1) and (3)).

Non-Citizen and Family Income Rules Rescinded

HUD’s January 27, 2009 final rule²⁴ revised not only part 5, subpart B of title 24 of the Code of Federal Regulations related to SSN disclosure and verification, but also subparts E and F,²⁵ which govern restrictions on assistance to non-citizens and family income, respectively. The supplementary information accompanying the October 15 proposed rule and December 29 final rule stated repeatedly that HUD intends to allow the pre-January 27 regulations to continue to be in effect for the non-citizen and family income provisions. There was, however, no reference to these sections in the text of the December 29 final rule. Several interim rules delayed the effective date of the January 27, 2009 final rule, but did not rescind it.²⁶ Happily, on January 27, 2010, HUD issued a final rule confirming that it has rescinded the revisions to the rules governing assistance to non-citizens and family income.²⁷ However, advocates should note that HUD has stated that it will revisit the rules on family income and has suggested that it may revisit the non-citizen eligibility question.²⁸

Conclusion

With a few exceptions, all applicants for assisted housing and participants therein will soon be required to provide their SSNs to the operating entity. Whether or when HUD revisits the noncitizen and income rules remains to be seen. ■

²⁴January 27 Final Rule, 74 Fed. Reg. 4,832.

²⁵24 C.F.R. §§ 5.508, 5.516, 5.518, 5.609.

²⁶Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs: Delay of Effective Date, 74 Fed. Reg. 13,339, 13,340 (Mar. 27, 2009) (“Through this final rule, HUD delays the effective date of the January 27, 2009, final rule until September 30, 2009.”); Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs; Delay of Effective Date, 74 Fed. Reg. 44,285, 44,286 (Aug. 28, 2009) (“HUD further delays the effective date of the January 27, 2009, final rule until January 31, 2010.”).

²⁷Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs: Implementation of the Enterprise Income Verification System; Withdrawal of Rescinded Regulatory Amendments, 75 Fed. Reg. 4,271 (Jan. 27, 2010). As stated in the January 27, 2010 final rule, “[t]he amendments to 24 CFR 5.508, 5.516, 5.518, 5.609 and 92.203 published at 74 FR 4832, January 27, 2009, which were delayed at 74 FR 13339, March 27, 2009, and further delayed at 74 FR 44285, August 28, 2009, are withdrawn effective January 31, 2010.”

²⁸As stated in the December 29 final rule, “HUD is aware of the need to address the issue of annual income and intends to address this issue.” December 29 Final Rule, 74 Fed. Reg. 68,925. “Given the sensitivity and significance of the issues involved, HUD has withdrawn these amendments Any changes to HUD’s noncitizen regulations are more appropriately undertaken by separate rulemaking that focuses exclusively on these policies and providing the public with additional opportunity to comment.” *Id.* at 68,929.

HUD Appropriations for FY 2010

On December 16, 2009, President Obama signed into law an omnibus funding bill for 2010.¹ The bill appropriates funds for the fiscal year that began on October 1, 2009. The bill provides just over \$46 billion for programs administered by the Department of Housing and Urban Development (HUD), an increase of \$4.5 billion from Fiscal Year (FY) 2009. See the National Low Income Housing Coalition budget charts for FY 2009 and FY 2010 below and on page 52.

Voucher Program

The spending bill for FY 2010 provides \$18.2 billion for total voucher funding, a \$1.4 billion increase over the FY 2009 funding level. Of the total voucher funding, \$16.3 billion will go toward voucher renewals. According

¹The short title of the bill is the "Consolidated Appropriations Act, 2010," Pub. L. No. 111-117 (Dec.16, 2009) (formerly H.R. 3288), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&dodocid=f:h3288enr.pdf.

to Center on Budget and Policy Priority estimates, when combined with almost \$300 million in "carryover" funds from the current year, the amount is likely sufficient for renewal of all vouchers used in FY 2009.²

The spending bill allocates renewal funding for each PHA based on leasing and cost data from FY 2009, with a HUD-established cost adjustment factor for 2010.³ As in prior years, no PHA can fund more vouchers than authorized by HUD.⁴ In contrast to the formula used in FY 2008 and FY 2009, however, the bill does not authorize HUD to reduce renewal funding eligibility for PHAs with "excess" balances of reserve funding.⁵ The removal of the offset will eliminate a possible source of uncertainty for PHAs planning their voucher budget for next year.⁶

The omnibus bill provides for approximately 11,000 new incremental vouchers through the appropriation of \$90 million, down from \$125 million in FY 2009. The

²CENTER ON BUDGET AND POLICY PRIORITIES, Update on 2010 Funding for Housing Vouchers and Other HUD Programs, 1 (2009), <http://www.cbpp.org/files/2010-housing-funding.pdf>.

³Pub. L. No. 111-117, Tenant-Based Rental Assistance.

⁴*Id.* Moving to Work agencies, however, will be funded pursuant to their Moving to Work agreements.

⁵CBPP, *supra* note 2, at 2.

⁶*Id.*

FY10 Budget Chart for Selected HUD Programs (in millions)

HUD Program (set asides indented)	FY04 Enacted	FY05 Enacted	FY06 Enacted	FY07 Enacted	FY08 Enacted	FY09 Enacted	FY10 Enacted
Tenant-Based Rental Assistance	14,186	14,766	15,417	15,920	16,391	16,817	18,184
Contract Renewals	12,893	13,463	13,949	14,436	14,666	15,034	16,339
Tenant Protection Vouchers	205	163	178	149	200	150	120
Administrative Fees	1,235	1,200	1,238	1,281	1,351	1,450	1,575
Family Self Sufficiency Coordinators	48	46	47	47	49	50	60
Family Unification Program Vouchers					20	20	15
Veterans Supportive Housing Vouchers					75	75	75
Nonelderly Disabled Vouchers					30	30	0
Disaster Housing Assistance Vouchers							0
Project-Based Rental Assistance	4,792	5,298	5,037	5,976	6,382	7,500	8,552
Public Housing Capital Fund	2,695	2,579	2,439	2,439	2,439	2,450	2,500
Emergency/Disaster Grants	50	30	17	17	19	20	20
Resident Opportunities and Supportive Services	55	52.5	38	38	40	40	50
Public Housing Operating Fund	3,579	2,438	3,564	3,864	4,200	4,455	4,775
HOPE VI	149	143	99	99	100	120	135
Choice Neighborhoods Initiative							65
Native American Housing Block Grants	650	621	624	624	630	645	700
Native Hawaiian Housing Block Grants	9	9	9	9	9	10	13
Housing Opportunities for Persons with AIDS	295	282	286	286	300	310	335

Chart courtesy of the National Low Income Housing Commission. Reprinted with permission.

decrease comes from the lack of funding for new vouchers for non-elderly people with disabilities. The FY 2009 spending bill allocated \$30 million for those vouchers. The FY 2010 bill includes \$15 million for the Family Unification Program,⁷ compared to \$20 million in FY 2009, and provides \$75 million for HUD-VASH vouchers.⁸ This is the third consecutive year that incremental vouchers have been funded. Prior to 2008, Congress had not funded incremental vouchers since 2002.

In addition to incremental and renewal vouchers, the bill appropriates \$120 million for tenant protection vouchers and requires HUD to issue them “for all units

⁷Pub. L. No. 111-117, Tenant-Based Rental Assistance. The Family Unification Program provides rental assistance for reunifying families with children in foster care or to prevent children from entering foster care.
⁸*Id.* The HUD-VASH vouchers are for low-income veterans with mental health or substance abuse problems. The program combines rental assistance from HUD with supportive services funded by the Department of Veterans Affairs.

that were occupied within the previous 24 months that cease to be available as assisted housing, subject only to the availability of funds.”⁹

Vouchers previously allocated to a PHA to serve non-elderly disabled families and for the Family Unification Program must remain available to these populations, to the extent feasible.¹⁰

Finally, the bill extends the existing rule making certain college students ineligible for Section 8 rental assistance.¹¹ Exceptions to the rule include students who are over 24 years of age; veterans; married; parents or legal guardians of a dependent child; or persons with a disability.¹²

⁹*Id.*

¹⁰*Id.*

¹¹Pub. L. No. 111-117, § 215. For more discussion of student eligibility for Section 8 rental assistance, see NHLP, *New Section 8 Restrictions for Students*, 36 HOUS. L. BULL. 115 (May 2006).

¹²*Id.*

FY10 Budget Chart for Selected Programs (in millions)

HUD Program (set asides indented)	FY04 Enacted	FY05 Enacted	FY06 Enacted	FY07 Enacted	FY08 Enacted	FY09 Enacted	FY10 Enacted
Community Development Fund	4,921	4,671	4,178	3,772	3,866	3,900	4,450
CDBG Formula Grants	4,331	4,110	3,711	3,711	3,593	3,642	3,990
Economic Development Initiative Grants	276	262	307	0	180	165	173
Sustainable Communities Initiative							150
Rural Innovation Fund							25
University Community Fund							0
Brownfields Redevelopment	25	24	10	10	10	10	17.5
Energy Innovation Fund							50
HOME Investment Partnership Program	2,006	1,900	1,733	1,733	1,704	1,825	1,825
HOME Formula Grants	1,859	1,789	1,690	1,690	1,629	1,821	1,825
American Dream Downpayment Initiative	87	50	25	25	10	0	0
Self-Help Homeownership Opportunity Program	27	25	20	20	26.5	26.5	27
Housing Counseling Assistance	40	42	42	42	50	65	87.5
Homeless Assistance Grants	1,260	1,241	1,327	1,442	1,586	1,677	1,865
Rural Housing and Economic Development	25	24	17	17	17	26	0
Housing for the Elderly (Section 202)	774	741	735	735	735	765	825
Housing for Persons with Disabilities (Section 811)	249	238	237	237	237	250	300
Fair Housing and Equal Opportunity	48	46	46	46	50	54	72
Fair Housing Assistance Program	28	26	26	26	26	26	29.5
Fair Housing Initiatives Program	20	20	20	20	24	28	42.5
Healthy Homes & Lead Hazard Control	174	167	152	152	145	140	140
Policy Development & Research (excluding academic grants)	47	45	36	36	28	32	48
Total Budget Authority (includes items not listed on this chart)	31,200	32,040	34,270	33,650	37,600	41,500	46,059

Chart courtesy of the National Low Income Housing Commission. Reprinted with permission.

Project-Based Section 8

The stability of the project-based Section 8 program has been precarious in recent years.¹³ Funding shortfalls have caused concern that projects would not be funded for a full 12 months, reducing the incentive for owners to remain in the program. The FY 2010 appropriations bill funds project-based Section 8 contract renewals at \$8.53 billion, \$1.05 billion above the FY 2009 level.¹⁴ Last February, the American Recovery and Reinvestment Act of 2009 (ARRA) allocated an additional \$2 billion to the project-based Section 8 program, which addressed the funding shortfall.¹⁵ As a result, the FY 2010 funding level should be sufficient to guarantee a full 12 months of funding for renewal of expiring project-based Section 8 contracts.

Public Housing

Congress boosted funding for the public housing operating fund by \$320 million above the FY 2009 level for a total of \$4.78 billion. The increase is estimated to fund PHAs at or close to 100% of the operating subsidy formula need.¹⁶ This represents a significant shift in policy, as PHAs have not received full operating funding since 2002.¹⁷

The bill sets funding for the public housing capital fund at \$2.5 billion, an increase of \$50 million from FY 2009.¹⁸ The capital fund provides money for repair and rehabilitation of public housing units and projects. Although welcome, this slight increase in funding will not make a significant dent in the substantial backlog of repairs for public housing.

The bill also allows HUD to increase the number of Moving to Work agencies by three. HUD may choose from any HOPE VI agency that is considered high performing under the Public Housing Assessment System, so long as it does not administer more than 5,000 combined voucher and public housing units.¹⁹

HOME, Community Development Block Grant (CDBG), HOPE VI and Choice Neighborhoods

The omnibus bill funds HOME formula grants at \$1.83 billion,²⁰ the same amount as FY 2009, and CDBG formula grants at just under \$4 billion,²¹ an increase of \$348 million from FY 2009. The bill provides \$135 million for the HOPE VI program, \$15 million above the FY 2009 funding

level.²² In addition, \$65 million is available for a demonstration project of the Choice Neighborhoods Initiative for the transformation, rehabilitation and replacement housing needs of both public and HUD-assisted housing.²³ The goal of the initiative is to “transform neighborhoods of poverty into functioning, sustainable mixed income neighborhoods with appropriate services, public assets, transportation and access to jobs, and schools, including public schools, community schools, and charter schools.”²⁴

Housing for the Elderly and People with Disabilities

Supportive housing for the elderly (Section 202) and housing for people with disabilities (Section 811) are funded at \$825 million²⁵ and \$300 million²⁶ respectively. Congress funded both programs above FY 2009 levels. The bill also includes a provision that allows owners of Section 202 housing to refinance the properties, even where it does not lower debt service, to provide capital for repair needs.²⁷ The refinancing provisions require that HUD assess the costs and benefits of refinancing, with concern given to the effect on tenants. Other provisions of the bill require additional rental assistance to protect unassisted tenants. These provisions, however, may provide inadequate protections to maintain the future affordability of a project, depending upon how the guidelines are developed and implemented.

Fair Housing

The omnibus bill provides \$72 million for fair housing activities, a substantial increase over FY 2009 funding of \$54 million. Of the total funding, \$42.5 million will be used to carry out activities under Section 561 of the Housing and Community Development Act, such as the Fair Housing Initiatives Program. Of the total allocation, \$500,000 may be used for the translation of materials to assist persons with limited English proficiency in utilizing HUD services.²⁸ This allocation is critical, as HUD has long stalled in translating vital documents and remains behind major federal agencies in providing meaningful language access.

Other HUD Programs

The bill provides \$1.87 billion for homeless assistance programs, such as Emergency Shelter Grant, Shelter Plus Care and Section 8 Moderate Rehabilitation Single Room

¹³See, e.g., NHLP, *Congress Acts to Address Project-Based Section 8 Funding Crisis*, 38 HOUS. L. BULL. 213 (Oct. 2008).

¹⁴Pub. L. No. 111-117, Project-Based Rental Assistance.

¹⁵American Recovery and Reinvestment Act, Pub. L. No. 111-5 (Feb. 17, 2009).

¹⁶CBPP, *supra* note 2, at 1.

¹⁷*Id.*

¹⁸Pub. L. No. 111-117, Public Housing Capital Fund.

¹⁹Pub. L. No. 111-117, § 232.

²⁰Pub. L. No. 111-117, Home Investment Partnerships Program.

²¹Pub. L. No. 111-117, Community Development Fund.

²²Pub. L. No. 111-117, Revitalization of Severely Distressed Housing (HOPE VI).

²³*Id.*

²⁴*Id.*

²⁵Pub. L. No. 111-117, Housing for the Elderly.

²⁶Pub. L. No. 111-117, Housing for Persons with Disabilities.

²⁷Pub. L. No. 111-117, § 229.

²⁸Pub. L. No. 111-117, Fair Housing and Equal Opportunity.

Occupancy.²⁹ The spending bill sets funding for Housing Opportunities for Persons with AIDS at \$335 million, an increase of \$25 million from FY 2009.³⁰ The FY 2010 appropriations bill also provides \$48 million for Policy Development and Research.³¹

Legal Services Restrictions

The bill elsewhere sets funding for local legal aid programs funded by the Legal Services Corporation (LSC) at \$420 million, an increase of \$30 million from FY 2009.³² In addition, the spending bill lifts the restriction on the ability of LSC-funded programs to seek and recover attorney's fees, a restriction imposed by the FY 1996 appropriations bill. Despite a request by the Obama Administration, Congress did not remove two other restrictions that hamper the work of local legal services organizations—the limited use of non-LSC money and the ability to bring class actions on behalf of clients.³³

Looking Forward

The almost 11% increase in HUD funding for FY 2010, combined with the \$13.7 billion allocated to HUD programs under ARRA, express “on the part of Congress and the Obama Administration, a renewed commitment to the stability and viability of affordable housing and community development programs.”³⁴ Housing advocates remain hopeful that the forthcoming FY 2011 budget, scheduled for release in early February, will continue to build on this progress. ■

Rural Housing Appropriations Make Few Changes

Following the funding patterns established during the Bush Administration, the appropriations for the U.S. Department of Agriculture (USDA) Rural Housing Service housing programs that serve very low- and low-income households will remain virtually unchanged in Fiscal Year 2010 (FY 2010). At the same time, the one program that serves moderate-income households, the guaranteed Section 502 home loan program, had its funding nearly doubled. The substantial increase in the guaranteed funding comes as a result of the program's popularity and apparent successful lobbying by financial institutions that benefit from the program guarantees.

The FY 2010 appropriations do not bode a rosy picture for the future of the rural housing programs, which have generally been struggling for funding since the mid 1990s. In all but one instance, the appropriations approved by Congress reflect the Obama Administration's funding request. As noted, the significant exception is the guaranteed loan program, where the administration requested \$6.2 billion and Congress appropriated \$12 billion.

For FY 2010, the direct single family home loan program (Section 502) and the direct rural rental housing loan program (Section 515) are funded at exactly the same level as Fiscal Year 2009 (FY 2009). No changes have been made in funding for the home repair loan program (Section 504) or the rental housing guaranteed loan program (Section 538). The farm labor housing loan program (Section 514) is the only loan program that received an increase in funding, from \$20 million to \$27.3 million, which, while significant in terms of growth in program funding, is neither significant in total expenditures nor in addressing the need for farm labor housing. The Rental Housing Preservation revolving loan fund received the only decrease in funding, dropping from \$2.9 million in FY 2009 to \$1.8 million in FY 2010.

The grant and subsidy programs for the most part received minor increases in the FY 2010 appropriations. The total increase did not raise expenditures by more than \$100 million over FY 2009. The most significant increase occurred in the Section 521 Rental Assistance Program, which increased from \$902.5 million to \$980 million. The increase does not signal a change in program funding or priorities, but simply reflects the fact that a higher budget amount is necessary to maintain current contracts, whose funding term was recently changed to one year. A shorter contract term means that funding levels increase as costs rise and as longer-term contracts are renewed with one-year contracts.

The only other significant changes came in the Section 542 Rural Rental Housing Voucher Program and the Rental Housing Preservation Demonstration Program.

²⁹Pub. L. No. 111-117, Homeless Assistance Grants.

³⁰Pub. L. No. 111-117, Housing Opportunities for Persons With AIDS.

³¹Pub. L. No. 111-117, Policy Development and Research.

³²Pub. L. No. 111-117, Legal Services Corporation.

³³BRENNAN CENTER FOR JUSTICE, Timeline of FY 2010 Appropriations Process and Efforts to Repeal Key LSC Restrictions, http://www.brennancenter.org/content/resource/timeline_of_fy_2010_appropriations_process_and_efforts_to_repeal_the_lsc_re/.

³⁴CBPP, *supra* note 2, at 1.

The voucher program increase from \$5 million to \$16.4 million simply reflects the fact that vouchers that have been issued in the last several years are facing expiration. Additional funding is needed to keep assistance available to residents who were threatened with displacement when their landlords prepaid their Section 515 loans. The Rural Preservation Demonstration Program budget was increased from \$20 million to \$25 million. This increase reflects the substantial demand that exists for the revitalization of the Section 515 multifamily housing inventory.

Minor increases were made in the Section 504 very low-income senior home repair grant program, the Section 516 farm labor housing grant program, the Section 523 Self Help Technical Assistance Program, and the Section 533 Housing Preservation Grant Program. Funding remained level for the Preservation Rental Assistance Program, the Section 515 Rural Rental Housing Program for New Construction, and the Section 514/516 rental assistance programs.

**FY 10 Budget Chart for
Selected Rural Housing Programs**
(all numbers in millions)

Program	FY 2009 Funding	FY 2010 Funding	Program	FY 2009 Funding	FY 2010 Funding
502 Direct Home Loans	\$1,121.5	\$ 1,121	504 Repair Grants	\$29.7	\$31.6
502 Guar. Home Loans	6,223.9	12,000	516 Farm Labor Grants	9.1	9.9
Sect. 504 Repair Loans	34.4	34.4	523 Self Help Grants	38.7	41.9
514 Farm Labor Loans	20	27.3	533 Pres. Grants	8.9	9.4
515 Rental Hsng. Loans	69.5	69.5	521 Rental Assistance	902.5	980
538 Rental Hsng. Guar.	129.1	129.1	542 Housing Vouchers	5	16.4
Rental Hsng Pres. Loans	2.9	1.8	Rental Pres. Demo.	20	25

As noted earlier, the only significant change in the entire RHS budget is an increase of nearly \$6 billion in the Single Family Guaranteed Home Loan Program, which serves moderate-income households. The program is extremely popular with the financial institutions that benefit from the program's loan guarantees. Unfortunately, the increased funding for the guaranteed loan program over the past several years has placed tremendous pressure on local Rural Development (RD) staff members, who are required to review and approve the guaranteed loans. Indeed, the workload has become so significant as a result of the program's popularity that RD staff members are slowing down the processing and approval process for the direct loan program, which serves low-income households. ■

Recapitalizing the HUD-Assisted Housing Stock: Part Two*

The privately owned, federally supported housing inventory, like any other aging housing stock, requires additional capital to address growing physical needs, from wear and tear and for market and energy upgrades. Maintaining affordability in the face of these needs presents a tremendous challenge across the variety of Department of Housing and Urban Development (HUD) and Rural Development (RD) programs involved. Part One of this article in the January Bulletin¹ reviewed the recapitalization dilemma under federal programs generally (including prior efforts and recommended principles), the Section 236 program, the Section 202 elderly housing program and the RD Section 515 rural housing programs. Part Two of this article covers the remaining restricted portion of the HUD-financed inventor, and properties with maturing federally supported mortgages.

Section 250: Recapitalization Prior to Mortgage Maturity

A cohort of properties facing significant recapitalization issues are those known generally as "Section 250 properties," which are restricted from unilateral prepayment under Section 250 of the National Housing Act.² In contrast to the general rule for properties with HUD-subsidized mortgages, where the owner may unilaterally prepay the mortgage after 20 years, owners of these properties must seek HUD approval throughout the entire mortgage term. This additional restriction exists because the project:

- was originally developed by a nonprofit;
- has a rent supplement contract;
- received flexible subsidy assistance; or
- participated in the Emergency Low Income Housing Preservation Act (ELIHPA)³ preservation program.

In the latter two cases, only those properties that agreed to a full mortgage term prepayment restriction in exchange for additional incentives would likely be considered bound by Section 250.

The recapitalization issue arises here where a project needs significant rehabilitation prior to mortgage maturity and, in order to finance the rehabilitation, the owner

*This article (Parts One and Two) was co-authored by Brandon Weiss, Skadden Fellow at Public Counsel's Community Development Project in Los Angeles, and NHLP Staff Attorney Navneet Grewal.

¹NHLP, *Recapitalizing the HUD-Assisted Housing Stock: Part One*, 40 Hous. L. BULL. 6 (Jan. 2010).

²Codified at 12 U.S.C.A. § 1715z-15 (Westlaw Nov. 10, 2009).

³42 U.S.C.A. §§ 1472 *et seq.* (Westlaw Nov. 10, 2009).

seeks to place new debt on the property. Given that HUD and private lenders are generally wary of being in a subordinate mortgagee position, the common practice is for the owner to seek HUD approval to pay off the HUD-insured mortgage and replace it with a new loan.

Prepaying the HUD-insured mortgage poses a problem because the affordability and eligibility limitations, the tenant protections and essentially all of the public benefit from the government's prior investment of public funds are tied to the HUD-insured mortgage. The mortgage note or deed of trust note and the associated regulatory agreement, which contain many of the use restrictions, are only effective while the mortgage is in place. Similarly, the entire statutory and regulatory framework governing the property ordinarily ceases to apply upon an owner's exit from the program through prepayment. Thus, there is a tension between the need for legitimate recapitalization and the need to ensure that residents are protected and that the public is not being short-changed on its investment in this housing. Unfortunately, the current legal regime mediating this tension is entirely unworkable.

The Statutory Framework: Section 250

Enacted in 1983, Section 250 of the National Housing Act states unequivocally that where HUD approval is required for prepayment, the Secretary shall not accept the offer unless "the Secretary has determined that such project is *no longer meeting a need for rental housing for lower income families in the area.*"⁴ This restriction makes no allowance for the need for recapitalization prior to maturity, even where the housing continues to meet a need. Given the pervasive housing affordability challenges across the United States and the dire need for subsidized housing, there are likely precious few areas where the statute could be satisfied.

HUD's Implementation of Section 250

Despite the clear language of the law, HUD has essentially chosen to ignore the text of Section 250 and has instead established its own recapitalization process through HUD-issued guidance. Purporting to implement the statute, HUD issued Notice H 06-11 on August 8, 2006, "Prepayments Subject to Section 250(a) of the National Housing Act."⁵ In this notice, HUD claims the authority to approve a prepayment request despite the fact that the housing continues to meet a need for lower-income families, arguably in direct violation of Section 250. The proffered justification is that HUD "will permit a prepayment in order to recapitalize the project," but will do so "only if the owner agrees to execute a Use Agreement that ensures that the project will continue to be maintained as rental housing for lower income families in the area

until at least the date the original mortgage would have terminated had it not been prepaid." The rationale is thus that the former regulatory agreement is no longer needed because it will be replaced by a new Use Agreement. Such an interpretation directly contradicts the language of the statute.⁶

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the text of Section 250 and has instead
established its own recapitalization process
through HUD-issued guidance.*

Critique of HUD's Implementation of Section 250

While clearly taking broad liberties with the mandate of Section 250, HUD's attempt to establish a recapitalization procedure through Notice H 06-11 might be more justifiable if not for the manner by which HUD has chosen to execute it. The notice states that the Use Agreement must "require the same affordability and rental restrictions as those that were in place before the prepayment and minimize the threat of a negative impact on current and future low-income tenants." HUD thus tried to ensure that tenants and the affordability of the property are similarly situated before and after the prepayment. However, the mechanism it has chosen to pursue this goal is flawed in a number of ways.

For example, the current model HUD Use Agreement used in the case of a Section 236 project prepayment, Form HUD-93142, falls well short of keeping tenants in the same position as they were under the Section 236 regulatory agreement. One potentially harmful difference is the allowance of rent increases to 30% of 80% of area median income, unadjusted for household size, which can be higher than many of the former budget-based rents. The end result is that a prepayment, justified on the basis of rehabilitation needs, results in an incremental loss of more deeply affordable housing. Other differences created by substituting the new Use Agreement include the following: good cause eviction protections are limited

⁶The statute does not state that prepayment requests shall be denied unless the *regulatory agreement* is no longer serving a need, but that such requests shall be denied if the *housing itself* is no longer serving a need. Furthermore, the statute's legislative history likewise argues against HUD's interpretation. A prior version of Section 250 provided HUD the authority to grant a prepayment request where "the needs of lower income families in such project can more efficiently and effectively be met through other Federal housing assistance taking into account the remaining time the project could meet such needs." Congress specifically deleted this provision in a 1988 amendment of Section 250 (Pub. L. No. 100-242, tit. II, § 261, 101 Stat. 1878, 1890 (1988)), thus explicitly stripping HUD of the very kind of authority it continues to claim in Notice H 06-11.

⁴Section 250 of the National Housing Act, *supra* note 2.

⁵Notice H06-11 replaced Notice H 2004-17, issued August 20, 2004, under the same title.

only to current, not future, tenants; tenants lose the right to organize, review and comment on owner policies; and residents lose maintenance assurances afforded by HUD inspection and enforcement under the REAC program.

Setting aside these specific problems related to the standard HUD Use Agreement, more global problems further hamper HUD's implementation of Section 250. One such problem strikes at the core of the prepayment process. The entire justification for HUD's strained interpretation of Section 250 is, according to Notice H 06-11, to "effectuate much needed rehabilitation of the project." However, the decision as to whether a project is approved for prepayment has become untethered from actual project need. HUD requires owners to demonstrate that a "significant amount of repair" is needed in order to approve prepayment. However, HUD's criteria only require proof of significant *costs* for repairs, not proof of *actual need*.⁷ This has given rise to anecdotal stories of residents who "get new sinks, when our old ones worked just fine."

This situation may occur due to incentives that cause owners to attempt to prepay for reasons other than to effectuate much-needed rehabilitation. One such incentive relates to another more global problem with the current prepayment process: namely, the use of proceeds resulting from the prepayment. In some cases, a prepayment actually unlocks significant value, the beneficiary of which stands to profit handsomely, and thus the rehabilitation simply serves as window dressing for a payday to the owner. This problem would not exist if recapitalization proceeds were required to be reinvested in the project.

For example, in many instances, a project has built up significant "residual receipts,"⁸ funds over and above the distributions owners are allowed to take out of the buildings during the restricted term. At prepayment, however, HUD often simply releases these funds to the owners, without negotiating for any further public benefit. Aside from creating yet another way in which tenants are not similarly situated before and after prepayment (since the funds are no longer available for project needs), this practice also creates an incentive to prepay unrelated to the rehabilitation needs of the project.⁹

⁷See Department of Housing and Urban Development, Policy Clarification for Prepayments Subject to Section 250(a) of the National Housing Act (undated), <http://www.hud.gov/offices/hsg/mfh/hto/clarify/noticeh0611.pdf> (outlining three ways to satisfy the requisite standard for repair).

⁸During the term of the mortgage, residual receipts are only allowed to be used with HUD approval for purposes fully consistent with the intent of the program, such as making repairs, providing additional project amenities, reducing operating deficits when legitimate cash flow deficits exist, making mortgage payments when default is actual or imminent, and paying the limited allowable distribution under restricted circumstances. See HUD Handbook 4350.1, Rev. 1, Ch. 25, § 25-9 (July 1993).

⁹Other such potential incentives exist in the unlocked value that comes from the proceeds of any sale of the project at prepayment, or even simply the enhanced liquidity that comes from a refinancing. In some cases, HUD has required owners to deposit certain of these funds in a trust

A final problem relates to the limited tenant involvement in the current recapitalization process. Section 250 merely requires that: (1) the tenants be notified of the prepayment request; (2) the tenants be provided an opportunity to comment on the owner's request; and (3) the Secretary take any such comments into consideration. Notice H 06-11 does go farther than Section 250 by requiring the owner to make the proposed Use Agreement available during normal business hours.¹⁰ The owner must also offer the tenants 30 days to consider and comment upon the prepayment and Use Agreement, must forward all such comments and the owner's response to HUD, and must consider the comments, "making any adjustments in the plan deemed appropriate by the owner." Nothing requires the owner to provide tenants with an assessment of project needs or a proposed scope of work for the rehabilitation. Furthermore, there is little redress for a tenant who fails to submit comments during the 30-day window, nor is the owner required to take any action with respect to comments not "deemed appropriate." An even broader problem is that tenants are given no rights to enforce the Use Agreements should the owner violate any of the obligations.

Towards a Balanced Recapitalization Policy for Section 250 Properties

While the current legal regime for recapitalizing the Section 250 stock is unworkable, it is possible to mediate the tension between legitimate rehabilitation needs and preservation of tenant protections and public investments. The policy solutions flow logically from the above-listed problems.

Section 250 should be amended to allow for legitimate recapitalizations. The current language allowing prepayment approval only where projects are "no longer meeting a need" fails to account for the often legitimate need for significant rehabilitation prior to mortgage maturity. The current system incentivizes HUD to ignore the statute to facilitate legitimate recapitalizations.¹¹

Furthermore, Congress and HUD should ensure that tenants and housing affordability are not harmed by the prepayment. HUD should amend the standard Use Agreement to provide the protections listed above

account to be used for public purposes, at least during the remaining years of the original mortgage term. Unfortunately, such practices are not uniform, the inconsistency resulting in instances of owners simply using the prepayment as the trigger to release a windfall above the deal that was originally negotiated with the federal government. In the overall net present value analysis, doing some cosmetic enhancements may be worthwhile to gain access to the value unlocked by prepayment.

¹⁰However, experience has shown that often key terms of the Use Agreement are not filled in when made available to the tenants.

¹¹In some situations, litigation is the only tool available to address poorly conceived terms. Forcing HUD, owners, tenants and advocates into this realm wastes countless hours, muddies the governing rules and easily could be remedied by simply revising Section 250 to account for competing concerns.

that are currently lacking. Additional creative alternatives for recapitalization should be explored to obviate the need to remove the project from the relevant program through prepayment. For example, if a project has residual receipts funds sufficient to cover the proposed rehabilitation, the owner should be required to tap those monies prior to requesting to prepay the mortgage. Other ideas might involve HUD experimenting with providing capital or rental assistance funds to cover recapitalization in exchange for extended affordability commitments.¹² Alternatively, HUD could explore tools such as mortgage insurance and/or a willingness to take a subordinate mortgagee position where HUD holds the mortgage in exchange for a private mortgagee lending against the property without requiring the prepayment of the HUD-insured mortgage.

Perhaps the greatest uncertainty about recapitalization concerns the situation now inexorably approaching for thousands of properties—mortgage maturity.

Another straightforward policy fix is to tie prepayment approval to actual project need. If the justification for the prepayment is to perform much-needed rehabilitation, there should be a comprehensive assessment of that need and of future needs in the process of approving any prepayment. Owners should be required to submit supporting documentation demonstrating a match between their proposed plans for rehabilitation and current project need.

In addition, Congress and HUD should provide uniform standards for dealing with prepayment proceeds. To the extent that prepayment unlocks significant value to which the owner would otherwise not have access, there should be a uniform policy dictating how those funds are to be used. Whether due to access to residual receipts, sales proceeds or simply new liquidity from refinancing, use of excess funds should reflect that they are being tapped early under the approval and are the result of significant federal investment. Placing such funds in a trust account, a percentage of which is allocated to investment in affordable housing, could be one promising method. While some have previously argued that nonprofit owners

¹²In a similar vein, HUD should more actively leverage its approval and currently available incentives to secure extended affordability. For example, some owners prepay with the promise of subsequently extending an already existing project-based Section 8 rental assistance contract. Currently, however, HUD refuses to condition prepayment approval on the owner legally committing to extend the Section 8 contract.

should bear even greater restrictions with respect to any such proceeds because their special status carries special responsibilities, certainly this is the case for all owners when additional public investment is part of the recapitalization package.

Finally, tenants must be afforded meaningful involvement in the process. This includes being provided with access to all documents necessary to make an informed judgment, including the needs assessment and rehabilitation plans. Owners are generally already required to give at least 150 days' notice for other prepayments,¹³ yet tenants only have 30 days to comment on complex proposals. This window should be extended to provide time for tenants to obtain assistance to review the Use Agreement and other relevant documents. Owners should be required to meet with tenants and respond in writing to submitted questions. HUD should also be required to respond in a timely fashion to tenants' written questions and comments.

The Year-40 Problem: Recapitalization at Maturity

Perhaps the greatest uncertainty about recapitalization concerns the situation now inexorably approaching for thousands of properties—mortgage maturity. Unlike the issues surrounding certain prepayments, no HUD approval is needed where the mortgage term is ending on its own accord, and tenants face the unwelcome proposition of being left unprotected when the associated restrictions expire.

A 2004 report by the General Accounting Office (GAO) evaluated the scope of this problem and determined that 21%, or 2,328 of the 11,267 subsidized properties with HUD mortgages, are scheduled to reach maturity by 2013, with three-quarters of these occurring between 2011 and 2013.¹⁴ These 2,328 properties contain 236,650 units—102,563 of these units lack any form of rental assistance, and many more have project-based Section 8 contracts which themselves are set to expire.¹⁵ Hundreds of thousands of families thus face a dire housing situation if Congress fails to remedy the situation.¹⁶

¹³Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, Pub. L. No. 105-276, tit. II, § 219(b)(3), 112 Stat. 2,461, 2,488 (Oct. 21, 1998) requires a notice of not less than 150 days, but not more than 270 days, prior to a prepayment.

¹⁴UNITED STATES GENERAL ACCOUNTING OFFICE, MULTIFAMILY HOUSING: MORE ACCESSIBLE HUD DATA COULD HELP EFFORTS TO PRESERVE HOUSING FOR LOW-INCOME TENANTS 3 (2004). Compare that figure to the 10 years prior to 2004, in which only 32 such mortgages matured. *Id.* at 5.

¹⁵*Id.* at 10, 16. The total number of units with maturing mortgages that either do not have rental assistance or have rental assistance that will expire by 2013 totals 180,619. *Id.* at 15.

¹⁶Compounding this problem is the fact that state and local attention paid to this issue varies widely and is often insufficient. The GAO reports that "about three quarters of the state and local agencies that responded to our survey reported that they do not track the maturity

In 2004, Congressman Barney Frank introduced H.R. 4679, the Displacement Prevention Act, in the 108th Congress. The bill contained a number of measures aimed at this impending problem. While hearings were held on the bill, it was never acted upon.

Like the rest of the HUD stock, many of these buildings reaching mortgage maturity are in great need of significant rehabilitation. The problem is often termed the “Year-40 problem” because many Section 221(d)(3) Below Market Interest Rate and Section 236 projects financed in the late 1960s and early 1970s are reaching the end of 40-year mortgage terms. Rural properties financed by United States Department of Agriculture RD loans face a similar situation. Without significant infusion of capital to address physical needs that accrued over the course of four decades, many of the buildings are in desperate need of repair. Again, interrelated issues of long-term affordability and recapitalization arise.

The Housing Preservation and Tenant Protection Act of 2009

In the 111th Congress, Congressman Frank has once again authored a draft housing preservation bill, various sections of which address the issue of mortgage maturity.¹⁷ From a broad perspective, there are a number of ways such legislation might approach the issue. Providing various “qualified entities” an option to purchase the building in exchange for committing to preserving long-term affordability is one of the more potent tools included in versions of the draft bill. Another approach might mirror that of the Low-Income Housing Preservation and Resident Homeownership Act,¹⁸ containing mandatory extension of affordability provisions in exchange for guaranteed government incentives. A third approach, also included in versions of the draft bill, is two-pronged: government-provided voluntary incentives to preserve affordability, coupled with direct tenant rental assistance where an owner rejects the incentives.

While the purchase option is certainly the most attractive from a preservation perspective, even the third approach hinging on voluntary incentives would be an improvement over the current situation. Contained in Section 102, “Displacement Prevention for Federally Assisted Multifamily Housing,” of the current draft bill, this concept would authorize appropriations necessary to make grants and loans to owners and purchasers to be used for capital improvements in exchange for the long-term extension of the currently applicable affordability restrictions.

dates on HUD mortgages, and none provided examples of tools or incentives used to keep units affordable after mortgage maturity.” *Id.* at 22.

¹⁷Housing Preservation and Tenant Protection Act of 2009, Title VII of H.R. ___, 111th Cong. (2009) (discussion draft).

¹⁸The Low-Income Housing Preservation and Resident Homeownership Act, Pub. L. No. 101-625, tit. VI, 104 Stat. 4079, 4275 (Nov. 28, 1990) (codified at 12 U.S.C.A. §§ 4101 *et seq.*).

Section 102 also authorizes new project-based assistance to currently unassisted units in exchange for additional affordability restrictions.

For owners who reject these incentives, Section 102 would also make families living in properties with maturing mortgages eligible for tenant-based rental assistance in the form of enhanced vouchers. These vouchers are currently provided to tenants in situations involving certain prepayments or Section 8 opt-outs, but not at mortgage maturity.¹⁹ With these vouchers, tenants would be entitled to remain in their current apartment and receive rental assistance to offset a potential increase in rents to market rate. Providing tenants with enhanced vouchers is not inherently a preservation recapitalization tool, and thus fails to address issues of long-term physical or financial need, extended affordability for future tenants or reinvestment of proceeds. However, by coupling voluntary incentives with the provision of enhanced vouchers, the draft bill, if enacted, would at least provide some degree of security for those current tenants headed toward the cliff of mortgage maturity.

Section 102 additionally requires provision of a 12-month notice to tenants and to relevant government officials of an owner’s decision not to extend the affordability restrictions. While such notice is a necessary component, the bill could go further in ensuring tenant participation and endorsement of the preservation planning process, as well as granting tenants the right to enforce affordability restrictions and subsidy requirements.

Furthermore, in issuing implementing regulations, HUD should establish sufficient standards for rehabilitation, adequately taking into account future project needs. These standards should go well beyond merely bringing the buildings into code compliance, but instead should ensure the long-term physical soundness of the property. Likewise, the HUD grants or loans should be allocated in sufficient amounts, calibrated to consider factors including the potential loss of any interest-reduction subsidies, the necessary rehabilitation, other available funding resources and the market-rate returns required to encourage owner participation. Ideally, HUD’s implementation of the program would not unnecessarily add to the complexity of the process or result in the need for cumbersome layering of subsidies.

Conclusion

The HUD-assisted housing stock remains a vital asset to communities and low-income households across the nation. However, it continues to depreciate physically over time, and efforts to recapitalize and rehabilitate are inevitably necessary. Such efforts must mediate the tension between tapping new capital while not sacrificing

¹⁹This has spurred some owners to prepay shortly before mortgage maturity to ensure that tenants receive enhanced vouchers.

the affordability protections that implement the governing housing program.

An evaluation of five such approaches in this two-part article demonstrates that successful efforts must observe six key principles:

- meeting short-term and long-term physical and financial needs;
- reinvesting excess proceeds back into affordable housing;
- guaranteeing affordability for current and future tenants;
- weeding out poorly performing owners and managers;
- providing for tenant participation in the decision-making process; and
- ensuring clarity in the governing law and regulations.

Passage of Congressman Frank's draft omnibus preservation bill would be a significant step in the right direction for several of the types of properties reviewed here. Other innovative long-term measures should be explored as well, such as providing stronger incentives to transfer these projects to mission-driven nonprofits or to local land trusts, in order to provide greater assurances of long-term public benefit from responsible recapitalization.²⁰ By combining the lessons learned from prior approaches with new innovative proposals, this important housing stock can remain a viable and valuable asset long into the future. ■

²⁰Exit tax relief is one such important proposal that would help address the issue of many private owners being unwilling to sell due to the steep capital gains taxes they would incur as a result of having taken prior significant depreciation deductions. Many owners thus hold onto their property to secure the step up in basis that occurs upon transfer at death, thus eliminating both the tax revenue to the government, as well as potentially failing to recapitalize the property. Exit tax relief would eliminate this tax burden in cases of a sale to a preservation-motivated purchaser.

The Importance of Stable Housing for Formerly Incarcerated Individuals

Each year more than 725,000 people leave state and federal prisons.¹ An additional 230,000 people leave county jails every week.² Formerly incarcerated individuals struggle to secure employment, obtain medical care and avoid substance abuse. According to criminal justice officials, however, finding housing is the biggest challenge faced by individuals returning to the community.³ This article will identify the barriers to accessing stable housing, describe the housing arrangements of individuals returning to the community and explore the relationship between residential instability and recidivism.

Obstacles to Stable Housing

A number of institutional and legal barriers prevent formerly incarcerated individuals from finding stable housing after release. Private housing represents 97% of the total housing stock in the United States.⁴ Due to soaring prices, however, private housing is simply out of reach for many formerly incarcerated individuals living in urban areas.⁵ Moreover, most landlords conduct criminal background checks on prospective tenants.⁶ Given the short supply of affordable housing, landlords can afford to deny housing to applicants with criminal records. Screening for sex offenders is especially prevalent.

Federally assisted housing is the only option for many people leaving correctional facilities. Harsh admission

¹HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2007 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf>.

²AMY L. SOLOMON ET AL., LIFE AFTER LOCKUP: IMPROVING REENTRY FROM JAIL TO THE COMMUNITY XV (2008), available at <http://www.jjay.cuny.edu/centers/institutes/pri/pdfs/Final%20Life%20After%20Lockup.pdf>.

³CATERINA GOUVIS ROMAN & JEREMY TRAVIS, THE URBAN INST., TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISONER REENTRY 2 (2004), available at http://www.urban.org/UploadedPDF/411096_taking_stock.pdf.

⁴JOAN PETERSILIA, CALIFORNIA POLICY RESEARCH CENTER, UNDERSTANDING CALIFORNIA CORRECTIONS 69 (2006).

⁵See NAT'L LOW INCOME HOUS. COALITION, OUT OF REACH 2009, <http://www.nlihc.org/oor/oor2009/data.cfm?getstate=on&getmsa=on&msa=2243&state=CA>. For example, the fair market rent for a one-bedroom apartment in Oakland, California, is \$1,093.

⁶See Maria Foscarinis & Rebecca K. Troth, *Reentry and Homelessness: Alternatives to Recidivism*, 39 CLEARINGHOUSE REV. 440, 446 (2005). All 50 states allow private landlords to screen an applicant for a criminal record. *But see* Madison, Wis. Code of Ordinances, Ch. 39.03(1) and (4) (Renumbered by Ord. 12,039, Adopted 2-17-98), available at <http://www.municode.com/resources/gateway.asp?pid=50000&sid=49>, Urbana, Ill, Code of Ordinances, Ch. 12 Art. III. Div. 1, §§ 12-37 and 12-64, (Ord. No. 7879-92, § 1(29), 4-24-79; Ord. No. 9798-49, § 1, 10-6-97), available at <http://www.city.urbana.il.us/>. Both Madison, Wisconsin and Urbana, Illinois passed ordinances that prevent discrimination on the basis of an arrest or conviction record.

policies, however, prevent many people with criminal records from accessing federally assisted housing. Public housing authorities (PHAs) must reject lifetime registered sex offenders and individuals convicted of manufacturing or producing methamphetamine on the premises of federally assisted housing.⁷ In addition, federal law permits PHAs to deny admission to applicants with histories of violent criminal activity, drug-related criminal activity, or criminal activity that may threaten the health, safety or peaceful enjoyment of the premises by other residents.⁸ The statute directs PHAs to consider criminal activity that occurred within a “reasonable time” prior to the admission decision.⁹ Nevertheless, some PHAs consider criminal activity that occurred as long as 10 years prior to the admission decision.¹⁰

Housing Arrangements After Release

Because of the barriers to obtaining stable housing, many formerly incarcerated individuals end up in unstable housing arrangements. A total of 10% of parolees are homeless nationwide.¹¹ In large urban areas such as Los Angeles and San Francisco, 30% to 50% of parolees are homeless.¹² A large portion of formerly incarcerated individuals rely on family members to provide shelter after release.¹³ Some family members, however, set limits on the amount of time that a returning relative can stay.¹⁴ Consequently, formerly incarcerated individuals end up “shuttling” between relatives, friends, shelters and the street.¹⁵ A study of men returning to the metropolitan

Cleveland area reveals the extent of the shuttling:¹⁶ 63% of the study participants reported living in two, three, four, or five places within the first year after release.¹⁷ At the end of the first year, 46% of the men referred to their housing arrangements as temporary and expected to move within a few weeks or months.¹⁸ Conversely, a small portion of formerly incarcerated individuals manage to secure their own apartment or house after release. In a study of men returning to Chicago, only 19% of the study participants reported living in their own place 16 months after release.¹⁹

Relationship Between Unstable Housing and Recidivism

Ultimately, many individuals are not able to avoid re-incarceration. In California, for example, 79% of parolees return to prison or abscond.²⁰ Research suggests that securing stable housing is crucial to successful re-entry. The study of men returning to the Cleveland metropolitan area found that obtaining stable housing within the first month after release inhibited re-incarceration.²¹ As stated in an Urban Institute study, “The importance of finding a stable residence cannot be overestimated: men who found such housing within the first month after release were less likely to return to prison during the first year out.”²² The study of men returning to Chicago reinforces the idea. Study participants who reported living in their own apartment or house two months after release faced a lower risk of re-incarceration.²³

Moreover, a study of over 40,000 individuals returning to New York City from state correctional facilities reveals the correlation between shelter use and risk of recidivism.²⁴ Individuals who entered a homeless shelter within the first two years after release faced a higher risk of re-incarceration.²⁵ Perhaps more significantly, individuals who reported living in a shelter before incarceration faced a higher risk of both shelter use after release and re-incarceration.²⁶ The figures suggest that “the crossing

⁷42 U.S.C.A. §§ 1437n(f), 13663 (Westlaw Oct. 27, 2009). The ban on individuals convicted of manufacturing or producing methamphetamine does not apply to project-based Section 8, Section 202, Section 811, Section 221(d)(3), Section 236, or USDA housing. The ban on lifetime registered sex offenders does not apply to USDA housing.

⁸42 U.S.C.A. § 13661(c) (Westlaw Oct. 27, 2009).

⁹*Id.*

¹⁰See San Francisco Housing Authority Admissions and Continued Occupancy Plan 2008, available at <http://www.sfha.org/about/pha/pdf/2008ACOP.pdf>.

¹¹LITTLE HOOVER COMM’N, BACK TO THE COMMUNITY: SAFE & SOUND PAROLE POLICIES 39 (2003).

¹²*Id.*

¹³See Nancy La Vigne et al., The Urban Institute, CHICAGO PRISONERS’ EXPERIENCES RETURNING HOME 16 (2004), available at http://www.urban.org/UploadedPDF/311115_ChicagoPrisoners.pdf. In a study of men returning to Chicago, 88% of the men reported living with family members or intimate partners four to eight months after release.

¹⁴TRACEY L. SHOLLENBERGER, THE URBAN INST., WHEN RELATIVES RETURN: INTERVIEWS WITH FAMILY MEMBERS OF RETURNING PRISONERS IN HOUSTON, TEXAS 9-10 (2009), available at http://www.urban.org/UploadedPDF/411903_when_relatives_return.pdf. The study followed family members of men and women returning to Houston. Of the family members who provided housing to a returning relative, over half imposed limits on the duration of the housing arrangements. Some of the study participants said that the returning relative could stay until he or she found an apartment or a job. Others said that the returning relative could stay as long as he or she did not use drugs or engage in criminal activity.

¹⁵JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 219 (The Urban Inst. Press 2005).

¹⁶CHRISTY A. VISHER & SHANNON M.E. COURTNEY, THE URBAN INST., ONE YEAR OUT: EXPERIENCES OF PRISONERS RETURNING TO CLEVELAND 1 (2007), available at http://www.urban.org/UploadedPDF/311445_One_Year.pdf.

¹⁷*Id.* at 3.

¹⁸*Id.*

¹⁹JENNIFER YAHNER & CHRISTY VISHER, THE URBAN INST., ILLINOIS PRISONERS’ REENTRY SUCCESS THREE YEARS AFTER RELEASE 3 (2008), available at http://www.urban.org/UploadedPDF/411748_reentry_success.pdf.

²⁰LITTLE HOOVER COMM’N, *supra* note 11, at 55.

²¹VISHER & COURTNEY, *supra* note 16, at 11.

²²*Id.*

²³YAHNER & VISHER, *supra* note 19, at 3.

²⁴Stephen Metraux & Dennis P. Culhane, *Homeless Shelter Use and Reincarceration Following Prison Release*, 3 CRIMINOLOGY & PUB. POLICY 139 (2004).

²⁵*Id.* at 147.

²⁶*Id.* During the first two years after release, roughly 11% of the study participants entered a homeless shelter and 33% returned to prison. Among the study participants with a record of shelter use prior to incarceration, however, roughly 45% entered a homeless shelter and 42% returned to prison.

over from incarceration to homelessness, and vice versa, threatens to transform spells of incarceration or homelessness into more long-term patterns of social exclusion.²⁷ Directing housing assistance to individuals with a history of residential instability before incarceration could reduce the rate of homelessness and re-incarceration among the re-entry population.²⁸

Conclusion

Many formerly incarcerated individuals end up in unstable housing arrangements after release. As the research above indicates, stable housing is a vital component of effective re-entry. By working to reduce the barriers that prevent formerly incarcerated individuals from accessing stable housing, advocates can reduce recidivism and improve public safety and community wellbeing. ■

²⁷*Id.* at 142.

²⁸*Id.* at 151; *see also* CORP. FOR SUPPORTIVE HOUS., GETTING OUT WITH NOWHERE TO GO: THE CASE FOR RE-ENTRY SUPPORTIVE HOUSING, *available at* http://www.csh.org/_data/global/images/ReEntryBooklet.pdf. Research shows that supportive housing—permanent affordable housing linked to services—works to break the cycle of homelessness and incarceration.

Recent Cases

The following are brief summaries of recently reported federal and state 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 website.³ Copies of the cases are *not* available from NHLP.

Housing Choice Voucher Program: Police Report Insufficient to Establish Drug-Related Criminal Activity

Weekes v. Boston Hous. Auth., No. 09H784CV00531 (Mass. Hous. Ct. Dec. 10, 2009). In terminating a voucher tenant's assistance, a hearing officer relied on a police report stating that officers seized clear plastic bags containing a substance "believed to be Class D marijuana" from the tenant's apartment. The court found that the statements in the police report, standing alone, were insufficient to establish by a preponderance of the evidence that the substance seized from the tenant's apartment was marijuana. The court therefore found that the hearing officer's conclusion that the tenant allowed her apartment to be used for drug-related criminal activity in violation of her Section 8 lease was legally erroneous. The court vacated the hearing officer's decision and ordered the housing authority to reinstate the tenant's voucher.

Housing Choice Voucher Program: Evidence Supported Hearing Officer's Finding that Tenant Was Evicted

Morford-Garcia v. Metro. Council Hous. & Redev. Agency, 2009 WL 4909435 (Minn. Ct. App. Dec. 22, 2009) (unreported). An owner filed an eviction action against a voucher tenant. The parties later entered into a settlement agreeing to a mutual termination of the lease. The settlement stated that if the tenant violated its terms, the landlord would be entitled to an immediate writ of recovery. The tenant violated the settlement, and a writ of recovery was issued but later canceled. The tenant argued that the record did not support the hearing officer's finding that she was evicted. The court disagreed, finding that an eviction judgment must have been entered in the owner's favor, or else a writ of recovery would not have been issued. The court also found that there was substantial evidence to support the

¹<http://www.westlaw.com>.

²<http://www.lexis.com>.

³For a list of courts that are accessible online, 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>.

hearing officer's finding that the tenant failed to vacate the premises by July 31, as required by the settlement. The tenant argued that she had substantially complied with the settlement because she was no longer residing in the unit, although some of her belongings remained at the residence. The court rejected the tenant's argument, as the settlement did not provide for substantial compliance. Finally, the tenant argued that the hearing officer was required to consider mitigating factors, including the triviality of leaving personal belongings behind, the insignificance of her failure to notify the housing authority when her landlord filed the eviction and the impact that the loss of rental assistance would have on her family. The court found that because 24 C.F.R. § 982.552(b)(2) provides that a housing authority must terminate assistance if a recipient is evicted for serious lease violations, and thus is a mandate, the hearing officer was not permitted to consider the mitigating factors.

Housing Choice Voucher Program: Failure to Acquire Approval Prior to Moving Is Not a Basis for Termination

Cain v. Allegheny County Hous. Auth., __A.2d__, 2009 WL 4916539 (Pa. Commw. Ct. 2009). A voucher tenant's landlord told her to move due to nonpayment of plumbing bills and rent. The Allegheny County Housing Authority (ACHA) later terminated the tenant's voucher for failure to receive ACHA's approval before moving. In support of its argument that the tenant needed to receive approval prior to her move, ACHA relied on 24 C.F.R. § 982.314(e), which specifies that a PHA may deny permission to move if there is a basis to terminate assistance. Tenant disputed that the federal regulations require approval of a move and relied primarily on case law of other jurisdictions. The court held that the federal regulations do not provide that failure to obtain approval prior to a move is a basis for termination. The court also found that there was a reasonable inference that tenant orally provided notice of her intention to move to the ACHA, and that ACHA made no argument that a certain party must receive the notice or that the notice must be written.

Housing Choice Voucher Program: Tenant Not Responsible for Housing Authority's Portion of Rent

Marant Apartments, LLC v. Baez, 2009 WL 5103310, slip op. (Wis. Ct. App. Dec. 29, 2009). The tenant appealed the lower court's decision that she was liable for rent payments for two months during which the owner was noncompliant with federal housing quality standards (HQS). Due to this noncompliance, the housing authority refused to remit

rent payments on her behalf. The appellate court held that the tenant was not liable for these rent payments. The owner had executed the Housing Assistance Payments (HAP) contract and Section 8 tenancy addendum, which required the owner to maintain the tenant's unit in accordance with HQS, prohibited the owner from terminating the tenant's lease or holding the tenant liable for rent in the case of nonpayment by the housing authority, and importantly, made the addendum controlling in the event of conflict with the provisions of the lease. The court held that although the payments were withheld after the initial lease term, the lease had continued on a month-to-month basis. The court concluded that a HAP contract continues as long as lease extensions occur. Thus, the terms of the tenancy addendum were still controlling.

Housing Choice Voucher Program: Termination for Unreported Income Upheld

Ansari v. Metro. Hous. & Redev. Auth., 2009 WL 4796131 (Minn. Ct. App. Dec. 15, 2009) (unreported). The housing authority terminated a voucher tenant's benefits after he failed to report subsidy payments that he received as the manager of an additional Section 8 property. The tenant challenged the termination decision, arguing that he had received no personal benefit from the subsidy payments and, instead, spent them only in his capacity as a property manager to maintain the property. The court upheld the hearing officer's determination that the subsidy payments that the tenant received were income, because he failed to introduce any evidence that he received no personal benefit from the payments. Finding that the hearing officer did not arbitrarily and capriciously overlook important extenuating circumstances, the court affirmed her decision.

Public Housing: Exclusionary Rule Does Not Apply to Eviction Action

U.S. Residential Mgmt. & Dev., LLC, v. Head, __N.E.2d__, 2009 WL 4931004 (Ill. App. Ct. 2009). A public housing tenant was arrested in his unit for marijuana possession, but criminal charges against him were dropped. The property was managed by U.S. Residential Management and Development (USRMD) on behalf of the Chicago Housing Authority. USRMD sought to evict the tenant for drug-related criminal activity. The trial court found that evidence of the tenant's criminal activity was seized in violation of the Fourth Amendment and that the exclusionary rule barred admission of this evidence. The trial court dismissed the eviction action because without the illegally seized evidence, USRMD could not establish that the tenant violated his lease. On appeal, USRMD argued that the trial court should not have applied the exclusionary

rule because the eviction action was not a criminal or quasi-criminal proceeding. The appellate court agreed, finding that USRMD only sought to regain possession of the premises and not to punish the tenant by a fine or other penalty, and that the exclusionary rule therefore did not apply. The appellate court remanded the action for further proceedings.

Public Housing: Pleading Standards for Political Subdivision Liability

Williams v. Cuyahoga Metro. Hous. Auth., 2009 WL 4857623 (Ohio Ct. App. Dec. 17, 2009) (unreported). The plaintiff was visiting a tenant at a Cuyahoga Metropolitan Housing Authority (CMHA) property and was injured when a pool table in the recreation room collapsed on her. She alleged that CMHA was negligent in constructing, maintaining and repairing the recreation room equipment, that the defective pool table was a physical defect within the grounds of CMHA's property, that CMHA had actual or constructive knowledge that the pool table was not reasonably safe for use, and that CMHA had a duty to warn tenants and their guests of the danger but failed to warn them. The court rejected CMHA's argument that it was entitled to political subdivision immunity, and it upheld the lower court's denial of CMHA's motion for judgment on the pleadings. It found that the plaintiff's allegations were sufficient under state notice pleading requirements to state a cause of action against CMHA.

Public Housing: Pleading Standards for Political Subdivision Liability

Diaz v. Cuyahoga Metro. Hous. Auth., ___A.2d___, 2010 WL 27868 (Ohio Ct. App. 2010). The plaintiff-appellee filed suit against the Cuyahoga Metropolitan Housing Authority (CMHA) after her daughter was allegedly struck by a window while visiting a public housing development. The court affirmed a denial of motion for judgment on the pleadings on CMHA's claim that it possessed governmental immunity from the suit under Ohio's Political Subdivision Tort Liability Act. Under this statute, a political subdivision may be subject to civil liability for the negligent creation or failure to remove physical defects in buildings and grounds. The court rejected CMHA's contention that to meet the statutory requirements of notice pleading, the appellee must plead with specificity how CMHA is not immune from the suit. Instead, the court held that appellee's complaint need only be sufficiently detailed to "put CMHA on notice as to the facts and circumstances surrounding the complained of injury."

Project-Based Section 8: Termination Proceedings Dismissed Where Owner Failed to Observe Procedural Requirements

Kingsbridge Ct. Assocs. v. Hamlette, 2009 WL 4724253 (N.Y. Civ. Ct. Dec. 8, 2009). A project-based Section 8 owner sought to evict a tenant for failing to disclose her Social Security income on her annual income recertification forms. However, the owner did not comply with the regulatory requirements for terminating the tenancy. Specifically, the owner did not conduct any pre-termination investigation of the tenant's alleged fraud, it did not show that it notified the tenant in writing regarding the suspected fraud, and it did not show that it gave the tenant 10 days' notice to meet to discuss possible termination of the tenancy. When the meeting occurred, it failed to comply with Department of Housing and Urban Development guidance because the tenant was not represented by someone who was "not involved in any manner with the review of the allegedly false information." Further, the owner was required to give the tenant a written final decision within 10 days of the meeting and failed to do so until more than 21 days after the meeting. The court held that the owner's failure to comply with these conditions was fatal and dismissed the eviction action.

Project-Based Section 8: State Agency's Duty to Conduct Rent Comparability Studies

Greenleaf Ltd. v. Ill. Hous. Dev. Auth., 2009 WL 5166225 (N.D. Ill. Dec. 23, 2009). Project-based Section 8 owners brought suit against the Illinois Housing Development Authority (IHDA) alleging that IHDA breached their Housing Assistance Payments (HAP) contracts by: failing to increase contract rents or by increasing contract rents by less than the amount called for in the HAP contract; reducing the annual adjustment factor by .01 for units occupied by the same family in consecutive years; and requiring the owners to submit rent comparability studies. The HAP contracts provided that the contract rents are to be adjusted on the date of the anniversary of the contract (and that the annual adjustment could be either upward or downward). Reading both the 1994 and 1987 amendments to the project-based Section 8 statute, the court found that IHDA had a duty to perform rent comparability studies 60 days before the anniversary date of the HAP contracts. The court held IHDA was barred from invoking the limitations clause of the HAP contract to limit damages that might be awarded for breach of contract for the years when it did not submit comparability studies.

Fair Housing Act: Failure to Provide Sufficient Evidence of Need for Companion Animal; Attorney's Fees

Lucas v. Riverside Park Condo. Unit Owners Ass'n, ___N.W. 2d___, 2009 WL 4929395 (N.D. 2009). A condominium owner brought an action against the condominium owners' association to recover damages and obtain an injunction for violation of the Fair Housing Act (FHA) and its state law counterpart. Specifically, the owner claimed that the association violated these statutes by failing to accommodate his alleged need for a therapeutic companion dog. The condominium's declaration of covenants and restrictions prohibited owners from keeping pets on the premises. Summary judgment had been entered below in favor of the association, and the owner appealed. The court held that the conclusory and ambiguous statements provided by the owner's physicians were insufficient to raise a genuine issue of material fact. The owner failed to provide competent evidence of the relationship between his disability and his need for a therapeutic companion service animal, other than the physician requests that the association "permit" the owner to have one. However, the court found that an attorney's fees award was not warranted, as it would require a finding of frivolousness, and the owner's action was not necessarily frivolous.

Fair Housing Act: Halfway Houses and Zoning

Schwarz v. City of Treasure Island, 2009 WL 5176535 (M.D. Fla. Dec. 22, 2009). Owners of properties in the city's RM-15 zoning district, which are rented to recovering substance abusers, filed an action against the city alleging violations of the FHA, the Americans with Disabilities Act and the Rehabilitation Act. The owners sought to challenge a zoning requirement limiting the number of times a single-family or two-family dwelling could change occupancy during a 12-month period to six times. The owners appealed the district court's order granting summary judgment to the city. The Eleventh Circuit Court of Appeals affirmed, except that it found that "there *may* be a genuine issue of material fact" regarding whether the accommodation requested by the owners—a relaxation on the city's restriction on occupancy turnover in the RM-15 zoning district—was "necessary" within the meaning of the FHA. The Eleventh Circuit remanded the issue of necessity to the district court to determine whether there existed a genuine issue of material fact as to the necessity of the zoning provision. The owners argued that relaxing the zoning requirement was necessary to afford recovering substance abusers an equal opportunity to use and enjoy the halfway houses, which they portrayed as an essential part of a successful recovery. The court concluded that there was a genuine issue of material fact regarding the issue of whether short-term stays in the residences at issue

contributed to an addict's recovery in a meaningful way such that a relaxation of the zoning requirement was necessary, thus rendering summary judgment inappropriate.

Fair Housing Act: Title Insurance Did Not Constitute Financial Assistance

Lyons v. First Am. Title Ins. Co., 2009 WL 5195866 (N.D. Cal. Dec. 22, 2009). The plaintiff-homeowners filed a class action alleging that First American Title Insurance Co. had discriminated against minority homeowners on the basis of gender, race, color and/or national origin in its provision of title insurance policies. Specifically, the homeowners alleged that First American caused its minority title insurance purchasers to pay excessively disparate premiums. The homeowners alleged causes of action under the FHA and California's Fair Employment and Housing Act (FEHA). The court granted First American's motion to dismiss the complaint for failure to state a claim. The court found that the title insurance did not provide true "financial assistance" to the homeowners for the purpose of purchasing or maintaining a dwelling, as is required for title insurance to qualify as a "real estate related transaction" pursuant to the FHA or FEHA.

Predatory Lending: Statistical Evidence of Disparate Impact Needed to Show an Overall Policy of Racial Discrimination

Rodriguez v. Bear Stearns Co., 2009 WL 5184702 (D. Conn. Dec. 22, 2009). Borrowers brought a class action on behalf of African-American and Latino borrowers who had, or continue to have, a non-prime residential loan serviced by defendants Bear Stearns or EMC Mortgage Corporation. The borrowers argued that the defendants' allegedly predatory lending practices had a disparate impact on racial minorities in violation of the FHA. The borrowers alleged that the defendants acquired a large volume of near-prime and sub-prime loans made to Hispanics and African Americans and then engaged in predatory loan servicing practices, while similarly situated Caucasian borrowers were not subject to these practices to the same extent. The borrowers also alleged that EMC serviced non-prime loans differently than prime loans. The court concluded that an FHA plaintiff does not need to identify an express policy to make a prima facie disparate impact claim and can, in the alternative, point to numerous practices that illustrate a broad policy. However, the court granted summary judgment to the defendants, finding that the borrowers failed to demonstrate that a genuine issue of material fact existed as to whether a broader policy existed in this case. In particular, the court noted that statistical evidence is usually necessary to maintain a disparate impact claim, and the borrowers provided no such evidence. ■

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices recently issued by the Department of Housing and Urban Development (HUD), the Department of Agriculture (USDA's Rural Housing Service/Rural Development (RD)), Federal Housing Finance Agency (FHFA), Federal Emergency Management Agency (FEMA) and the Department of Veterans Affairs. 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 website,¹ (2) bound volumes of the Federal Register, (3) HUD Clips,² (4) HUD,³ and (5) USDA's Rural Development website.⁴ Citations are included with each document to help you secure copies.

HUD Interim and Final Rules

Fed. Reg. 1,685-1,696 (Jan. 12, 2010)

HOPE for Homeowners Program; Statutory Transfer of Program Authority to HUD and Conforming Amendments to Adopt Recently Enacted Statutory Changes

Summary: This interim rule implements the changes made to the HOPE for Homeowners program by the recently enacted Helping Families Save Their Homes Act of 2009.

Effective Date: March 15, 2010.

Fed. Reg. 68,923-68,934 (Dec. 29, 2009)

Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs: Implementation of the Enterprise Income Verification System—Amendments

A detailed review of this final rule appears on page 48 of this issue of *Bulletin*.

Internal Revenue Service Final Rules

Fed. Reg. 66,048 (Dec. 14, 2009)

Reduction in Taxable Income for Housing Hurricane Katrina Displaced Individuals

Summary: This document contains final regulations relating to the reduction in taxable income under Section 302 of the Katrina Emergency Tax Relief Act of 2005. The final regulations also reflect legislation under Section 702

of the Heartland Disaster Tax Relief Act of 2008. The final regulations affect taxpayers who provide housing in their principal residences to individuals displaced by certain major disasters.

Effective Date: December 14, 2009.

Federal Trade Commission Final Rules

Fed. Reg. 2,723-2,784 (Jan. 15, 2010)

Fair Credit Reporting Risk-Based Regulations

Summary: The Board of Governors of the Federal Reserve System and the Federal Trade Commission are jointly issuing final rules to implement the risk-based pricing provisions in the Fair and Accurate Credit Transactions Act of 2003, which amends the Fair Credit Reporting Act. The final rules generally require a creditor to provide a risk-based pricing notice to a consumer when the creditor uses a consumer report to grant or extend credit to the consumer on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that creditor. The final rules also provide for two alternative means by which creditors can determine when they are offering credit on material terms that are materially less favorable. The final rules also include certain exceptions to the general rule, including exceptions for creditors that provide a consumer with a disclosure of the consumer's credit score in conjunction with additional information that provides context for the credit score disclosure.

Effective Date: January 1, 2011.

HUD Proposed Rules

Fed. Reg. 66,547-66,562 (Dec. 15, 2009)

SAFE Mortgage Licensing Act: HUD Responsibilities Under the SAFE Act

Summary: The Secure and Fair Enforcement Mortgage Licensing Act of 2008 (SAFE Act) was enacted into law on July 30, 2008, as part of the Housing and Economic Recovery Act of 2008. This new law directs states to adopt licensing and registration requirements for loan originators that meet the minimum standards specified in the SAFE Act, in lieu of HUD establishing and maintaining a licensing system for loan originators. This rule sets forth the minimum standards that the SAFE Act provides states to meet in licensing loan originators. Additionally, this rule provides the following: the procedure that HUD will use to determine whether a state's licensing and registration system is SAFE Act compliant; the actions that HUD will take if HUD determines that a state has not established a SAFE Act-compliant licensing and registration system; the minimum requirements for the administration of a nationwide mortgage licensing system and registry; and HUD's enforcement authority if it operates a state licensing system.

Comments Due: February 16, 2010.

¹http://www.access.gpo.gov/su_docs.

²<http://www.hudclips.org/cgi/index.cgi>.

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

⁴<http://www.rdinit.usda.gov/regs>.

FHFA Proposed Rules

Fed. Reg. 1,289-1,296 (Jan. 11, 2010) Minority and Women Inclusion

Summary: The FHFA is issuing notice and opportunity for the public to comment on this proposed regulation on minority and women inclusion. Section 1116 of the Housing and Economic Recovery Act of 2008 requires FHFA, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Federal Home Loan Banks to promote diversity and the inclusion of women and minorities in all activities. The proposed rule will implement this provision.

Comments Due: March 12, 2010.

HUD Federal Register Notices

Fed. Reg. 1,632-1,634 (Jan. 12, 2010) Public Housing Assessment System (PHAS): Asset Management Transition

Summary: This Notice provides new information related to scoring and submission requirements for public housing agencies (PHAs) under the Public Housing Assessment System for PHA fiscal years ending June 30, 2009, September 30, 2009, December 31, 2009, and March 31, 2010.

Dated: January 4, 2010.

Fed. Reg. 423 (Jan. 5, 2010) Notice of Availability: HUD Real Estate Settlement Procedures Act (RESPA) Handbook

Summary: HUD announces the availability on its website of the revised special information booklet required by RESPA. RESPA establishes the process for disclosing settlement costs in the financing or refinancing of a home, and helps protect consumers from unethical practices by settlement service providers during the home-buying and loan process. Under RESPA, lenders and mortgage brokers are required to give borrowers this booklet within three days of the borrower's applying for a mortgage loan. The booklet provides information designed to assist individuals seeking to buy a home to become familiar with the home-buying process. As a result, the booklet provides information regarding the purchase contract, how to use a good faith estimate to shop for the best loan, required settlement services to close the loan, and the HUD-1 Settlement Statement. It also provides information regarding interest rates, points, balloon payments, prepayment penalties and how they can affect mortgage payments. The booklet also discusses how to resolve loan servicing problems that will help avoid actions that could lead to foreclosure.

Dated: December 29, 2009.

Fed. Reg. 69,467-69,500 (Dec. 31, 2009) Notice of Regulatory Waiver Requests Granted for the Third Quarter of Calendar Year 2009

Summary: This Notice contains a list of regulatory waivers granted by HUD during the period beginning on July 1, 2009, and ending on September 30, 2009.

Dated: December 23, 2009.

HUD Notices

H 10-03 (Jan. 11, 2010) Fiscal Year 2009 Annual Operating Cost Standards— Section 202 and Section 811 Programs

Summary: This Notice transmits the Operating Cost Standards (OCS), which HUD Office staff should use for calculating the annual per person/per unit amount of a Project Rental Assistance Contract (PRAC) when making Fiscal Year 2009 subsidy fund reservations for

Capital Advance applications under the Section 202 and Section 811 programs. These Standards have been updated using the National Consumer Price Index of housing changes for 2009.

H 10-02 (Jan. 11, 2010) Enterprise Income Verification (EIV) & You Brochure— Requirements for Distribution and Use

Summary: This Notice provides guidance to owners and management agents (O/As) on the distribution and use of the EIV & You brochure. Any O/A participating in one of Multifamily Housing's rental assistance programs who is using the EIV system is subject to this Notice. The EIV & You brochure is to inform tenants and potential tenants about the EIV system, the data that is available about them in EIV, how the information will be used, and their responsibilities as a tenant.

PIH 2010-2 (HA) (Jan. 5, 2010) Non-Discrimination and Accessibility for Persons with Disabilities

Summary: This Notice reminds recipients of federal funds of their obligation to comply with pertinent laws and implementing regulations which mandate non-discrimination and accessibility in federally funded housing and non-housing programs for persons with disabilities. Additionally, this Notice provides information on key compliance elements of the relevant regulations and examples and resources to enhance recipients' compliance efforts.

PIH 2010-1 (HA) (Jan. 5, 2010) Extension of the Disaster Voucher Program (DVP)

Summary: This Notice informs DVP administering public housing agencies that the DVP has been extended beyond the previously projected end date of December 31, 2009, for all pre-disaster public housing, project-based, homeless and special needs housing families currently

receiving DVP assistance. The purpose of this extension is to allow adequate time for families eligible for tenant protection vouchers or vouchers provided through the Supplemental Appropriations Act for Federal Fiscal Year (FFY) 2009 to transition to the Housing Choice Voucher program.

PIH 2009-52 (HA) (Dec. 15, 2009)

Protecting Tenants at Foreclosure Act—Guidance on New Tenant Protections

A detailed review of this Notice appears on page 43 of this issue of the *Bulletin*.

PIH 2009-51 (HA) (Dec. 11, 2009)

PHA Determinations of Rent Reasonableness in the Housing Choice Voucher Program—Comparable Unassisted Units in the Premises

Summary: This Notice provides guidance on rent reasonableness requirements in the Housing Choice Voucher program, including what constitutes an unassisted as opposed to an assisted unit. ■

HOUSING JUSTICE NETWORK NATIONAL MEETING

Advancing Housing Justice: Event Basics

Fees

Fees include materials, lunch each day, and refreshments.

	MEETING FEE	FEE FOR SPONSORED CLIENT*
Training only: March 6	\$ 280	\$ 230
Meeting only: March 7-8	\$ 560	\$ 350
Meeting + Training	\$ 725	\$ 565

*This rate applies to clients whose registrations are paid for by a legal services organization.

CANCELLATION/REFUND POLICY

To qualify for a refund less a \$50 handling fee, a written cancellation must be received by NHLP no later than February 18, 2010. No refunds will be given after that date.

Registration

Space is limited, so register early! You may register via mail, fax, or online. Online registration will be available on our website, www.nhlp.org. Forward registration with payment to:

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MAIL

NHLP

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Oakland, CA 94610

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Washington Court Hotel is the site for the training, meeting and guest accommodations. Please call the hotel directly to make reservations (last session will end at 5 p.m. on Monday, March 8, so please plan accordingly). Mention that you are attending the Housing Justice Network conference to receive a conference room rate of \$199. Rate is single/double occupancy plus tax. **Please make your reservations early! Rooms at the conference rate are more limited than usual this year and are available on a first-come, first-served basis.**

Questions

Contact Mark Antonio at 510.251.9400 x3111 or mantonio@nhlp.org.

HOUSING JUSTICE NETWORK NATIONAL MEETING

Advancing Housing Justice: Registration

PLEASE PRINT CLEARLY

1

PERSONAL INFORMATION

NAME _____ NAME ON BADGE (IF DIFFERENT) _____

ORGANIZATION _____

MAILING ADDRESS _____

CITY _____ STATE _____ ZIP _____

PHONE _____ FAX _____

EMAIL _____ ORGANIZATION'S WEB SITE _____

Housing Experience: years. What issues have you worked on? _____

I am an HJN member. I would like to become an HJN member.
Please send me an application form via email fax

Do you require special arrangements? (Please attach a description)

access visual audio vegetarian other dietary

2

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Federal Housing Program: One Day Training \$ 280 \$ 230

Housing Justice Network Meeting only \$ 560 \$ 350

One Day Training + Meeting \$ 725 \$ 565

3

PAYMENT

Payment must be included at the time of registration. Registrations will not be processed or confirmed until full payment has been received.

This payment covers more than one registration. I have attached a registration form for each paid attendee.

I've enclosed a check for \$ made payable to National Housing Law Project

Please bill my Mastercard Visa for \$

CARD NUMBER _____ EXP. DATE (MONTH/YEAR) _____

NAME OF CARDHOLDER _____ AUTHORIZED SIGNATURE _____

BILLING ADDRESS (REQUIRED FOR CREDIT CARD ORDERS) _____

CITY _____ STATE _____ ZIP _____

Mail to National Housing Law Project at 614 Grand Avenue #320, Oakland, CA 94610. Credit card orders only may be faxed to (510) 451-2300.

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HUD Housing Programs: Tenants' Rights (3rd Edition, 2004)	\$ 250 (before February 15) \$ 350 (after February 15)	_____	\$ _____
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(8.25% for CA residents; Alameda County sales tax 9.75%)	California Sales Tax	\$ _____
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