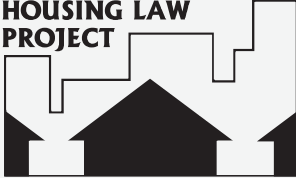


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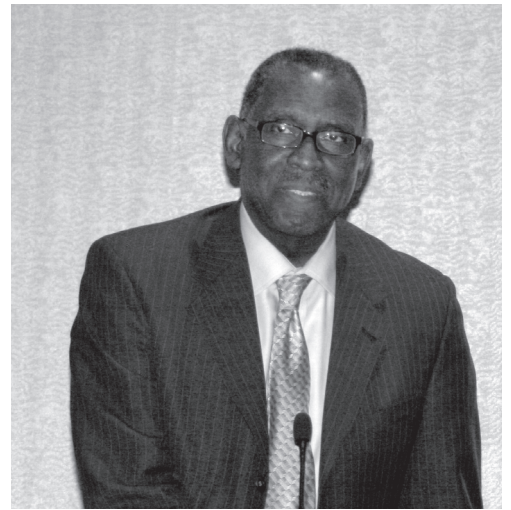
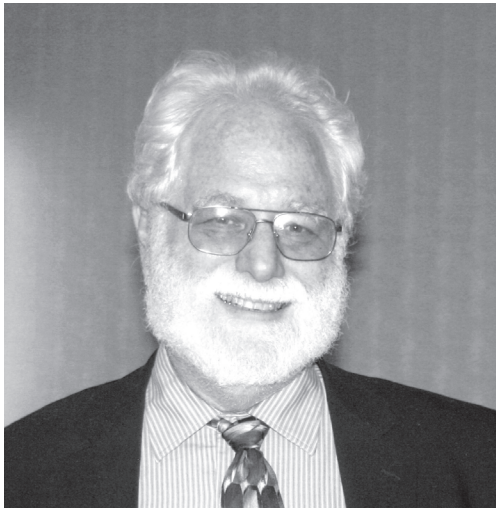


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# Housing Law Bulletin

Volume 39 • January 2009

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**Cover:** Highlights from the 2008 Housing Justice Network Conference. Clockwise from top left: Gideon Anders, NHLP; Judith Liben, Massachusetts Law Reform Institute (with Bryson Award); Prof. David Hall, Northeastern Univ. School of Law; National Low Income Housing Coalition staff Jake Kirsch, Danilo Pelletiere, Sheila Crowley (holding Special Leadership Award to Sheila Crowley and staff of NLIHC), Moises Loza (board), Taylor Materio; Justice Cruz Reynoso; Catherine Bishop, NHLP, Sara Shortt, Housing Rights Committee of S.F. (with Housing Justice Award), Phillip Morgan, Bay Area Legal Aid; Marcia Rosen, NHLP; Gavin Thornton, Columbia Legal Services (with Housing Justice Award).

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## Chasing the Justice Dream: Housing as Justice

by Professor David Hall  
Northeastern University School of Law<sup>1</sup>

I want to first thank you for extending this invitation to me to speak today at this national meeting of the Housing Justice Network. The work that you as lawyers, organizers, and policy analysts engage in each day is so important to the fundamental quest for justice in this society. The reason I label your quest as fundamental is because the ideals and rights that you are striving to protect, enforce, and preserve are not abstract constitutional principles that only have meaning to legal scholars and theorists.

Ensuring that people have quality and affordable housing is fundamental to our enlightened understanding of justice. Housing, like food, sustains a person's life. But it also provides a sense of identity, meaning, and purpose. Yet this aspect of the justice dream in America is not just the attainment of housing, but also ensuring that it is of a quality that contributes to a person's self-esteem. For how we live and where we live sends powerful messages to our unconscious and conscious mind about our self-worth and our potential.

So those who use their legal skills and organizing talents and efforts to try to ensure that this fundamental ideal is recognized and preserved are a special group of people, and I applaud you for your dedication and sacrifice. Some of you do your work through the auspices of a legal services organization, and some are even part of the Legal Services Corporation. I give you special greetings from the Board and President Barnett. We are all thankful for the work you do each day to keep the doors of justice open and meaningful. My five years as a member of the LSC Board have been inspirational because I had a first hand look at the wonderful work you do.

I want to talk to you today about chasing dreams. Not the dreams that you and I have of moving to a tropical island in the Caribbean, or the dream that some single people have of meeting that special soul mate who changes

<sup>1</sup>This is the text of a luncheon speech given by Professor Hall to the participants in the National Meeting of the Housing Justice Network on December 8, 2008, reproduced here with permission of the author.

David Hall is Professor of Law at Northeastern University School of Law in Boston, Massachusetts, as previously holding the posts of Dean of the Law School and Provost and Senior Vice President for Academic Affairs. Professor Hall holds both a doctorate of juridical science and a LL.M. from Harvard Law School, and received both a J.D. and M.A. from the University of Oklahoma. He has authored a book on the intersection of law and spirituality, entitled *The Spiritual Revitalization of the Legal Profession: A Search for Sacred Rivers*, published by the Edwin Mellen Press. Since a 2003 appointment by President Bush, Professor Hall has served as a member of the Board of Directors of the Legal Services Corporation.

your life for the better. I want to focus on dreams of justice, which have been the impetus for so much change in this society. If lawyers and social activists did not have a sincere dream of a different reality than the one they were facing, then you and I would not have the privileges, rights, and blessings that we have today.

Because of the malaise and resistance that many social justice advocates have experienced for the last eight years—and some would argue even longer—I believe we have lost some of that spirit of dreaming. Our posture has been one of trying to defend rights already obtained and minimizing losses. Thus the thought of dreaming of advancements or conquering new horizons has not been on the table. I am here to remind us that it is time to dream again. We now have a wind at our backs, and it is now time to reenergize our passion for justice. Thus I want to speak to you today about “Chasing the Justice Dream.”

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*I am here to remind us that it is time to dream again. We now have a wind at our backs, and it is now time to reenergize our passion for justice.*

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Justice is a concept that most of us think we understand, but many of us would be hard pressed to provide a single definition. Whether defined narrowly or broadly, we must all admit that it is an elusive concept that often exists more in our minds than it does in reality. This sacred concept—justice—was originally offered up at the birth of this nation as one of its most treasured ideals. Yet this precious moral and legal value was stillborn in the womb of this nation, and has remained a fleeting idea ever since that day.

So we live in a society and a world where justice has not always been present on the throne. It has been so twisted and narrowed through compromises, and through the manipulation of legal processes and procedures, that we don't even recognize it anymore. We think we have achieved it when we keep individuals from being evicted from their apartment, though in our hearts we know that they will be back again because what they are living on is not enough to sustain their housing or their lives. We think we have achieved justice when we get a homeless person a shelter bed for the night, but what about the next night, and the countless other homeless individuals who are still scattered throughout the landscape of our nation. We believe we have achieved justice when we are creative enough to get more low-income housing units built in our city. Yet for every person who benefits there are hundreds who need the same thing. We think we have justice in our hands when we force some landlords to reconstruct their

buildings to accommodate residents with disabilities. Yet we know that the disabled in our midst are not viewed as full and viable human beings by many who they encounter on a daily basis. So our justice dream escapes our grasp as quickly as we touch it.

Some might argue that my understanding of justice is too broad. For some of us sincerely believe that justice can only be understood and applied in the context of individual cases that include a victim and an evil wrongdoer. But in a society such as ours, that has a history of endorsing and enabling so much systematic injustice, we cannot afford to be trapped by such a limited vision of justice. For woven within the lining of this justice dream is a context within which the playing fields are supposed to be level, and the underlying social setting must be fair. Yet for the people that so many of you serve every day, these fundamental prerequisites are missing.

We must not see justice in the housing arena as a fixed formula that is easily applied, but as a sacred principle that is always contextual and excruciatingly difficult to attain. We must do justice to the person, but in order to do that we must see and understand the social circumstances and conditions surrounding that person. For without this broad lens, we will not dispense justice; we will only placate suffering, and cover over deep social wounds.

Therefore, this new era of dreaming must embrace a broader vision of justice in the housing arena. As President Obama and Congress strive to stimulate the economy through the rebuilding of infrastructures, bridges, and roads, why can't we advocate that we also put America back to work by building more affordable and quality housing in this country, so that we can once and for all eliminate homelessness in the richest country in the world? That must be the justice dream we chase. I know some would argue that you can't sell that dream to Congress or to the American people, especially when so many foreclosures have occurred. I argue that this is the right time to sell it. For the myth of the free market has been shattered by recent events. If major financial institutions need an infusion of resources to keep them from failing, if car manufacturers need a bailout to keep them from going under, why can't we ensure that the fundamental needs of the poor in this society do not go under the radar? Not only can this provide more employment and opportunities for re-training, it also forces us to realign our priorities. For when people are without housing, and I mean quality housing, then it is impossible for them to be productive and contributing members to society. We end up paying the cost in increased public assistance, law enforcement, jails, and mental health facilities. So we either chase the justice dream in this manner, or we will end up paying for social nightmares.

If we ever questioned the centrality of housing to the American economy, then the present economic downturn and recession should be overwhelming evidence of the intricate connection between the two. Therefore, it should

remind us of how important it is to have stable, viable policies in the housing arena.

If home ownership is the epitome of the American dream, then not only must there be a moratorium on foreclosures, but this crisis should encourage us to create policies and programs that make this dream more available to more Americans in a manner that is sound, thoughtful, and beneficial.

This new justice dream must make us more sensitive to the other needs that must be addressed as a part of the affordable housing agenda. Many of you know this already, but various organizations are promoting wraparound services that go along with housing. If we want people, especially those who have been homeless, to maintain their housing and improve their lives, then we must ensure that services like budgeting, home care, computer literacy, and conflict resolution are also provided to them. Yes this is a broader vision of justice, because many who find themselves in a homeless situation, or in need of affordable housing, arrived there based on choices they made. There is also a systemic injustice due to race, poverty, gender, and disabilities that has never been fully addressed in this society. Therefore our model of justice must be broad and systemic. It must take into account the past inequities as we strive to shape a better future.

The justice dream for housing in this new era must also employ more creative policies that ensure that people in low-income housing are not asked to give up their legal rights or human dignity in exchange for accepting low-income housing. My experiences as a Receiver for the Mandela Resident Housing Cooperative in Boston has certainly made me sensitive to how existing policies, even with good intentions, can make residents feel as if they are being harassed and belittled. Eviction policies and procedures, Enterprise Income Verification (EIV) rules and implementation, and even recertification must be re-examined from a therapeutic jurisprudence perspective. For laws and policies well intended, can through their structure and implementation have negative psychological impact on human beings.

In this new era of the justice dream, especially for those who fall under the LSC rules and policies, we must be willing to revisit the restrictions that are placed on legal service lawyers who serve the poor. If class actions are an available tool for all other litigants, then they must be an available tool for those who represent the poor. If advocating for law reform is something other lawyers can do, then legal service lawyers must be allowed to do the same thing. We can't have one form of justice for the rich and another form of justice for the poor. So I hope that the new board of LSC will ask Congress to revisit the restrictions placed upon the Corporation.

As lawyers and activists, we must be courageous enough in this new era to define justice in broad terms. When people, because of their birth not because of their effort, are doomed to receive fewer chances at the brass

ring of life, then justice is still a distant dream never to be a reality. When the infant mortality rate for some is so much greater than others merely because of their color and economic conditions at birth, then justice is a complete illusion. When women are abused because of their gender and men's unwillingness to control ourselves, then justice remains a fading dream. The justice dream we chase is not a narrow fulfillment of individual rights. It encompasses the social conditions and circumstances in which people exist, and touches every aspect of their being. It rests on the moral and spiritual messages we send through our institutions and our individual lives. Justice is not an act; it is not one concrete thing that we achieve and then forget. Justice is an ideal, a legal, spiritual value that we must continuously release into the universe, and relentlessly pursue.

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*Justice is an ideal, a legal, spiritual value that we must continuously release into the universe, and relentlessly pursue.*

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Therefore our greatest hope for justice is to stop injustice from being reborn in every generation. Our greatest hope for justice is to ensure that future generations do not fall into the same patterns of the past. If we want more productive citizens tomorrow, if we want to eliminate high crime rates, high unemployment, and health disparities in the future, then let us ensure that the basic needs, like quality housing, that all persons deserve are provided today.

Langston Hughes, a great American poet, wrote a poem entitled 'A Dream Deferred.' He asked the question, "What happens to a dream deferred. Does it dry up like a raisin in the sun? Does it fester like a sore and then run. Maybe it just sags like a heavy load or maybe it explodes."

This poem eloquently reminds us of the consequences we create for delaying our dreams and the dreams of others. To pass on to another generation the fulfillment of a fundamental ideal is to plant seeds within the soil of a nation that will bare strange fruits. So much of the crime, drug abuse, and miseducation that exists in this society is a direct outgrowth of the deferral of the justice dream. Many will not agree, but we are harvesting the evils of slavery and centuries of discrimination still today; and the harvest is plenteous, but the dreamers are few.

We who stand at the dawn of this new era in American political life have the choice to defer again this justice dream by narrowing it. America can wash its hands of the underlying inequality and poverty by individualizing the definition of justice. But our individual victories will be stunted by the overwhelming social conditions that must still be rectified. There are those who are already suggesting that we must not be unrealistic about what this era

can produce and what President Obama can accomplish. Reasonableness and moderation are important attributes for all of us to pursue. Yet if Barack Obama had resisted the ideal of hope, if he had listened to those who said not now, be realistic, he would not be poised to become the 44<sup>th</sup> President of the United States. Therefore one of the gifts he gave to all of us is the right to dream again. To hope for, advocate for, and work hard for a brighter future.

In conclusion, those of you gathered here are the key chasers of the justice dream in the housing arena. Your commitment to housing advocacy has placed you at the center of this profession's quest for the dream of justice. I realize that you face enormous barriers and obstacles. There is limited funding, and federal restrictions that limit what you can do and how you do it. There are personal sacrifices that you are being asked to make each day. But you do this work because you are dreamers. You understand intuitively that without the dream, there is very little reason to live. Without the chase, there are only empty tomorrows. In your moments of doubt, when you wonder whether it is all worth it, remember that you follow in the footsteps of great dreamers. You are a dreamer like Martin Luther King and Harriet Tubman. You are a dreamer like all of those brave souls who left the comfort of their northern homes and went south to help those whom injustice had trapped and lynched. You walk in the footsteps of housing advocates who envisioned affordable housing and resident co-ownership models when others said it was impossible to achieve.

One day we must give account not of the difficulty of our chase, but whether we continued to chase the dream. For if you stop chasing this dream of justice, then this nation will never be the type of place it could and should be. There are people in this city and this country who will suffer greatly if you stop chasing the dream. They need you more desperately than you will ever understand. And you need them more than you presently realize. For it is this wonderful partnership between two dreamers that creates this symphony of justice. So we come today to lift high this housing justice dream that you have nurtured. But let not our lifting occur only today in the midst of those we know embrace the dream. Let this broad dream of justice be lifted so the President and Congressional leaders and policy makers hear it and embrace it as well. No matter what they say, no matter how some may dismiss your efforts.

Chase this justice dream my friends. Chase it with your head and with your heart. Chase it as if your life depended upon it, because it does. For our lives will be ultimately measured by the good we do in the world and by the love and service that we give, especially to those in need. Chase this dream not only in the courtrooms and law offices, but chase it in every aspect of your life, in every waking hour. Chase it even in your dreams. If we do that, then when we wake, we will have become a dream catcher. ■

## D.C. Circuit Enforces Protections for Enhanced Voucher Holders Under Federal and Local Law

The United States Court of Appeals for the District of Columbia Circuit has decided that an owner converting federally assisted property to market rate must accept the tenants' enhanced vouchers, as required both by the federal enhanced voucher statute and by local law prohibiting discrimination based upon source of income.<sup>1</sup> In *Feemster v. BSA Limited Partnership*, the court affirmed the lower court's interpretation of the enhanced voucher statute and reversed its decision that the local source of income protection law did not prohibit the owner's refusal to accept the vouchers. As a result, the tenants may remain in occupancy until their tenancy is lawfully terminated under local law, and the lower court will now determine other available remedies for the local law violations.

### Background

Since the early 1980s, BSA has owned and managed the Bates Street Townhomes, a development of thirty-seven residential units spread across thirty buildings on five streets in Washington, D.C. Until 2004, BSA participated in the HUD project-based Section 8 rental assistance program, which limited rents to 30% of adjusted income, and HUD also provided BSA with mortgage insurance. All nine tenant plaintiffs had received rental assistance through the Section 8 program at Bates Street Townhomes, and several have lived there for over twenty years.

When its Housing Assistance Payments Contract expired, BSA decided to opt out of the Section 8 program. It prepaid its HUD-insured mortgage, sent a one-year notice to tenants on September 30, 2003, and allowed its final contract extension with HUD to expire on September 30, 2004. In the summer of 2004, BSA employees began to encourage tenants to vacate their units, offering financial compensation to those who agreed to leave. Although its initial proposed sale to a third-party developer fell through, BSA continued efforts to sell the properties and in 2005 found a new buyer. That sales contract expressly conditioned the purchase of individual units on their vacancy at the time of closing. BSA has not accepted new tenants at the Bates Street Townhomes since January 2003.

The enhanced voucher provision of the United States Housing Act authorizes the issuance of enhanced vouchers to residents of HUD-assisted housing upon the

<sup>1</sup>*Feemster v. BSA Limited Partnership*, 548 F.3d 1063 (D.C.Cir. Nov. 14, 2008).

occurrence of certain “eligibility events,” such as a decision of a development owner to opt out of a project-based Section 8 housing assistance payments (HAP) contract. The basic purpose of enhanced vouchers is to prevent involuntary displacement of assisted residents.

Enhanced vouchers are largely equivalent to typical tenant-based housing choice vouchers except that the payment standards for these vouchers may be higher (up to the contract rent of the resident’s formerly HUD-assisted unit).<sup>2</sup> In addition, the statute provides that with an enhanced voucher an “assisted family may elect to remain in the same project in which the family was residing on the date of the eligibility event for the project . . . .”<sup>3</sup>

Pursuant to HUD’s standard form one-year notice for Section 8 opt-outs, BSA’s September 2003 opt-out letter to its tenants stated:

Federal law allows you to elect to continue living at this property provided that the unit, the rent, and we, the owners, meet the requirements of the Section 8 tenant-based assistance program. As an Owner, we will honor your right as a tenant to remain at the property on this basis as long as it continues to be offered as rental housing, provided that there is no cause for eviction under Federal, State or local law.<sup>4</sup>

The local housing authority determined that the tenants were eligible for enhanced vouchers. However, when tenants tried to use their vouchers for rental payments, BSA either refused to accept them or to execute the necessary lease agreements. After expiration of the one-year notice period in September 2004, BSA wrote letters to the tenants declaring that it would not sign the paperwork required for use of the vouchers, but stated that, “provided you pay the rent charged and otherwise abide by the terms of your tenancy, you may continue to reside in the property which you currently lease until such time as [you] may be required to vacate upon appropriate notice,”<sup>5</sup> and each letter specified the “current rent” for that tenant’s unit. The tenants continued to pay rent each month to BSA, either at the full market amount or at the lower amount established by the project-based Section 8 program.

Since market rents were not sustainable for most tenants, on November 2, 2004, the tenants filed a federal complaint and an application for a temporary restraining order (TRO). The district court granted a TRO quickly, requiring BSA to initiate the process of accepting the tenants’ enhanced vouchers, including executing and submitting any necessary papers to DCHA to begin the “lease-up”

process, so that the tenants could use their enhanced vouchers at their current homes.<sup>6</sup> Although BSA initiated the lease-up process with DCHA as ordered, it refused to complete the paperwork required to pay the rent subsidy on behalf of the tenants.

Shortly after issuance of the TRO, BSA offered the tenants the opportunity to buy their homes, in accordance with the District of Columbia’s Tenant Opportunity to Purchase Act.<sup>7</sup> With assistance from a local nonprofit housing developer, four tenants negotiated contracts for sale. However, on the day before closing, BSA informed the tenants that it would not complete the sales unless they reimbursed it for approximately \$37,000 in rent allegedly unpaid since the commencement of the litigation—rent that would have been covered by the enhanced vouchers had BSA accepted them. To allow the sales to go forward, the district court facilitated an arrangement under which the tenants agreed to place the disputed sum in an escrow account.<sup>8</sup>

In January 2005, BSA served the remaining tenants with 180-day eviction notices. When they then refused to move out, BSA brought an eviction action in local court. That court found BSA’s eviction notices legally inadequate,<sup>9</sup> and BSA filed an appeal that remains pending.

In their federal complaint, the tenants claimed that BSA must accept their enhanced vouchers until their tenancies are validly terminated under local law and that its refusal to do so violated both federal housing statutes<sup>10</sup> and the District of Columbia Human Rights Act.<sup>11</sup> The district court granted summary judgment for the tenants on their federal claims, finding it “clear that ‘families renting at the time of the termination of [a] project-based subsidy contract [have] the right to remain in their units, using enhanced vouchers, for so long as the tenant remains eligible for the vouchers or until the tenant is evicted.’”<sup>12</sup> On the D.C. Human Rights Act claim, however, the district court granted summary judgment in favor of BSA, finding that the plaintiffs failed to show that an impermissible

<sup>2</sup>See generally NHLP, HUD HOUSING PROGRAMS: TENANTS’ RIGHTS § 15.4.2.4 (3d ed. 2004).

<sup>3</sup>42 U.S.C.A. § 1437f(t)(1)(B) (West 2003).

<sup>4</sup>Feemster at 1065.

<sup>5</sup>Id.

<sup>6</sup>Feemster v. BSA Ltd. P’ship, No. 04-1901, TRO at 2, 2004 WL 2884434 (D.D.C. Nov. 2, 2004).

<sup>7</sup>D.C.Code § 42-3404.02 *et seq.*

<sup>8</sup>Although conceding that the injunctive relief claims of these homebuyers and any other tenants who moved were thereby mooted, these tenants continued to press their damages claims.

<sup>9</sup>Hawkins v. BSA Ltd. P’ship, No. 04-6839, Order at 4 (D.C.Sup.Ct. Aug. 28, 2007).

<sup>10</sup>In addition to the enhanced voucher statute, 42 U.S.C. § 1437f(t), the tenants also alleged, and the district court held, that BSA’s actions violated the National Housing Act, which directs HUD to assure that Section 8 “project owners not interfere with the efforts of tenants to obtain rent subsidies or other public assistance.” 12 U.S.C. § 1715z-1b(b)(2). The appellate court did not consider this issue because it was not briefed and violation would not yield a different remedy.

<sup>11</sup>D.C.Code § 2-1402.21(a)(1) and (2). See discussion of the local law claim, *infra*.

<sup>12</sup>Feemster v. BSA Ltd. P’ship, 471 F.Supp.2d 87, 98 (D.D.C.2007), quoting Jeanty v. Shore Terrace Realty Ass’n, No. 03-8669, 2004 WL 1794496, at \*3 (S.D.N.Y. Aug.10, 2004).

factor played a motivating or substantial role in BSA's refusal to accept their enhanced vouchers.<sup>13</sup>

### The Enhanced Voucher Claim Under Federal Law

The tenants in *Feemster* contended that the owner's refusal to accept their enhanced vouchers violated the "elect to remain" provision of the federal enhanced voucher statute, 42 U.S.C. § 1437f(t)(1)(B). By its express terms, that statute provides a family that receives an enhanced voucher the right to "elect to remain in the same project in which the family was residing on the date" that the project owner's Section 8 contract expires. Unlike other owners who have unsuccessfully resisted tenants' enhanced voucher claims,<sup>14</sup> BSA did not dispute that § 1437f(t) gives tenants the right to remain in their units despite an opt-out, nor that a covered owner must permit its tenants to use enhanced vouchers for rent, nor that tenants may sue to enforce their statutory rights in federal court. On the enhanced voucher claim, BSA limited its defense to the sole issue of whether its units were being "offered for rental housing"<sup>15</sup> at the time it refused the tenants' enhanced vouchers. In BSA's view, whether a unit is offered for rental housing is a question of the landlord's subjective intent. Because it sought to exit the rental business and offer its units for sale rather than for rent, BSA argued that it is not "offer[ing]" its units for rental housing, and thus its actions fall outside the statute.

Because BSA sought to enforce the language in the Guide, the D.C. Circuit first had to determine the legal status due HUD's pronouncement. After stating that "[t]he degree of deference that we owe to such a policy guide is uncertain,"<sup>16</sup> the court opined that HUD's policy is at least allowed to claim respect according to its persuasiveness, but that even if HUD's statement received full *Chevron* deference,<sup>17</sup> BSA's position would not be strengthened. Rather than disputing the legality or status of HUD's policy, the tenants opposed the owner's position that this is a question of its subjective intent. The tenants acknowledged that, once their tenancies were lawfully terminated under

local law, their federal enhanced voucher rights would not compel BSA to accept them to avoid their eviction. What they disputed, however, was that the owner's subjective intent controlled their right to remain in their homes and their related right not to be regarded as in default merely because they tendered vouchers rather than cash. Their argument was that whether a unit remains a rental property is determined by the law of the local jurisdiction and that the local courts had so far determined that the tenants have the right to continued occupancy.

To resolve this question, the court analyzed the text of HUD's policy statement. Characterizing the "units are offered" text as "ambiguous," the court looked to the context to reject BSA's interpretation, citing the next sentence: "Owners may not terminate the tenancy of a tenant who exercises this right to remain except for cause under Federal, State or local law,"<sup>18</sup> as well as several other HUD statements.<sup>19</sup> The court concluded that HUD's issuances use the phrase "offered for rental housing" as synonymous with "remains a rental property" and "used for rental housing," and prohibit termination of tenancies without cause, eschewing any reference to the landlord's intent:

Taken together, HUD's statements make clear that it considers a property to be "offered for rental housing" until it is withdrawn from rental use in accordance with the law of the local jurisdiction. *Accord Jeanty v. Shore Terrace Realty*, 2004 WL 1794496, at \*4 ("HUD has interpreted 42 U.S.C. § 1437f to mean that families who receive enhanced vouchers have the right to remain, and that a landlord *must* accept their enhanced vouchers unless the landlord evicts them through the court system." (citing the HUD Policy Guide)). This is an objective inquiry tied to the legal status of the property, not to the owner's intentions. In light of the statute's plain text, its anti-displacement purpose, and HUD's reasonable and persuasive interpretation, the district court correctly determined that the tenants' right under § 1437f(t) to remain in their homes and to pay their rent with enhanced vouchers is secure unless and until their tenancies are validly terminated under D.C. law.

548 F.3d at 1069.

<sup>13</sup>*Id.* at 102.

<sup>14</sup>*Jeanty v. Shore Terrace Realty Ass'n*, No. 03-8669, 2004 WL 1794496 (S.D.N.Y. Aug. 10, 2004); *Estevez v. Cosmopolitan Assocs.*, 2005 WL 3164146 (E.D.N.Y. Nov. 28, 2005); *Barrientos v. 1801-1825 Morton, LLC*, No. 06-6437, slip ops. (C.D. Cal. Sept. 10, 2007 and Oct. 24, 2007) (the latter order grants motion to reconsider and clarifies prior order), *appeal docketed*, No. 07-56697 (9th Cir. Nov. 21, 2007).

<sup>15</sup>This "rental use" limitation appears only in HUD's guidance, not in the statute. See HUD, SECTION 8 RENEWAL POLICY, § 11-3.B (2001), which states: "Tenants who receive an enhanced voucher have the right to remain in their units as long as the units are offered for rental housing..." *Id.* (court's emphasis).

<sup>16</sup>*Feemster v. BSA Ltd. P'ship*, 548 F.3d 1063, 1067 (D.C. Cir. Nov. 14, 2008) (citing cases).

<sup>17</sup>*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), under which courts generally will uphold an agency's reasonable interpretation of ambiguous statutory language.

<sup>18</sup>*Feemster* at 1068, citing HUD Policy Guide, § 11-3.B.

<sup>19</sup>The court referenced several sources, 548 F.3d at 1068-69. HUD requires owners to certify "that they will comply with the requirement to allow families receiving enhanced vouchers who elect to remain to do so as long as the property remains a rental property, unless the owner has just cause for eviction," HUD Policy Guide, § 1-6.I (court's emphasis), and to "agree not to terminate the tenancy of a tenant who exercises [his or her] right to remain, except for cause under State or local law," *id.* Attachment 3A-1, at 6. A contemporaneous HUD Notice governing enhanced vouchers contains similar language. HUD Notice PIH 2001-41, § II.B, at 26 (2001).

The court also rejected the owner's claim that this interpretation would ensnare owners in an "endless lease," stating that owners may terminate tenancies on any ground permitted by local law, concluding that "One thing that BSA may not do, however, is refuse to accept payment by voucher and then contend that eviction is warranted for nonpayment of rent."<sup>20</sup>

### The Local Source of Income Claim

The District of Columbia Human Rights Act makes it unlawful to refuse to "conduct any transaction in real property," to "require different terms for such transaction," or to "include in the terms or conditions of a transaction in real property" any condition or restriction "wholly or partially for a discriminatory reason based on" any one of a list of specified factors, including an individual's "source of income."<sup>21</sup> The Act expressly recognizes Section 8 assistance as a source of income, and that those harmed may sue for damages and other remedies.<sup>22</sup>

BSA did not dispute that it demanded that the tenants pay rent from their own funds and not through the Section 8 voucher program. However, the owner claimed that this was not "source of income" discrimination, because it was not motivated by anti-voucher animus but rather by the desire to vacate the units for sale. In dismissing the local law claim, the district court had accepted BSA's argument that motive was dispositive. The D.C. Circuit rejected this analysis because it has generally looked to Title VII cases in interpreting the Act, and "under Title VII, when a policy is "discriminatory on its face," the defendant's motive is irrelevant."<sup>23</sup> When BSA expressly refused to accept the tenants' vouchers, it committed a facial violation of the local law. At oral argument, BSA had suggested that the voucher program's requirements are burdensome, particularly the requirement that the landlord execute an initial lease with the tenant, to which the court responded:

Were we to accept that excuse, however, we would render the Human Rights Act's definition of "source of income" nugatory. The Act expressly defines "source of income" as encompassing the Section 8 program; indeed, Section 8 vouchers are the source-of-income provision's paradigm case...Permitting BSA to refuse to accept Section 8 vouchers on the ground that it does not wish to comply with Section 8's requirements would vitiate that definition and the legal safeguard it was intended to provide.

548 F.3d at 1070-71.<sup>24</sup>

<sup>20</sup>*Feemster* at 1069.

<sup>21</sup>D.C. Code § 2-1402.21(a)(1) and (2).

<sup>22</sup>*Id.*, §§ 2-1402.21(e) and 2-1403.16.

<sup>23</sup>548 F.3d at 1070 (citing several U.S. Supreme Court cases).

<sup>24</sup>See also NHLP, *Courts Consider Landlord Defenses to Source of Income Laws*, 38 HOUS. L. BULL. 239 (Nov.-Dec. 2008).

### Conclusion

*Feemster* marks another important victory in protecting the federal right of HUD-assisted tenants facing housing conversion actions to remain in their homes, despite the various creative attempts of owners to avoid its coverage. The D.C. Circuit's resounding decision also reinforces the utility of local laws establishing source of income protections. This strong precedent can help advocates ensure that such protections can and will be upheld in the future. ■

## HUD Publishes Violence Against Women Act Interim Rule

In late November, the Department of Housing and Urban Development (HUD) took its first step toward adopting regulations to implement the housing provisions of the Violence Against Women Act of 2005 (VAWA).<sup>1</sup> HUD published an interim rule<sup>2</sup> that would amend existing subsidized housing regulations, including those governing the public housing and Section 8 programs, to incorporate VAWA's protections for survivors of domestic violence, dating violence, and stalking. For the most part, the interim rule parrots VAWA's statutory language, frustrating advocates, public housing agencies (PHAs), and owners who had hoped that the regulations would clarify some of VAWA's ambiguities. However, some provisions differ from the statute and, in fact, could be problematic for advocates representing survivors. Although the interim rule became effective December 29, 2008, HUD considered comments on the interim rule until January 27, 2008. It has not indicated when it plans to publish a final rule.

### The Interim Rule's Structure

The interim rule would place the bulk of the regulatory language implementing VAWA in 24 C.F.R Part 5, the regulations that currently set forth HUD's general program requirements. The interim rule adds a new Subpart L titled "Protection for Victims of Domestic Violence in Public and Section 8 Housing" to 24 C.F.R Part 5.<sup>3</sup>

<sup>1</sup>Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006). For more information on VAWA and HUD's implementation, see NHLP, *HUD Continues VAWA Implementation*, 37 HOUS. L. BULL. 7 (Jan. 2007); NHLP, *PHAs and Advocates Begin Early Efforts to Implement VAWA*, 37 HOUS. L. BULL. 193 (Dec. 2007); NHLP, *HUD Issues VAWA Guidance for Project-Based Section 8 Owners*, 38 HOUS. L. BULL. 220 (Oct. 2008).

<sup>2</sup>HUD Programs: Violence Against Women Act Conforming Amendments, 73 Fed. Reg. 72,336 (Nov. 28, 2008) [hereinafter "VAWA Interim Rule"].

<sup>3</sup>*Id.* at 72,340.

Subpart L contains five subsections: applicability; definitions; protection of victims of domestic violence, dating violence, and stalking in public and Section 8 housing; certification of status and confidentiality; and effect on other laws.<sup>4</sup> The regulations that govern the individual HUD programs would then cross-reference the VAWA amendments in 24 C.F.R. Part 5. Specifically, Subpart L would apply to the housing choice voucher program; project-based voucher and certificate programs; public housing program; and renewed funding or leases under 24 C.F.R. parts 880, 882, 883, 884, 886, and 891 (which govern the various project-based Section 8 programs and the supportive housing program for the elderly and persons with disabilities).

### Areas in Which VAWA Is Incorporated Without Change

In the interim rule's preamble, HUD states that it is "simply conforming its existing regulations to statutory provisions [of VAWA]," and that it "is not exercising agency discretion."<sup>5</sup> This statement holds true for much of the interim rule's content, as it replicates VAWA's language stating that:

- An incident of violence will not be construed as a serious or repeated lease violation by the victim or as good cause to terminate the victim's tenancy or assistance.<sup>6</sup>
- Admission shall not be denied on the basis that an applicant is or has been a victim of domestic violence, dating violence, or stalking.<sup>7</sup>
- Criminal activity related to domestic violence, dating violence, or stalking shall not be cause for termination of the victim's tenancy or assistance.<sup>8</sup>
- A PHA or owner may bifurcate a lease to evict, remove, terminate occupancy rights, or terminate assistance to a tenant who engages in criminal acts of violence without evicting or terminating assistance to the victim of the violence.<sup>9</sup>
- VAWA does not limit the authority of a PHA or owner to honor court orders addressing rights of access to or control of property issued to protect the victim and to address distribution of property in a case where a family breaks up.<sup>10</sup>

<sup>4</sup>*Id.*

<sup>5</sup>*Id.* at 72,339.

<sup>6</sup>24 C.F.R. § 5.2005(a), 73 Fed. Reg. 72,341 (Nov. 28, 2008). For purposes of brevity, further citations to the Code of Federal Regulations refer to the revisions set forth in 73 Fed. Reg. 72,341.

<sup>7</sup>*Id.*

<sup>8</sup>§ 5.2005(b).

<sup>9</sup>§ 5.2005(c).

<sup>10</sup>§ 5.2005(a).

- Certification of domestic violence, dating violence, or stalking shall be kept confidential by the PHA or owner.<sup>11</sup>
- Consolidated plans must estimate the housing needs of victims of domestic violence, dating violence, sexual assault, and stalking.<sup>12</sup>
- The 5-year plan must include a statement about goals, activities, objectives, policies, or programs that will enable a PHA to serve the needs of child and adult victims of domestic violence, dating violence, sexual assault, or stalking.<sup>13</sup>
- The annual plan must include a description of any activities, services, or programs offered by a PHA that help victims of domestic violence, dating violence, sexual assault, or stalking to obtain or maintain housing, to prevent violence, or to enhance victim safety.<sup>14</sup>
- A PHA may allow portability for a family that moves out of the assisted unit in violation of the lease in order to protect the health or safety of a victim of domestic violence, dating violence, or stalking.<sup>15</sup>

### Areas of Concern

Although the interim rule states that it incorporates VAWA "without change,"<sup>16</sup> this statement is belied by several provisions that substantially alter the statute's language. Two of the areas of greatest concern are the interim rule's provisions regarding "actual and imminent threat" and certification of domestic violence, dating violence, and stalking.

#### Actual and Imminent Threat

VAWA does not limit a PHA or owner's authority to evict or terminate assistance to any tenant, including a survivor, if the PHA or owner can demonstrate an "actual and imminent threat" to other tenants or employees at the property.<sup>17</sup> In contrast, the interim rule states that a PHA or owner need only demonstrate an "actual or imminent threat."<sup>18</sup> While this may seem to be a small change, it is concerning because VAWA makes clear that the threat must be both genuine and impending. Also troubling is HUD's attempt to define the phrase "imminent threat."

<sup>11</sup>§ 5.2007(a)(1)(v).

<sup>12</sup>§ 91.205(b)(1).

<sup>13</sup>§ 903.6.

<sup>14</sup>§ 903.7.

<sup>15</sup>§ 982.353.

<sup>16</sup>VAWA Interim Rule, 73 Fed. Reg. 72,339.

<sup>17</sup>42 U.S.C.A. § 1437d(l)(6)(E) (West, WESTLAW through P.L. 110-460 approved 12-23-08) (emphasis added); 42 U.S.C.A. §§ 1437f(d)(1)(B)(iii)(V), 1437f(o)(20)(D)(iv) (West, WESTLAW through P.L. 110-460 approved 12-23-08) (emphasis added).

<sup>18</sup>24 C.F.R. § 5.2005(e).

VAWA does not define the term, and HUD's decision to do so undermines its statement that it has incorporated VAWA's statutory language without change. The interim rule states that "words, gestures, actions, or other indicators will be considered an 'imminent threat' if a reasonable person, considering all of the relevant circumstances, would have a well-grounded fear of death or bodily harm as a result."<sup>19</sup> This definition is problematic because it contains no requirement of immediacy. For example, if an abuser made threats to other tenants or employees in the past, but is now incarcerated, or has not engaged in threatening activity in several months, HUD's definition of "imminent threat" could still apply, putting a survivor of domestic violence at risk of eviction or termination of assistance. By failing to include a requirement of immediacy or urgency in its definition of "imminent threat," HUD has ignored VAWA's plain language.

### **Certification of Domestic Violence, Dating Violence, or Stalking**

The interim rule's language regarding certification of domestic violence, dating violence, or stalking also differs significantly from VAWA. VAWA states that a PHA or owner "may request that an individual certify via a HUD-approved certification form that the individual is a victim of domestic violence, dating violence, or stalking."<sup>20</sup> VAWA goes on to state that "[a]n individual may satisfy the certification requirement of subparagraph (A)" by providing (1) documentation signed by an employee, agent, or volunteer of a victim service provider, an attorney, or a medical professional; or (2) a police or court record.<sup>21</sup> HUD has previously interpreted these provisions to mean that "[i]n lieu of a certification form," a police or court record or documentation signed by a professional may be provided.<sup>22</sup> In other words, both VAWA's statutory language and HUD's prior guidance provide that an applicant or tenant may satisfy the certification requirement by supplying one of any of the following three documents: (1) HUD's certification form; (2) documentation signed by a qualified third party; or (3) a police or court record.

In contrast, the interim rule indicates that an individual must always provide the HUD form in response to an owner or PHA's request for certification. The interim rule states that a PHA or owner

may request that the tenant . . . certify in a form approved by HUD that the tenant is a victim of domestic violence, dating violence, or stalking, within 14 business days after the date that the tenant receives the request or such longer time as the PHA, owner, or management agent may at its discretion allow. The certification:

- (i) May be based solely on the personal signed attestation of the victim . . . ; or
- (ii) May be based on or supported by a federal, state, tribal, territorial, or local police or court record; or
- (iii) May be based on or supported by documentation signed by an employee, agent, volunteer of a victim service provider, an attorney, or medical professional . . .<sup>23</sup>

The interim rule makes clear that a PHA or owner may request that an individual provide the HUD form as proof of domestic violence, dating violence, or stalking. However, the interim rule never specifies that the tenant can provide a police or court record or qualified third-party documentation instead of the certification form. Rather, its certification provisions, read together as a whole, seem to suggest that the tenant must complete the HUD-approved form, if requested, and the information provided in this form "may be based on or supported by" a police or court record or qualified third-party documentation.

To add to this confusion, the interim rule's preamble states that "It is not mandatory that the victim provide the HUD form, and the PHA, owner, or management agent may not require the victim to provide the form."<sup>24</sup> However, this language is nowhere in the interim rule itself. Also missing from the interim rule is VAWA's statutory language providing that a PHA or owner's request for certification of domestic violence, dating violence, or stalking be in writing.<sup>25</sup> Additionally, the interim rule omits the statute's language stating that a PHA or owner is not required to demand official documentation or physical proof, and may provide VAWA's protections based solely on the individual's statement or other evidence.<sup>26</sup> Finally, the interim rule discusses certification only in the context of "continued tenancy."<sup>27</sup> It does not discuss certification in the context of voucher terminations or denials of housing to applicants.

Ironically, VAWA's certification provisions have been among the most difficult to implement. Several advocates have reported that PHAs and owners often require victims to provide multiple forms of documentation, which can be problematic in cases where the victim is in hiding or cannot access police, courts, or services due to fear of retaliation. The interim rule, as currently worded, does little to alleviate the confusion surrounding VAWA's certification procedures.

<sup>19</sup>*Id.*

<sup>20</sup>§ 1437d(u)(1)(A); § 1437f(ee)(1)(A).

<sup>21</sup>§ 1437d(u)(1)(C); § 1437f(ee)(1)(C).

<sup>22</sup>See Notice PIH 2006-42 (Dec. 27, 2006); Form HUD-50066.

<sup>23</sup>24 C.F.R. § 5.2007(a).

<sup>24</sup>VAWA Interim Rule, 73 Fed. Reg. 72,338.

<sup>25</sup>§ 1437d(u)(1)(B); § 1437f(ee)(1)(B).

<sup>26</sup>§ 1437d(u)(1)(D); § 1437f(ee)(1)(D).

<sup>27</sup>§ 5.2007(a)(1).

## Omissions in the Interim Rule

The interim rule fails to address several areas that are crucial to meaningful implementation of VAWA. For example, the interim rule does not include any amendments to 24 C.F.R. Part 966, which sets forth the requirements for public housing leases and the grievance procedure. VAWA requires that public housing leases include the statute's eviction and confidentiality protections,<sup>28</sup> yet this requirement is absent from the interim rule. Further, the interim rule fails to address what effect, if any, VAWA has on 24 C.F.R. § 966.51, which presently states that a PHA may exclude from the grievance procedure a termination of tenancy that involves violent criminal activity. Accordingly, 24 C.F.R. § 966.51 currently could be interpreted to exclude from the grievance procedure terminations of victims that are related to acts of domestic violence committed against them.

The interim rule replicates VAWA's provisions permitting a PHA or owner to bifurcate a lease to evict a tenant who engages in criminal acts of violence without evicting the victim of the violence. However, it does not incorporate VAWA's language stating that a PHA may terminate assistance to a household member who commits criminal acts of violence without terminating the victim's assistance.<sup>29</sup> In fact, there are several places in the interim rule that fail to incorporate VAWA's protections against voucher terminations.<sup>30</sup> In the preamble to the interim rule, HUD states that PHAs may be able to use their existing authority under 24 C.F.R. § 982.552(c)(2)(ii) to terminate voucher assistance for certain family members for criminal activity while permitting other family members to continue receiving assistance. However, even if it would be redundant to include VAWA's language regarding bifurcation of vouchers in the final rule, this would seem to be an important reminder for PHAs that they have this authority in cases involving domestic violence, dating violence, or stalking.

## Conclusion

Housing and domestic violence advocates across the country submitted comments identifying the VAWA interim rule's deficiencies. Hopefully HUD will consider these comments and amend the interim rule accordingly before it issues the final rule. Even if the final rule does little more than reiterate VAWA's language, advocates can still work locally with PHAs to amend their Section 8 Administrative Plans and public housing Admissions and Continued Occupancy Policies to address the needs of survivors of domestic violence, dating violence, and stalking.<sup>31</sup> ■

<sup>28</sup>§ 1437d(l)(5)-(6).

<sup>29</sup>§ 1437f(o)(7)(D).

<sup>30</sup>See, e.g., §§ 5.2005(b), 5.2007.

<sup>31</sup>For sample PHA plan language and domestic violence policies, please contact Meliah Schultzman, attorney and Equal Justice Works fellow, at mschultzman@nhlp.org.

## Fair Housing Tax Credit Case Survives Motion to Dismiss

The United States District Court for the Northern District of Texas recently denied a Motion to Dismiss by the Texas Department of Housing and Community Affairs (TDHCA) in a fair housing case brought by the Inclusive Communities Project (ICP),<sup>1</sup> which sought to increase the number of affordable housing units in more racially and economically integrated neighborhoods. TDHCA argued that ICP had no standing to bring the suit and that the case could not go forward because of ICP's failure to join the IRS and the City of Dallas. However, the court found in favor of ICP on all issues presented, permitting the case to proceed.

### Background

Federal law imposes on the Department of Treasury and state housing finance agencies (HFAs) an obligation to promote racial and ethnic desegregation.<sup>2</sup> Both the Treasury and state HFAs are required "affirmatively to further" fair housing.<sup>3</sup> In the context of other programs, several courts of appeal have held that the "affirmatively to further" duty prohibits an agency from funding housing developments that will exacerbate racial concentration.<sup>4</sup> Pursuant to these holdings, Treasury and state HFAs arguably should be obligated to reject tax credit applications that would worsen racial concentration.<sup>5</sup>

The ICP filed an initial complaint on March 28, 2008, alleging that TDHCA had violated the Fair Housing Act (FHA), the Equal Protection Clause of the Fourteenth Amendment, and 42 U.S.C. § 1982 by (1) using race as a consideration in siting Low-Income Housing Tax Credit (LIHTC) properties and (2) disproportionately allocating tax credits in areas primarily comprised of people of color while denying credits in predominantly white

<sup>1</sup>Inclusive Communities Project v. Texas Dep't. of Hous. and Cmty. Affairs, No. 3:08-CV-0546-D, 2008 WL 5191935 (N.D. Tex.) (hereafter *ICP v. TDHCA*). For background, see NHLP, *Texas Group Files Suit Alleging LIHTC Program Perpetuates Segregation*, 38 HOUS. L. BULL. 146 (July 2008).

<sup>2</sup>See 42 U.S.C.A. § 3608(d) (West, WESTLAW through P.L. 110-231 approved 5-18-08); 42 U.S.C.A. § 5304(b)(2) (West, WESTLAW through P.L. 110-231 approved 5-18-08); see also Poverty & Race Research Action Council, *Civil Rights Mandates in the Low Income Housing Tax Credit (LIHTC) Program* 2 (2004), <http://www.prrac.org/pdf/crmandates.pdf>; Florence Wagman Roisman, *Poverty, Discrimination, and the Low Income Housing Tax Credit Program* 20 (2000), <http://www.nhlp.org/lalshac/roisman.pdf>.

<sup>3</sup>42 U.S.C.A. § 3608(d) (West, WESTLAW through P.L. 110-231 approved 5-18-08); 42 U.S.C.A. § 5304(b)(2) (West, WESTLAW through P.L. 110-231 approved 5-18-08); Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 17, 1994).

<sup>4</sup>Roisman, *supra* note 2, at 22 (citing *Shannon v. HUD*, 436 F.2d 809, 814 (3d Cir. 1970); *Alschuler v. HUD*, 686 F.2d 472, 482 (7th Cir. 1982); *Otero v. N.Y. Hous. Auth.*, 484 F.2d 1122, 1333-34 (2d Cir. 1973); *Anderson v. City of Alpharetta*, 737 F.2d 1530, 1535 (11th Cir. 1984)).

<sup>5</sup>*Id.*

neighborhoods, thus making housing unavailable based on race, color and national origin.<sup>6</sup> Because LIHTC properties are required by law not to discriminate against Section 8 voucher holders, they provide essential housing for low-income families. However, in a survey of 383 apartment complexes in predominantly white Dallas suburbs, ICP had found that only seventy were willing to accept Section 8 vouchers.<sup>7</sup> Twenty-six of those properties accepting vouchers were tax credit properties, which are subject to the nondiscrimination requirement.<sup>8</sup> The complaint alleges that over 60% of LIHTC units in Texas are located in U.S. Census tracts with a majority minority population.<sup>9</sup> Furthermore, the LIHTC projects that are located in predominantly white neighborhoods tend to be where the eligible population is also predominantly white.<sup>10</sup> Because of this inequitable distribution of LIHTC properties, ICP faces increased difficulty in helping its clients find affordable housing in integrated communities.

The claim requested a number of forms of equitable relief aimed at addressing the racial disparities resulting from the siting of LIHTC housing. First, the requested relief would require TDHCA to allocate as many tax credits in predominantly non-minority census tracts as in predominantly minority census tracts.<sup>11</sup> Second, ICP requested that the court prohibit TDHCA from using race and ethnicity of the proposed project location and probable residents into account during decision-making regarding allocations.<sup>12</sup> The third request for relief seeks to enjoin defendants from approving tax credits to applications in Dallas unless certain fair housing, health and safety requirements are met.<sup>13</sup> The fourth request for relief aims to prohibit TDHCA from perpetuating racial and ethnic segregation through its tax credit allocations.<sup>14</sup> Finally, ICP asks the court to require defendants to comply with and implement reporting and monitoring requirements to demonstrate compliance with fair housing obligations.<sup>15</sup> The complaint also requests attorney fees, court costs and litigation expenses.<sup>16</sup>

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<sup>6</sup>Complaint, *Inclusive Communities Project v. Texas Dep't. of Hous. and Cmty. Affairs*, No. 3:08-CV-0546-D (N.D. Tex. Mar. 8, 2008).

<sup>7</sup>Kim Horner, *Group Sues, Says Housing Program Perpetuates Segregation*, Dallas Morning News, Apr. 24, 2008, available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/042508dnmethousingsuit.1336daa.html>.

<sup>8</sup>*Id.*

<sup>9</sup>Compl. at 6, *Inclusive Communities Project v. Texas Dep't. of Hous. and Cmty. Affairs*, No. 3:08-CV-0546-D (N.D. Tex. Mar. 8, 2008).

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* at 16-7.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

## Defendant's Motion to Dismiss

In response to ICP's complaint, the defendant TDHCA filed a motion to dismiss. TDHCA contended that ICP does not have standing to bring this suit, for lack of a cognizable injury in fact, and that it failed to join two necessary parties—the City of Dallas and the IRS—as defendants. The court denied the motion, for the reasons explained below.

### Standing

The court analyzed standing for the claims under the FHA separately from the claims under 42 U.S.C. § 1982 and the Fourteenth Amendment. Any “aggrieved person” may pursue a cause of action under the FHA. An “aggrieved person” is one who “claims to have been injured by a discriminatory housing practice” or “believes that such a person will be injured by a discriminatory housing practice that is about to occur.”<sup>17</sup> Because of these specific provisions, a plaintiff need only show Article III standing under the FHA, without regard to addressing additional prudential standing concerns that might otherwise impede suit. Thus, ICP only had to establish injury in fact, causation, and redressability.

The court analogized ICP's standing to the situation in the Supreme Court case, *Havens Realty*, where the Court found standing when a fair housing organization had to use more resources to identify discriminatory steering practices.<sup>18</sup> Similarly, ICP argued, and the court agreed that it had to spend more resources to help African-American Section 8 voucher holders find housing in predominantly non-minority neighborhoods because of the lack of LIHTC units.<sup>19</sup> The court also dismissed TDHCA's argument that ICP was not directly affected because under Article III standing principles, the court need not distinguish between first- and third-party standing.<sup>20</sup>

The second element for standing requires that the defendant's actions caused the injury to be redressed. The court found that if not for TDHCA's denial of tax credit applications in predominantly white neighborhoods, an equal number of LIHTC units would be available in the predominantly minority neighborhoods as in the predominantly non-minority neighborhoods.<sup>21</sup> If an equal number of LIHTC units were available in minority and non-minority neighborhoods, ICP would have an easier time finding housing for its clients.<sup>22</sup> Assuming that TDHCA did not use race as a factor in allocations, the prevalence of LIHTC units would also equalize in all neighborhoods. Based on those two assumptions, the court found that ICP had “sufficiently alleged the causation element of standing.”<sup>23</sup>

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<sup>17</sup>42 U.S.C. § 3602(i); *See also ICP v. TDHCA* at \*3.

<sup>18</sup>*ICP v. TDHCA* at \*4, *citing Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982).

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

<sup>21</sup>*Id.* at \*5.

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

Finally, the court easily found that the injury alleged by ICP could be redressed by the equitable relief requested.<sup>24</sup> Thus, ICP met the elements for standing under the Fair Housing Act.

The court similarly found that ICP has standing under the slightly different analysis required for 42 U.S.C. § 1982 and the Fourteenth Amendment. In addition to the analysis required for the FHA, broader prudential standing rules apply to these causes of action.<sup>25</sup> Therefore, the court considered whether or not ICP had standing as a third party to enforce the rights being violated. The prudential rule against recognizing third-party standing has two purposes—to avoid unnecessary litigation and to ensure the “most effective advocate for the rights is before the court.”<sup>26</sup> The district court found that denying ICP standing under such a rule would not serve such purposes.<sup>27</sup> ICP’s close relationship with its clients ensures that the litigation will help them exercise their rights and the organization, with its mission of housing desegregation, would be effective in advocating the rights of its clients.<sup>28</sup> Thus, the court held that the prudential rule against third-party standing did not apply to ICP in this case.<sup>29</sup>

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*The case could provide a strong precedent to push state agencies toward fair allocations of its tax credits to spur development of affordable housing units in a wider variety of neighborhoods with better opportunities for jobs, schools and services.*

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### **Failure to Join Parties**

After having found that ICP had standing to pursue its three causes of action, the court turned to the final question of whether or not the organization had failed to join two necessary parties—the City of Dallas and the IRS.<sup>30</sup> A party must be joined if it is necessary to afford complete relief. TDHCA argued that the IRS is a necessary party because the Tax Code allegedly provides incentives for developers to select low-cost land and any remedy would require the IRS to amend those incentives.<sup>31</sup> ICP’s claim seeks to prohibit discrimination in the form of imbalanced acceptance of proposals in minority and non-minority communities, as well as the use of race

as a factor in selection, not where developers select the land. To remedy such discrimination, the IRS would not have to change any policy. Therefore, the court held that the IRS is not a necessary party.<sup>32</sup> TDHCA also claimed that the City of Dallas’s zoning laws would block construction of LIHTC units in white neighborhoods, but the court found no evidence supporting such a contention.<sup>33</sup> Thus, the court found that it could afford full relief to ICP without the IRS or the City of Dallas as parties, therefore obviating any need for joinder.<sup>34</sup>

### **Conclusion**

The ICP will now be able to move forward with its substantive fair housing claims against TDHCA. If successful, the case could provide a strong precedent to push state agencies toward fair allocations of its tax credits to spur development of affordable housing units in a wider variety of neighborhoods with better opportunities for jobs, schools and services. ■

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<sup>24</sup>*Id.* at \*6.

<sup>25</sup>*Id.*

<sup>26</sup>*Id.* at \*7.

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>*Id.*

<sup>30</sup>*Id.* at \*8

<sup>31</sup>*Id.*

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<sup>32</sup>*Id.*

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* at \*9.

## L.A. Acts to Prevent Arbitrary Evictions from Foreclosed Units

In Los Angeles, tenants in foreclosed properties have lost their homes through no fault of their own, and the rising number of vacant units has negatively impacted communities. In response, the city's Housing Department issued a notice in December affirming that the foreclosure of a rental property is not a valid ground for eviction under the Los Angeles Rent Stabilization Ordinance (LARSO).<sup>1</sup> The ordinance sets forth twelve legal reasons for eviction of tenants living in properties covered by LARSO.<sup>2</sup> The Housing Department's notice reminded lenders and their agents that LARSO prohibits evictions based solely on foreclosure, the anticipated sale of the unit, or a change in ownership.<sup>3</sup> However, LARSO does not cover units with a Certificate of Occupancy dated after October 1, 1978, or single-family homes, leaving many tenants unprotected<sup>4</sup> and setting the stage for further legislative action.

The Los Angeles City Council recognized that LARSO did not protect all tenants living in foreclosed properties. As of November 2008, approximately 1300 multifamily units have been foreclosed upon in Los Angeles, and LARSO covered most of these units.<sup>5</sup> However, at least fifty-six foreclosed multi-family projects comprising 200 units were exempt from LARSO, as well as an untold number of single-family homes occupied by renters.<sup>6</sup> In addition, because 60% of the city's foreclosures are in census tracts where the average income is below 120% of the Area Median Income, tenants evicted from these properties are likely to be low- and moderate-income households who cannot afford market rents.<sup>7</sup> State law minimally protects these tenants by affording them sixty days' notice before they may be displaced.<sup>8</sup>

On December 17, 2008, the City Council passed Ordinance No. 180,441, which extends LARSO's eviction protections to tenants in foreclosed single-family units, condominium units, and units with a Certificate of Occu-

pancy dated after October 1, 1978.<sup>9</sup> Specifically, the law provides that a landlord who obtains title through foreclosure to property containing rental units may bring an action to recover possession from a tenant only upon one of the twelve grounds for eviction set forth in the LARSO.<sup>10</sup> Tenants in foreclosed Section 8 voucher units are covered by the new ordinance, but tenants of foreclosed public housing units are not.<sup>11</sup> Nor do the protections extend to tenants in units obtained through foreclosure by non-profits and made available to low-income families.<sup>12</sup> Only tenants whose tenancy commenced on or before the date that the landlord obtained title through foreclosure are covered.<sup>13</sup> The ordinance is effective for one year, unless extended by the city council.<sup>14</sup>

The City Council's action was championed by a number of community groups, including the Coalition for Economic Survival, ACORN, People Organizing for Westside Renewal, the Eviction Defense Network, and the Inner City Law Center. These groups are sure to spread the word concerning the new ordinance. However, because the ordinance received relatively limited media coverage during the holiday season, much work remains to be done to ensure that tenants, courts, lenders and their agents are aware of the law. ■

<sup>1</sup>Los Angeles Housing Department, *Foreclosure Eviction Moratorium, Bulletin # 54*, Dec. 2008, <http://lahd.lacity.org/lahdinternet/LinkClick.aspx?link=Rent%2FFORECLOSURE+EVICTIION+MORATORIUM+Bulletin.pdf&tabid=36&mid=542>.

<sup>2</sup>L.A., CAL., MUN. CODE ch. XV, art. 1, § 151.02 (2008).

<sup>3</sup>Los Angeles Housing Department, *Foreclosure Eviction Moratorium, Bulletin # 54*, Dec. 2008, <http://lahd.lacity.org/lahdinternet/LinkClick.aspx?link=Rent%2FFORECLOSURE+EVICTIION+MORATORIUM+Bulletin.pdf&tabid=36&mid=542>.

<sup>4</sup>See L.A., CAL., MUN. CODE ch. XV, art. 1, § 151.09 (2008).

<sup>5</sup>Motion of Eric Garcetti, Los Angeles City Councilmember, Nov. 7, 2008, available at [http://clkrep.lacity.org/onlinedocs/2007/07-2438-s9\\_mot\\_11-7-08.pdf](http://clkrep.lacity.org/onlinedocs/2007/07-2438-s9_mot_11-7-08.pdf).

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*; see also Los Angeles Housing Department, *Neighborhood Stabilization Program Los Angeles City Council District Foreclosure Maps*, Oct. 14, 2008, <http://lahd.lacity.org/lahdinternet/LinkClick.aspx?link=CC+Brief+Maps+10-14-08+cm.pdf&tabid=36&mid=542>.

<sup>8</sup>CAL. CIV. PROC. CODE 1161b (West 2008).

<sup>9</sup>L.A., Cal., Ordinance 180,441 (Dec. 19, 2008), <http://cityclerk.lacity.org/lacityclerkconnect/index.cfm?fa=ccfi.viewrecord&cfnumber=07-2438-s9>.

<sup>10</sup>Ordinance 180,441 § 49.91.

<sup>11</sup>§ 49.91.

<sup>12</sup>§ 49.91. Litigation is currently pending as to whether the federal regulation permitting terminations of voucher tenancies for "other good cause" (24 C.F.R. §982.310(d)) impliedly preempts the city's authority to regulate terminations of voucher tenancies through LARSO. *Barrientos v. 1801-1825 Morton LLC*, No. 06-6437 (C.D. Cal. Sept. 11 and Oct. 24, 2007) (holding that HUD regulations permitting owners to evict voucher tenants based on business or economic reasons did not preempt local eviction protections), *appeal docketed*, No. 07-56697 (9th Cir. Nov. 21, 2007). A reversal by the Ninth Circuit, finding federal preemption, could threaten the new ordinance.

<sup>13</sup>§ 49.92

<sup>14</sup>§ 49.95. The city clerk's website states that the ordinance is effective December 23, 2008. See <http://cityclerk.lacity.org/lacityclerkconnect/index.cfm?fa=ccfi.viewrecord&cfnumber=07-2438-s9>.

# Arroyo Vista Tenants Continue Challenge to Proposed Public Housing Disposition

Tenants of a public housing property in California are pursuing their claims that the PHA has violated public housing, environmental and fair housing laws in seeking to sell their homes under a redevelopment plan that would provide for fewer deeply affordable units serving fewer families. Following an earlier federal court ruling that the tenants could pursue their relocation claims against the housing authority under 42 U.S.C. § 1983,<sup>1</sup> the tenants have continued to press their case, as described below.

## Background

The Dublin Housing Authority (DHA) proposes to dispose of its single conventional public housing property, Arroyo Vista, built in the early 1980s and consisting of 150 detached single-family homes. Arroyo Vista is located in Dublin, California, a suburb of San Francisco, with predominately moderate-income households and a relatively low minority population. The Arroyo Vista population is a diverse population of families with children, seniors and persons with disabilities (52% white, 21% Latino, 15% Asian and 28% African American)—many of whom have resided at Arroyo Vista for decades. Without prior approval from HUD to dispose of Arroyo Vista, DHA entered into a development agreement in July 2007 with the Dublin City Council and private developers to sell Arroyo Vista for \$12 million and a proposal to replace all public housing units with a mix of market-rate “for-sale” housing, a low-income housing tax credit project, and a Section 202 senior development. The market-rate and tax credit units will not be affordable to Arroyo Vista tenants, and many of the public housing family-size units will be “replaced” with senior-only units. As a result, the development agreement calls for all 150 Arroyo Vista families to be permanently displaced.

## Disposition Application

On August 14, 2007, approximately one month *after* entering into the development agreement, DHA submitted a Disposition Application to HUD. The tenants responded by submitting a letter to HUD objecting to the application, alleging *inter alia* that DHA’s application violated the public housing disposition statute because the plan is not in the best interest of the tenants and the public housing agency,<sup>2</sup> the disposition plan is inconsistent with

<sup>1</sup>See *Arroyo Vista Tenants Ass’n v. City of Dublin*, 2008 WL 2338231 (N.D. Cal. May 12, 2008); see also NHLP, *Tenants Can Sue for Violation of Public Housing Demolition Law*, 38 HOUS. LAW. BULL. (June 2008).

<sup>2</sup>42 U.S.C. § 1437p(2)(B) (West 2003)

the DHA’s Annual and Five Year Plan and the applicable Consolidated Plan, DHA had no relocation plan, DHA did not properly consult with tenants, that the application was incomplete because it did not contain any appraisals or an environmental review, DHA’s actions have a discriminatory effect and DHA failed in its action to affirmatively further fair housing.<sup>3</sup> HUD responded to that letter addressing in general most of the points raised by the tenants, but stating only that it would investigate and make sure that DHA was complying with the law.<sup>4</sup>

The tenants then sent a follow-up letter, but HUD did not respond.<sup>5</sup> The follow-up letter noted that DHA without HUD approval of the disposition had relocated at least thirty families, boarded up the vacant units and thereby threatened the continuing residence of the remaining families. Some of the relocated families were provided with vouchers by a neighboring public housing authority with jurisdiction in the area, as DHA did not operate a voucher program.<sup>6</sup>

## Complaint Challenging DHA Actions

When DHA began relocating tenants in August 2007, before even submitting an application for disposition to HUD, the Arroyo Vista Tenants’ Association and four individual tenants sued DHA and the city for failure to comply with federal disposition and demolition requirements applicable to public housing<sup>7</sup> and state relocation assistance laws.<sup>8</sup> In response to plaintiffs’ motion for preliminary injunction, the Court determined that plaintiffs’ rights to the notice and relocation assistance provisions of 42 U.S.C. § 1437p(a)(4) are enforceable through 42 U.S.C. § 1983, and that those rights include the right to notice that HUD has approved a disposition and/or demolition application before relocation begins.<sup>9</sup>

Rather than restraining DHA from relocating “voluntary” displacees prior to HUD approval, however, the Court subsequently urged the parties to stipulate to a “corrective” notice to all tenants. The corrective notice was issued to all tenants in their primary language in

<sup>3</sup>Letter from Bay Area Legal Aid, et al to Alphonso Jackson, HUD (Nov. 2, 2007).

<sup>4</sup>Letter from Dominique Blom to Naomi Young, Bay Area Legal Aid (Nov. 20, 2007).

<sup>5</sup>Letter from Bay Area Legal Aid, et al to Dominique Blom (Dec. 19, 2007).

<sup>6</sup>The neighboring PHA’s Administrative Plan allows for a preference for such families only if the PHA receives additional funding for such families. See Housing Authority of the County of Alameda, Section 8 Program Administrative Plan (Dec. 10, 2008), Ch. 11, available at [http://www.haca.net/index.php?option=com\\_content&view=article&id=71&Itemid=100](http://www.haca.net/index.php?option=com_content&view=article&id=71&Itemid=100). The residents have raised questions as to how the relocated tenants from Arroyo Vista obtained a preference for vouchers in order to move, because neither DHA nor the neighboring PHA have requested or received vouchers to assist with the relocation.

<sup>7</sup>42 U.S.C. § 1437p (West 2003); 24 C.F.R. Part 970 (2008).

<sup>8</sup>Cal. Govt. Code § 7260 *et seq.* (2009 Thomson Reuters/West); 25 Cal. Code of Regs § 6000 *et seq.* (2008 Thomson Reuters/West).

<sup>9</sup>See note 1, *supra*.

July 2008.<sup>10</sup> It informs tenants that they have no obligation to move unless HUD approves the disposition and they have received all notices required by state and federal law, including a notice that HUD has approved the disposition. It also extends the date by which any displacement could occur (to not less than five months beyond HUD approval) and informs tenants of their rights to receive relocation benefits pursuant to state and federal law. Relocation benefits include actual and reasonable relocation expenses, including moving expenses, security deposits, and credit check fees; comparable housing, including a Section 8 voucher and/or rental assistance payments; and advisory services and necessary counseling.

### Finding of No Significant Impact

In an effort to complete DHA's application for disposition of Arroyo Vista, the city completed an environmental assessment of the Arroyo Vista project pursuant to the National Environmental Policy Act and certified a "Finding of No Significant Impact" (FONSI) to HUD on July 24, 2008, nearly a year after DHA submitted its application for disposition. Under federal law, the local public entity must analyze the environmental consequences of the disposition or demolition project including such factors as water availability, air quality, endangered species, and effects on building environment (such as traffic, noise pollution and land use conflicts). It also must analyze the effects on the *nonphysical* environment, including economic and social factors, to determine whether there is a likelihood of significant negative socioeconomic impacts, and, if so, complete a full environmental impact statement.<sup>11</sup>

Tenants objected to Dublin's FONSI on the grounds that the city had failed to analyze the negative socioeconomic effects of the project, including the demographic character of the existing location, the displacement of existing tenants, and significant changes in employment and income patterns in the affected area.<sup>12</sup> They also objected that the city had undertaken displacement and relocation activities without prior HUD approval of a disposition application.

HUD determined in October 2008 that these are permissible objections and requested a response from the city to the allegations that the proposed disposition will result in a net loss of affordable units available to families with children, a loss of two- and four-bedroom units, the loss of units available for extremely low-income tenants, and that DHA's premature displacement and relocation activities limit the choice of reasonable alternatives to

disposition.<sup>13</sup> HUD rejected several other objections raised by tenants (*e.g.*, the city's failure to make a finding of significant socioeconomic effects, deficiencies in the relocation plan, inadequacy of relocation expenses, and insufficient facts or evidence to support the FONSI), finding that these are substantive matters for the city to consider. By letter dated December 29, 2008, HUD's San Francisco Regional Office determined that the city has adequately addressed the socioeconomic effects of the disposition proposal and that the relocation of residents and entering into a "conditional" disposition and development agreement without prior environmental review or HUD approval does not violate disposition and development or environmental regulations.<sup>14</sup> Accordingly, the Regional Office determined that the city's request for release of funds and certification responsibilities pursuant to 24 C.F.R. Part 58 have been met. DHA's application for disposition remains pending before HUD's Special Applications Center.

Plaintiffs also have amended their complaint to include, among other claims, state and federal fair housing claims, and are commencing discovery. If the application is approved, the tenants also anticipate amending the complaint to add claims against HUD.<sup>15</sup> ■

<sup>10</sup>See Important Notices to Arroyo Vista Tenants in English, Spanish, Tagalog, and Farsi issued July 21 and July 22, 2008.

<sup>11</sup>See 28 C.F.R. §§ 58.40(c) and 58.75 (2008).

<sup>12</sup>Letter from Public Interest Law Project, et al. to Stephen Schneller, Director of Public Housing, San Francisco Regional Office (July 31, 2008).

<sup>13</sup>Letter from Stephen Schneller, Director of Public Housing, San Francisco Regional Office to Richard Ambrose, Dublin City Manager (Oct. 15, 2008).

<sup>14</sup>Letter from Stephen Schneller, Director of Public Housing, San Francisco Regional Office to Joni Pattillo, Dublin City Manager (Dec. 29, 2008).

<sup>15</sup>Counsel for Tenants include Lisa Greif and Naomi Young, Bay Area Legal Aid, Oakland, CA; Deborah Collins, Michael Rawson, Craig Castellonet, California Affordable Housing Law Project of the Public Interest Law Project, Oakland, California. For more information, contact Deborah Collins at [dcollins@pilpca.org](mailto:dcollins@pilpca.org), or Lisa Greif at [Lgreif@baylegal.org](mailto:Lgreif@baylegal.org).

## 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,<sup>1</sup> Lexis,<sup>2</sup> or, in some instances, the court's website.<sup>3</sup> Copies of the cases are *not* available from NHLP.

### Public Housing: Class Certification

*Anderson v. HUD*, \_\_\_ F.3d \_\_\_, 2008 WL 5412870 (5th Cir. 2008). Displaced public housing residents filed suit against HUD and the Housing Authority of New Orleans (HANO) alleging that the failure to repair and reopen public housing developments violated the Fair Housing Act and the Equal Protection Clause. A federal district court certified as a class all African-American New Orleans public housing residents who were involuntarily displaced by Hurricane Katrina and who received vouchers or rental assistance from HUD or HANO that did not pay for utility assistance. HANO and HUD filed an interlocutory appeal challenging certification. The Fifth Circuit vacated and remanded the class certification order, finding that the district court abused its discretion by certifying a class based on claims that the residents never pled, because the residents' complaint lacked any allegations regarding the administration of the voucher program.

### Public Housing: Reversal of Termination as Disproportionate to Offense

*Vazquez v. New York City Hous. Auth.*, \_\_\_ N.Y.S.2d \_\_\_, 2008 WL 5245761 (N.Y. App. Div. 2008). The housing authority terminated a public housing resident's assistance after she pled guilty to a felony charge involving unauthorized use of an ATM card. The court vacated the termination, finding that the penalty was disproportionate to the resident's offense. The resident had paid restitution to the victim, complied with probation, and had no prior criminal record.

### Public Housing: Requirement that Residents Be Consulted Prior to Demolition

*Aponte-Rosario v. Vila*, \_\_\_ F. Supp. 2d \_\_\_, 2008 WL 5423005 (D.P.R. 2008). Residents filed suit alleging that the housing authority failed to consult with them during the develop-

ment of an application for demolition of a public housing project, as required by 42 U.S.C. § 1437p(b)(2). The court rejected this claim, finding that the proposed demolition was included in the housing authority's annual plans, and that public hearings were held on the plans. The residents also alleged that the housing authority neglected the development with the ulterior motive of letting the buildings fall apart to justify their demolition. The court found no evidence supporting this and noted that records established a steady level of investment in the complex's maintenance during the period leading up to the application for demolition.

### Public Housing: Resident Failed to Establish Private Right of Action or Section 1983 Claim for Alleged Violation of Section 3

*Williams v. New York City Hous. Auth.*, 2008 WL 5111105 (E.D.N.Y. 2008). A public housing resident filed a *pro se* action against the housing authority alleging that he had been denied employment in violation of Section 3. Citing its earlier decision in *Williams v. HUD*, 2006 WL 2546536 (E.D.N.Y. Sep. 1, 2006), the court found that the resident failed to demonstrate that a privately enforceable right of action exists under Section 3. The court also rejected the resident's equal protection and due process claims because he failed to allege that the housing authority had a formal policy or custom that led to the denial of employment. Finally, the court dismissed the resident's 42 U.S.C. § 1983 claim against a private employer because there was no nexus between the employer and the housing authority demonstrating that the employer was a state actor.

### Housing Choice Voucher Program: No Hearing Required Where Voucher Term Expired

*Augusta v. Cmty. Dev. Corp. of Long Island*, 2008 WL 5378386 (E.D.N.Y. 2008). A voucher holder vacated his unit and entered into a drug treatment program without informing the housing authority. Shortly before his discharge from the program, a housing authority employee informed him that his voucher was subject to expiration, but he could renew it if he provided evidence that he had completed the rehabilitation program. When the voucher holder failed to submit this evidence, the housing authority informed him that the voucher had expired and that he was no longer eligible for assistance. The voucher holder filed suit alleging that he was denied due process because his assistance was terminated without a hearing. The court found that because neither federal regulations nor the housing authority's administrative plan required that a hearing be provided when a request for a voucher extension is denied, the voucher holder was not entitled to a hearing.

<sup>1</sup><http://www.westlaw.com>.

<sup>2</sup><http://www.lexis.com>.

<sup>3</sup>For 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>.

## **Housing Choice Voucher Program: Termination Decision Must Be Supported by Substantial Evidence**

*Bush v. Mulligan*, 869 N.Y.S.2d 569 (N.Y. App. Div. 2008). The housing authority sought to terminate a voucher holder for failure to report Social Security benefits. At the termination hearing, the voucher holder submitted evidence showing that her failure to report resulted from her memory loss and dementia. Despite the uncontradicted evidence of the voucher holder's disability, the hearing officer upheld the termination. The court reversed, finding that the decision to terminate the voucher based upon fraud and an intentional failure to provide truthful information was not supported by substantial evidence.

## **Project-Based Section 8: Requirements for Recertification Notices**

*Starrett City, Inc. v. Brownlee*, \_\_\_ N.Y.S.2d \_\_\_, 2008 WL 5147073 (N.Y. App. Div. 2008). A project-based Section 8 owner commenced eviction proceedings after a tenant allegedly failed to cooperate with recertification requirements. The tenant failed to answer, and a default judgment was entered. The tenant obtained counsel and moved to set aside the default and dismiss the eviction proceedings on the ground that the recertification notices were deficient in that they did not set forth information required by HUD. Specifically, they failed to include the name and contact information of the person employed at the property to recertify the tenant and the rent the tenant would be obligated to pay absent a recertification of income eligibility. The court agreed that the recertification notices were deficient and upheld the lower court's decision to vacate the default judgment and dismiss the eviction proceedings.

## **Administrative Procedures Act: Reviewability of HUD Decision**

*Copeland v. United States*, 2008 WL 5349904 (S.D. Fla. Dec. 22, 2008). The housing authority terminated the plaintiff's voucher after she was evicted for nonpayment. She filed a complaint with the HUD field office, which found that the housing authority's action was appropriate. She then filed suit in federal court seeking judicial review of HUD's decision under the Administrative Procedures Act. The court granted HUD's motion to dismiss, finding that HUD's oversight of the housing authority was committed to agency discretion and was not reviewable by the court.

## **Rural Housing: Right to Grievance Procedure**

*Fortner v. Farm Valley-Applewood Apartments*, 898 N.E.2d 393 (Ind. Ct. App. 2008). A rural housing tenant was evicted on the grounds that she failed to report income. The tenant appealed the eviction, alleging that the owner did not afford her a grievance procedure pursuant to 7 C.F.R. § 3560.160 before instituting eviction proceedings. The court rejected the tenant's appeal, finding that under 7 C.F.R. § 3560.160(b)(2)(v), grievance procedures do not apply to lease violations that would result in termination of tenancy.

## **LIHTC Program: Standing to Challenge Alleged Segregation**

*Inclusive Communities Project, Inc. v. Tex. Dep't Hous. & Cmty. Affairs*, 2008 WL 5191935 (N.D. Tex. 2008). A detailed review of this decision appears on page 10 of this issue of the *Housing Law Bulletin*. ■

## **Recent Housing-Related Regulations and Notices**

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD), the Department of Agriculture (USDA's Rural Housing Service/Rural Development (RD)), Federal Housing Finance Board, Federal Emergency Management Agency (FEMA) and the Veterans Administration issued in December of 2008. 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,<sup>1</sup> (2) bound volumes of the Federal Register, (3) HUD Clips,<sup>2</sup> (4) HUD,<sup>3</sup> and (5) USDA's Rural Development website.<sup>4</sup> Citations are included with each document to help you secure copies.

<sup>1</sup>[http://www.access.gpo.gov/su\\_docs](http://www.access.gpo.gov/su_docs).

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

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

<sup>4</sup><http://www.rdinit.usda.gov/regs>.

## HUD Final Rules

**73 Fed. Reg. 75,324 (Dec. 11, 2008)**

### **Matching Requirement in McKinney-Vento Act Programs**

*Summary:* The McKinney-Vento Homeless Assistance Act is the primary federal statute that addresses the issues of homelessness in the United States. Three grant programs administered by HUD under this statute (the Supportive Housing program, the Shelter Plus Care program, and the Emergency Shelter Grants program) each impose a matching requirement for a grant awarded by HUD under the program. This rule codifies, in the regulations governing these programs, the scope of the match requirement, and the responsibility of the recipient of the grant to ensure that the funds that the recipient uses to satisfy HUD's match requirements are not prohibited to be used for this purpose under any statute that may govern the matching funds.

*Effective Date:* January 12, 2009.

**73 Fed. Reg. 76,832 (Dec. 17, 2008)**

### **Revision of Hearing Procedures**

*Summary:* This final rule amends the hearing procedures before hearing officers who have the responsibility for adjudicating those matters that do not raise issues under the Administrative Procedure Act (APA). This final rule also amends the hearing procedures before Administrative Law Judges who have the responsibility for adjudicating those matters that are subject to the requirements of the APA. Specifically, the final rule modifies pleading and motion requirements of the hearing procedures, and the procedures for the review of hearing officers' determinations. It also amends the discovery and deposition requirements to clarify the hearing officers' discovery procedures and to specifically allow for written interrogatories, in addition to depositions, requests for production of documents, and requests for admissions. Additionally, the final rule amends the discovery, appeal, and judicial review procedures related to hearings that are conducted pursuant to the APA. This final rule follows a September 8, 2008, published rule, and no comments were received in response to that rule. This final rule adopts the proposed rule without change.

*Effective Date:* January 16, 2009.

**73 Fed. Reg. 76,832 (Dec. 17, 2008)**

### **Revisions to the Regulations Implementing the Program Fraud Civil Remedies Act of 1986 Revision of Hearing Procedures; Revision of Hearing Procedures; Final Rules**

*Summary:* This final rule amends HUD's regulations implementing the Program Fraud Civil Remedies Act of 1986 (PFCRA), which were codified in 1996 and were amended in 2003 to include inflation adjustments. This final rule more closely conforms the PFCRA regulations with the PFCRA statutory language, to incorporate additional definitions into the PFCRA regulations, and to add

an additional item to the list of factors that HUD shall consider in determining the amount of penalties and assessments to be imposed. This final rule follows publication of a September 8, 2008, proposed rule, but makes no changes at this final rule stage.

*Effective Date:* January 16, 2009.

**73 Fed. Reg. 79,324 (Dec. 29, 2008)**

### **Consolidated HUD Hearing Procedures for Civil Rights Matters, CFR Correction**

In 24 C.F.R., parts 0 to 199, revised as of April 1, 2008, on pages 733 and 734, in Sec. 180.670, remove paragraphs (b)(3)(iii)(A) through (b)(3)(iii)(C).

**73 Fed. Reg. 80,297 (Dec. 31, 2008)**

### **Standards for Mortgagor's Investment in Mortgaged Property: Compliance With Court Order Vacating Final Rule**

*Summary:* This final rule complies with a court order to vacate HUD's rule entitled "Standards for Mortgagor's Investment in Mortgaged Property" published on October 1, 2007.

*Effective Date:* January 30, 2009.

## HUD Proposed Rules

**73 Fed. Reg. 78,553 (Dec. 22, 2008)**

### **Disposition of HUD-Owned Single Family Assets in Revitalization Areas**

*Summary:* This proposed rule would implement a statutorily established program to make HUD-held single family homes and mortgage assets available for sale to units of general local government, states, Indian tribes, nonprofit organizations, and for-profit entities (collectively, purchasers) to provide homeownership opportunities and to promote neighborhood revitalization. Revitalization areas would be identified through application of specified economic and housing criteria. The purchasers would then make available the assets in accordance with a HUD-approved plan to encourage homeownership and revitalize the area.

*Comment Due Date:* February 20, 2008.

## HUD Federal Register Notices

**73 Fed. Reg. 75,464 (Dec. 11, 2008)**

### **Procedures for Appealing Section 8 Rent Adjustments**

*Summary:* HUD has submitted to the Office of Management and Budget (OMB) an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to what happens when a rent increase for certain Section 8 subsidized projects is denied, in full or in part. In those cases owners may submit to HUD an appeal letter outlining the basis for the appeal. The appeal letter must

be submitted to the Contract Administrator or the HUD Director for review. HUD uses the information to determine whether to deny or allow Section 8 rent increases.

*Comments Due Date:* January 12, 2009.

**73 Fed. Reg. 75,729 (Dec. 12, 2008)**

**Disaster Housing Assistance Program (DHAP)-Ike**

*Summary:* This document provides notice that the Federal Emergency Management Agency (FEMA) and HUD executed an Interagency Agreement (IAA) establishing a grant program called "Disaster Housing Assistance Program (DHAP)-Ike" for Hurricanes Ike and Gustav. DHAP-Ike is a temporary housing rental assistance and case management program for identified individuals and families displaced by Hurricanes Ike and Gustav. Under the IAA, HUD acts as the servicing agency of DHAP-Ike and will begin administration of the program effective November 1, 2008.

*Dates:* FEMA and HUD executed the Interagency Agreement and established DHAP-Ike for Hurricanes Ike and Gustav on September 23, 2008.

**73 Fed. Reg. 75,731 (Dec. 12, 2008)**

**Notice of Proposed Information Collection for Public Comment; Training Evaluation Form**

*Summary:* HUD has submitted to OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to the publication, on September 19, 2005 (70 FR 54983), of a final rule amending the regulations of the Public Housing Operating Fund Program at 24 CFR part 990, which was developed through negotiated rulemaking. Part 990 provides a new formula for distributing operating subsidy to public housing agencies (PHAs) and establishes requirements for PHAs to convert to asset management.

*Comments Due Date:* February 10, 2009.

**73 Fed. Reg. 75,732 (Dec. 12, 2008)**

**Notice of Funding Availability (NOFA) for the Section 202 Demonstration Pre-Development Grant Program: Extension of Application Due Date**

*Summary:* On October 10, 2008, HUD published the NOFA for the Section 202 Demonstration Pre-Development Grant Program. Through this NOFA, HUD is making available approximately \$20 million for pre-development grants to private nonprofit organizations and consumer cooperatives in connection with the development of housing under the Section 202 Supportive Housing for the Elderly program. The October 10, 2008 publication established December 16, 2008 as the deadline date for the submission of applications. This Federal Register publication extends the deadline date for the submission of applications to February 18, 2009.

*Application Deadline:* February 18, 2009.

**73 Fed. Reg. 75,733 (Dec. 12, 2008)**

**Reconsideration of Waivers Granted to and Alternative Requirements for the State of Mississippi's CDBG Disaster Recovery Grant to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006**

*Summary:* This notice describes HUD's reconsideration of some of the additional waivers and alternative requirements applicable to the CDBG disaster recovery grant provided to the State of Mississippi for the purpose of assisting in the recovery in the most impacted and distressed areas related to the consequences of Hurricane Katrina in 2005. HUD previously published an allocation and application notice on February 13, 2006, applicable to this grant and four others under the same appropriation, and reconsidered the waivers in that notice on August 8, 2008. The original June 14, 2006, notice has now been reconsidered and all waivers are being retained, with the exception of some of the overall benefit waivers.

*Effective Date:* December 17, 2008.

**73 Fed. Reg. 75,733 (Dec. 12, 2008)**

**Notice of Regulatory Waiver Requests Granted for the Third Quarter of Calendar Year 2008**

*Summary:* This notice contains a list of regulatory waivers granted by HUD during the period beginning on July 1, 2008, and ending on September 30, 2008.

**73 Fed. Reg. 76,040 (Dec. 15, 2008)**

**Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request; Disaster Housing Assistance Program (DHAP) Incremental Rent Transition Study**

*Summary:* HUD has submitted to OMB an information collection requirement for review and is soliciting public comments. The information collected relates to an important study of the incremental rent transition (IRT) aspect of DHAP. This study will compare families transitioning from stepped-up rents (i.e., Phase I families) and \$0 rent (i.e., Phase II/Phase III families) to market rate or assisted housing and measure their outcomes over time. This Information Collection would enable HUD to answer the question of how to most effectively transition people from rental assistance to market rate housing after a disaster. It will also enable HUD to see if DHAP vouchers and their differential rents are having a different effect on housing, employment, education, health, and other outcomes after DHAP ends February 28, 2009.

*Comments Due Date:* December 29, 2008.

**73 Fed. Reg. 76,672 (Dec. 17, 2008)**

**Disaster Housing Assistance Program (DHAP) for Hurricane Ike (DHAP-Ike)**

*Summary:* This document provides notice that HUD and the Federal Emergency Management Agency (FEMA) have executed an Interagency Agreement under which HUD shall act as the servicing agency of DHAP-Ike com-

mencing November 1, 2008. DHAP-Ike is a joint initiative undertaken by HUD and FEMA to provide monthly rental assistance, case management services, security deposit, and utility deposit assistance for certain families displaced from their homes by Hurricane Ike or Hurricane Gustav.

**73 Fed. Reg. 76,673 (Dec. 17, 2008)**

**Extension of HUD's Implementation Guidance for Section 901 of the Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006.**

*Summary:* This notice supplements three earlier notices published in the Federal Register that provided guidance to public housing agencies (PHAs) on implementing the authority provided to HUD to allow PHAs in the most heavily impacted areas of Louisiana and Mississippi affected by Hurricanes Katrina and Rita to combine Housing Choice Voucher and public housing operating and capital funds to flexibly and efficiently facilitate disaster recovery in those areas. Eligible PHAs with a continued need for assisting families must submit a 2008 Notice of Intent and Fungibility Plan in accordance with the July 28, 2006, October 30, 2006, and August 6, 2007 Federal Register notices.

*Dates:* Eligible PHAs must submit their CY 2008 Notices of Intent and Fungibility Plans no later than January 31, 2009.

**73 Fed. Reg. 76,674 (Dec. 17, 2008)**

**Waiver of Regulations Issued by HUD Restatement of Policy**

*Summary:* This notice reiterates HUD's statement of policy concerning the procedures that govern the waiver of regulations and directives issued by HUD. This policy was first announced by notice published in 1991. In 2001, HUD published a notice that clarified how these procedures are implemented during a period of administration transition. This notice consolidates the information and procedures provided by the two notices, and updates information and terminology to reflect current HUD operations and procedures.

**73 Fed. Reg. 77,818 (Dec. 19, 2008)**

**Additional Allocations for Midwest Flood Community Development Block Grant (CDBG) Disaster Recovery Grantees**

*Summary:* This notice advises the public of the second allocation of CDBG disaster recovery grants for the purpose of assisting in the recovery of areas covered by a declaration of major disaster under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act as a result of natural disasters that were recent as of the law's enactment in June 2008. As described in the supplementary information section of this notice, HUD is authorized by statute and regulations to waive statutory and regulatory requirements and specify alternative

requirements, upon the request of the state grantees. This notice also describes how a state receiving an allocation may implement the common application, eligibility, and administrative waivers and the common alternative and statutory requirements for the grants.

*Effective Date:* December 24, 2008.

**73 Fed. Reg. 78,382 (Dec. 22, 2008)**

**Construction Complaint—Request for Financial Assistance**

*Summary:* HUD has submitted to OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to information submitted by homeowners and used by HUD to identify the items of complaint in order to help the homeowner obtain correction. The information is also used to identify builders not conforming to applicable standards and to determine eligibility for financial assistance.

*Comments Due Date:* January 21, 2009.

**73 Fed. Reg. 78,383 (Dec. 22, 2008)**

**Local Appeals to Single-Family Mortgage Limits**

*Summary:* HUD has submitted to OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to housing industry groups right to appeal for increases in FHA's maximum mortgage limits for specific counties or metropolitan statistical areas.

*Comments Due Date:* January 21, 2009.

**73 Fed. Reg. 78,383 (Dec. 22, 2008)**

**Manufactured Housing Dispute Resolution-State Certification Form; Information for Federal Manufactured Housing Dispute Resolution**

*Summary:* HUD has submitted to OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to HUD's desire to establish a manufactured housing dispute resolution program for states that choose not to operate their own dispute resolution programs. Form HUD-310-DRSC allows a state to certify that its state dispute resolution program meets the program requirements. Form HUD-311-DR allows persons who have initiated their participation in the federal dispute resolution program to submit the necessary information regarding their request to the federal program for further action. There are two groups of respondents. The first group is the fifty states; the second group consists of individual purchasers, manufacturers, retailers, and installers of manufactured housing. HUD has engaged dispute resolution professionals from various federal agencies to review the submissions and then possibly contact the submitting party or agency, and to act as neutrals, mediators, and arbitrators.

*Comments Due Date:* January 21, 2009.

**73 Fed. Reg. 78,821 (Dec. 23, 2008)**

**Study of Capital Needs in the Public Housing Program**

*Summary:* HUD has submitted to OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to the Capital Needs of the Public Housing program. The study will survey a statistically significant sample of housing authorities (HA) and a set of public housing developments, buildings and units, using instruments that include systems inspection coding and information, costs, and modernization and conversion actions. Using these instruments, the study will generate estimates in constant dollars of existing and accrued total and per-unit capital needs at the national level and for important subcategories such as HA size (measured by number of ACC units) and region. The sample and data instruments shall enable statistically significant comparison with results from the 1998 capital needs study. The study responds to a Congressional mandate.

*Comments Due Date:* January 22, 2008.

**73 Fed. Reg. 79,151 (Dec. 24, 2008)**

**Notice of Submission for Extension of a Currently Approved Information Collection to OMB; Comment Request; Applications for Housing Assistance Payments and Special Claims Processing**

*Summary:* HUD has submitted to OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to an extension of a currently approved collection for submitting Applications for Housing Assistance Payments for Section 8, Rent Supplement, Rental Assistance Payment (RAP), Section 202 Project Assistance Contracts (PACs) and Section 811 and 202 Project Rental Assistance Contracts (PRACS) program units. Special Claims for damages, unpaid rent loss, and vacancy claims are available for the Section 8, Section 202 PACs, and Section 811 and Section 202 PRACS programs.

This extended information collection provides a standard for Project Owners/Management Agents to report Adjustments to Schedule of Tenant Assistance Payments Due, miscellaneous Accounting Request for Schedule of Tenant Assistance Due and Approved Special Claims for Schedule of Tenant Assistance Payments Due, utilizing data already available in their software applications.

*Comments Due Date:* February 23, 2009.

**73 Fed. Reg. 79,152 (Dec. 24, 2008)**

**Notice of Proposed Information Collection: Comment Request; Community Development Block Grant Entitlement Program**

*Summary:* HUD will submit to OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to the estimated reporting burden associated with information that CDBG entitlement grantees will report in IDIS for CDBG-assisted activities, recordkeep-

ing requirements, and reporting requirements. Grantees are encouraged to update their accomplishments in IDIS on a quarterly basis. In addition, grantees are required to retain records necessary to document compliance with statutory and regulatory requirements, Executive Orders, applicable OMB Circulars, and determinations required to be made by grantees as a determination of eligibility. Grantees are required to prepare and submit their Consolidated Annual Performance and Evaluation Reports, which demonstrate the progress grantees make in carrying out CDBG-assisted activities listed in their consolidated plans. This report is due to HUD ninety days after the end of the grantee's program year. The information required for any particular activity is generally based on the eligibility of the activity and which of the three national objectives (benefit low- and moderate-income persons; eliminate/prevent slums or blight; or meet an urgent need) the grantee has determined that the activity will address.

*Comments Due Date:* February 23, 2009.

**73 Fed. Reg. 79,154 (Dec. 24, 2008)**

**Notice of Submission for Extension of a Currently Approved Information Collection: Comment Request; Owner Certification with HUD's Tenant Eligibility and Rent Procedures**

*Summary:* HUD will submit to OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The department needs to collect this information in order to establish an applicant's eligibility for admittance to subsidized housing, specify which eligible applicants may be given priority over others, and prohibit racial discrimination in conjunction with selection of tenants and unit assignments. HUD must specify tenant eligibility requirements as well as how tenants' incomes, rents and assistance must be verified and computed so as to prevent the department from making improper payments to owners on behalf of assisted tenants. HUD also must provide annual reports to Congress and the public on the race/ethnicity and gender composition of subsidy program beneficiaries. This information is essential to maintain a standard of fair practices in assigning tenants to HUD Multifamily properties.

*Comments Due Date:* February 23, 2009.

**73 Fed. Reg. 79,154 (Dec. 24, 2008)**

**Notice of Proposed Information Collection: Comment Request, State Community Development Block Grant (CDBG) Program**

*Summary:* HUD will submit to OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to the requirement that grant recipients receiving CDBG funding to retain records necessary to document compliance with statutory and regulatory requirements on an on-going basis. Grantees must also submit an annual performance and evaluation report to

demonstrate progress that it has made in carrying out its consolidated plan, and such records as may be necessary to facilitate review and audit by HUD of the grantee's administration of CDBG funds.

*Comments Due Date:* February 23, 2009.

**73 Fed. Reg. 79,547 (Dec. 29, 2008)**  
**Notice of HUD's Fiscal Year (FY) 2009 Notice of Funding Availability (NOFA); Policy Requirements and General Section to HUD's FY2009 NOFAs for Discretionary Programs**

*Summary:* This notice provides prospective applicants for HUD's competitive funding with the opportunity to become familiar with the General Section of HUD's FY 2009 NOFAs, in advance of publication of any FY 2009 NOFAs. This year, HUD plans to publish its NOFAs as they are approved for publication and not in a combined SuperNOFA. HUD believes that by making this change, the NOFAs will be available earlier in the fiscal year. To assist applicants in this transformation, HUD is publishing the anticipated schedule for release of HUD's FY2009 NOFAs in Appendix A.

## HUD Notices

**Notice PIH 2008 - 46 (HA) (Dec. 10, 2008)**  
**Certification of Accuracy of Data in Inventory Management/Public Housing Information Center System Used to Calculate Capital Fund Formula Allocation**

*Summary:* The purpose of this Notice is to advise executive directors of PHAs that HUD is requiring them to certify to the accuracy of the data PHAs have submitted to HUD in the Inventory Management System/Public Housing Information Center system that the department will use to calculate the formula for allocating Capital Fund grants.

**PIH-2008 - 45 (HA) (Dec. 10, 2008)**  
**Disaster Housing Assistance Program-Ike (DHAP-Ike) Case Management Guidelines**

*Summary:* These operating requirements set forth the policies and procedures for the Disaster Housing Assistance Program-Ike (DHAP-Ike) case management services. DHAP-Ike is a HUD-FEMA initiative to provide monthly rental assistance, case management services, and security deposit and utility deposit assistance for certain families displaced from their homes by Hurricane Ike. PHAs that agree to administer DHAP-Ike must do so in accordance with these requirements and any subsequent HUD directives and guidance for the program. During the time that families are assisted under DHAP-Ike, each FEMA designated family Head of Household is required to participate in case management services. The objectives of these services are greater self-sufficiency and permanent housing for participating families. In addition to the mandatory elements described in this notice, a number of

recommendations are provided by HUD in these guidelines to assist PHAs in developing successful case management programs.

## RD/RHS Administrative Notices

**RD AN No. 4411 (1980-D) (Dec. 3, 2008)**  
**Single Family Housing Guaranteed Loan Program Adequate and Dependable Income - Rents or Leases**

*Summary:* This Administrative Notice clarifies how to treat residential rental income when underwriting loans under the Single Family Housing Guaranteed Loan Program when there is a newly signed lease for a property which a borrower will not sell when purchasing a new principal residence.

**RD AN No. 4413 (1980-D) (Dec. 3, 2008)**  
**Single Family Housing Guaranteed Loan Program, Use of Retirement Assets in the Risk Analysis**

*Summary:* This Administrative Notice provides guidance regarding the use of retirement assets in the risk evaluation of loan applications for the Single Family Housing Guaranteed Loan Program.

## RD/RHS Administrative Letters

**Compliance with the Improper Payments Information Act, Section 521—Rental Assistance Program (Dec. 9, 2008)**

*Summary:* This unnumbered letter provides guidance to the Multi-Family Housing Program Directors on the implementation of the annual Improper Payment Information Act (IPIA) audit required to be conducted on the Section 521, Rental Assistance (RA) program. The RA program continues to be listed as a high risk program under the IPIA due to the size of its outlays and the high error rate. Compliance with IPIA will be on-going, and an audit will be required annually until the agency achieves an error rate of less than 2.5% of the program outlays. The results from the Fiscal Year 2008 audit showed the final error rate of gross dollars improperly calculated to be 3.95%. Therefore, another audit is required this year, using the same audit procedures as the last fiscal year. The Centralized Servicing Center's Audit Unit will be again conducting the review. ■

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