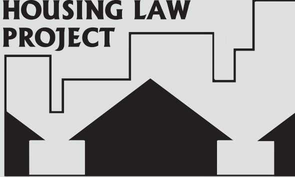

Housing Law Bulletin

Volume 40 • January 2010

Published by the National Housing Law Project

Choice Neighborhoods Initiative: A Work In Progress *—see page 1*

Oregon Complex Returned to Rural Development Inventory *—see page 5*

©2009 Michael O'Callahan

ADVANCING HOUSING JUSTICE

A Decent, Safe, & Affordable Home for All

Housing Justice Network National Meeting

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

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

The HJN Meeting is a tremendous opportunity to meet with colleagues and build our collective capacity to advance housing justice for low-income households across America.

Federal Housing Programs: One-Day Training for New Practitioners

SATURDAY, MARCH 6   9:00 am – 5:00 pm

This substantive training provides a comprehensive overview of the federal housing programs, recent changes, current trends, and issues facing practitioners. The full-day training is designed for advocates with limited housing experience—and will help prepare you for more in-depth discussion at the HJN Meeting sessions. Practitioners are welcome to attend just the meeting or just the training. Note: There is a discounted rate for attending both.

See pages 39–40 for more information and a registration form.

Housing Law Bulletin

Volume 40 • January 2010

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

727 Fifteenth Street, N.W., 6th Fl. • Washington, D.C. 20005

www.nhlp.org • nhlp@nhlp.org

Table of Contents

Page

Choice Neighborhoods Initiative: A Work In Progress ... 1
FY 2010 HUD Appropriations ... 3
Oregon Complex Returned to Rural Development Inventory ... 5
Recapitalizing the HUD-Assisted Housing Stock: Part One ... 6
Hope for HAMP: One Step Back, But Two Steps Forward? ... 12
California Expands Utility Shutoff Protections ... 14
Ninth Circuit Allows Discrimination Claims in Municipal Service Provision ... 15
USDA National Appeals Procedure Subject to EAJA and APA ... 18
New HUD Form May Improve Communication Between Tenants and Housing Providers ... 19
Recent Cases ... 20
Recent Housing-Related Regulations and Notices ... 24

Announcements
Index ... 27
Housing Justice Network: Event Basics ... 39
Housing Justice Network: Registration ... 40
Publication List/Order Form ... 41

Cover: Mercy Housing California's 10th & Mission Family Housing, San Francisco, provides 136 rental units; 91 are affordable to households earning 50% of local AMI, and the rest are for formerly homeless families in the 15-25% of AMI range.

The *Housing Law Bulletin* is published 10 times per year by the National Housing Law Project, a California nonprofit corporation. Opinions expressed in the *Bulletin* are those of the authors and should not be construed as representing the opinions or policy of any funding source. A one-year subscription to the *Bulletin* is $175. Inquiries or comments should be directed to Eva Guralnick, Editor, *Housing Law Bulletin*, at (510) 251-9400 or nhlp@nhlp.org.

Choice Neighborhoods Initiative: A Work In Progress

The Department of Housing and Urban Development (HUD) continues to develop and refine the Choice Neighborhoods Initiative, its proposed successor to HOPE VI. Since early 2009, with a $250 million request in the Administration's fiscal year 2010 budget, HUD has promoted and sought comments on the Choice Neighborhoods Initiative. HUD has been particularly interested in how the initiative should be informed and enlightened by recognition of the successes and failures of HOPE VI.[1]

Secretary Promotes Choice Neighborhoods

On November 6, 2009, HUD released its draft Choice Neighborhood Initiatives Act of 2009[2] to a wide range of "stakeholders" nationwide. It invited those stakeholders to a November 10, 2009, in-person and webcast meeting at HUD headquarters.[3] Present at HUD were over 150 resident advocates, policy analysts, public housing executives and others.

HUD Secretary Shaun Donovan described the lessons of HOPE VI from HUD's perspective and reiterated the theme of his July 14 speech,[4] that while HOPE VI had its weaknesses, it was, by and large, a tremendous success. HOPE VI, the Secretary said, deconcentrated poverty by creating mixed-income communities; leveraged $17.5 billion of non-federal money with a federal outlay of $6 billion; taught public housing authorities (PHAs) how to engage in entrepreneurial partnerships with local governmental and private entities; and taught HUD that PHAs which engage residents early and well move more quickly to project completion. It also provided experience with tools for moving participants to opportunity, including how to offer services and link residents to benefits of the program.

"Let me be very clear," the Secretary said. "Public housing will remain the primary beneficiary of Choice Neighborhoods." Within that context, he said that Choice Neighborhoods will build from the HOPE VI foundation. Rehabilitation or demolition and rebuilding of public housing and other affordable housing will be a vehicle for broad neighborhood revitalization. Federal departments and agencies will develop intentional partnerships to assist local partnerships. These multi-level partnerships will combine a variety of activities, including job

---

[1]NHLP, *Obama Administration Rolls Out Choice Neighborhoods Initiative*, 39 Hous. L. Bull. 223 (Sept. 2009).
[2]To view the proposed legislation, visit http://www.nlihc.org/doc/HUD-CNI-bill.pdf.
[3]HUD Webcasts, Public Housing, Choice Neighborhoods Stakeholders Meeting, November 10, 2009, http://www.hud.gov/webcasts/archives/ph.cfm.
[4]*Id.*

counseling, employment, rent incentives, supportive services such as Temporary Assistance for Needy Families (TANF) and Medicaid, improved educational opportunities, and weed-and-seed anti-drug programs.

Choice Neighborhoods will also be more agile than HOPE VI, the Secretary said. It will support planning grants as well as implementation grants; engage with grantees that are not PHAs, including local governments, private nonprofit and for-profit actors; recognize that one size does not fit all while seeking long-term sustainability; and focus on ameliorating the multiple manifestations of concentrated poverty.

Finally, Secretary Donovan recognized that conflicts among the stakeholders' interests and communities must be addressed. While, for instance, one-for-one replacement would be facially guaranteed in the draft Choice Neighborhoods legislation, it means different things to different people, such as on-site versus off-site replacement, project-based vouchers versus annual contribution contract redevelopment, and vouchers versus hard units. It also raises the question of how the right-to-return will be defined and enforced.

Secretary Donovan spoke for nearly an hour and then opened the floor for questions, both live and telephonic, fielded by a panel of HUD executive staff.[5] Attendees were offered a two-week window to submit written comments.[6]

Resident Advocates Respond

On November 20, 2009, the National Low Income Housing Coalition (NLIHC) convened a conference call of residents and resident advocates from across the country to formulate a response to the draft Choice Neighborhoods legislation. The response was signed by NLIHC and the National Housing Law Project (NHLP). The comments acknowledge the ambition of Choice Neighborhoods and applaud its vision and breadth. They thank HUD for its solicitation of input and look forward to a continuing conversation on the initiative.

Beyond that, the comments transmit the lessons of decades of sequential programs which resulted in more removal than renewal of affordable housing. They express a firm belief that the solutions must be built into the skeleton if they are to be manifested in the muscle.

If the chosen neighborhoods are proximate to good schools, transportation, other critical systems and low-poverty neighborhoods, the risk of gentrification and consequent displacement of very low- and extremely low-income residents must be recognized. Accordingly, long-term or perpetual affordability of the resulting assisted housing, as well as the affordability of the community as a whole, must be supported. To this end, the comments recommend a pre-award assessment of housing affordability in the neighborhood to be used as a baseline for long-term interventions.

The comments question the draft bill's provision allowing purely private, for-profit entities to receive grants. While not all eligible neighborhoods that could benefit from transformation currently have local nonprofit organizations to act as grantees, the initiative should facilitate and reward partnerships and collaboration with mission-driven entities with proven capacity and commitment to housing affordability in the subject neighborhood.

The comments also question the strength of the draft bill's one-for-one replacement provisions, pointing out that the bill would provide wide latitude in the location of replacement outside the neighborhood, would allow up to 50% of replacement to be accomplished through vouchers, and would fail to require the replacement of project-based vouchers upon contract expiration. The comments call for the reconstruction of significant proportions of demolished units on their original sites and the maintenance of "publicly owned and enforceable ties to the redevelopment of any publicly owned land or housing." Historically, this has been a critical safeguard of long-term affordability, particularly in gentrifying neighborhoods.[7]

To minimize disruption of families and critical support systems, the comments recommend that a "build-first" condition be applied wherever possible and that consideration be given to maximizing the continuity of children's school terms and school placement.

The draft bill would allow the use of funds for a broad range of neighborhood improvement projects. The comments encourage a more directed approach, consistent with the Administration's and the Senate's FY 2010 Budget pronouncements.[8] The coordination of inter-departmental and inter-agency organizational and financial resources at the federal level should be leveraged to facilitate a broad range of coordinated neighborhood improvements.[9] Grantees should be able to rely upon these additional non-HUD resources in developing their plans. Additionally, grantees should be rewarded with competitive points for tapping local governmental and non-governmental

[5]The panel's moderator was Jonathan Harwitz, Deputy Chief of Staff for Budget and Policy. The panelists were Assistant Secretary for Public and Indian Housing Sandra Henriquez; Assistant Secretary for Community Planning and Development Mercedes Márquez; Assistant Secretary for Fair Housing and Equal Opportunity John Trasviña; and Deputy Assistant Secretary for Multifamily Housing Carol Galante.

[6]Comments were submitted to choiceneighborhoods@hud.gov.

[7]Public ownership of the land and/or the improvements is seen as a vehicle for ensuring residents' due process protections, permanent affordability for residents below 30% of AMI, regulatory oversight and enforcement, and public participation in the consideration of any future major modification or redevelopment of the housing.

[8]*See* Office of Management and Budget, The President's Budget for Fiscal Year 2010, Department of Housing and Urban Development, http://www.whitehouse.gov/omb/budget/fy2010/assets/hud.pdf; S. Rept. No. 111-69 (2009).

[9]Including transportation infrastructure, workforce development, educational programs and institutions, and the other necessary components of transformation.

resources to support comprehensive neighborhood transformation projects that address neighborhood placement of and access to educational institutions, child care and medical care facilities, transportation infrastructure, job development services, environmental concerns and the like. The very limited amounts of housing money available should be used for housing.[10]

The draft bill lists as an eligible activity "work incentives, including incentives using rents." The comments call for the maintenance of Brooke Amendment rents and an affirmative commitment to Section 3 employment compliance by grantees.

The comments call for strengthening the "right of return" in the bill, including prohibiting rescreening of former residents and protecting resident mobility choice by precluding waiver of the project-based voucher program's mobility function. With respect to mobility, the comments call for advanced notice to residents of their long-term housing options, flexibility to allow residents to change their minds regarding their selection of options as the transformation progresses, and intensive mobility counseling and support services for affected and displaced residents.

The comments promote significant strengthening of the draft bill's public and assisted housing resident involvement provisions. The comments support engagement of residents and other community members in the development and amendment of the transformation plan, the public hearing process and all phases of implementation and monitoring. Further, the comments support a set-aside of 5% of the contract total for technical assistance and support for resident activities.

The comments pointed out the danger of failing to provide specific definitions for certain criteria and standards, including "concentration of extreme poverty," "severely distressed housing", "long-term viability", "potential for long-term viability", "inappropriately high population density", "significant contributing factor", and "critical community improvements."

Finally, the comments urged HUD to make funding available for transformation of rural communities as well as urban.

Other Federal Stakeholders

Noticeably absent from HUD's presentations on Choice Neighborhoods were prospective partners at the Departments of Transportation, Labor, Education, Energy, Health and Human Services, and their relevant agencies. We recognize that breaking down silos which have been laboriously constructed and defended is not easy and

[10]According to Secretary Donovan, since 1993, HOPE-VI has been allocated $6 billion in funding. *See supra* note 3. In 2003 alone, HOPE-VI received $574 million. Pub. L. No. 108-7, div. K, tit. II, 117 Stat. 11, 488 (2003). In the best case scenario, Choice Neighborhoods will receive $250 million in FY 2010. *See supra* note 7.

FY 2010 HUD Appropriations

On December 16, President Obama signed the Fiscal Year 2010 HUD appropriations bill (H.R. 3288) into law as a part of the Consolidated Appropriations Act. Pub. L. No. 111-117 (Dec. 16, 2009). The bill contained a total of $46.059 billion in budget authority for the Department of Housing and Urban Development (HUD). The following is a list of funding levels for major HUD programs.

- Tenant based rental assistance - $18.184 billion, of which $16.339 billion is for contract renewals and $120 million is for tenant protection vouchers.
- Project based rental assistance - $8.552 billion, of which $394 million comes from an advance appropriation for FY 2011.
- Public housing operating fund - $4.775 billion.
- Public housing capital fund - $2.5 billion.
- HOPE VI - $135 million.
- Choice Neighborhoods Initiative - $65 million.
- Native American Housing - $700 million.
- Housing Opportunities for Persons with AIDS - $335 million.
- Community Development Fund - $4.45 billion, of which $3.99 billion is for CDBG formula grants and $150 million is for Sustainable Communities Initiative.
- HOME Investment Partnership program - $1.825 billion.
- Homeless Assistance Grants - $1.865 billion.
- Housing for the Elderly (Section 202) - $825 million.
- Housing for Persons with Disabilities (Section 811) - $300 million.
- Fair Housing and Equal Opportunity - $72 million.

A chart of the FY 2010 budget for selected HUD programs has been posted on the National Low Income Housing Coalition's website at http://www.nlihc.org/doc/FY10-chart-12-17-09.pdf. A more detailed article on FY 2010 HUD appropriations will appear in the February issue of the Bulletin.

we applaud HUD's ongoing efforts to bring to the table the federal players whose organizational, logistical and financial engagement is so integral to the transformation vision. Hopefully, we will see evidence of these partnerships in the coming months.

Choice Neighborhoods Initiative Demonstration

December 17, 2009, as this article went to press, President Obama signed the Consolidated Appropriations Act, 2010 in which Congress appropriated up to $65 million for a Choice Neighborhoods Initiative demonstration program to be used for the "transformation, rehabilitation and replacement housing needs of both public and HUD-assisted housing and to transform neighborhoods of poverty into functioning, sustainable mixed income neighborhoods with appropriate services, public assets, transportation and access to jobs, and schools, including public schools, community schools, and charter schools".[11] What is learned by the demonstration program will, presumably, influence any permanent program.

It is encouraging that the demonstration initiative includes provisions which are responsive to a number of the concerns raised by resident advocates. While it allows for-profit developers to apply for funding, it requires that such applicants "apply jointly with a public entity, " and it requires that such grantees create partnerships with local organizations including assisted housing owners, service agencies and resident organizations. The demonstration provides that housing developed pursuant to the initiative be subject to "an additional period of affordability determined by the Secretary, but not fewer than 20 years." This provision recognizes a concern which was not addressed in the initial draft bill for the permanent program. Advocates encourage the Secretary to require affordability periods significantly longer than 20 years to ensure housing remains available to low-income residents in the "choice neighborhoods." The bill also provides that "grantees ... undertake comprehensive local planning *with input from residents and the community*". (*Emphasis* added) Hopefully, the Secretary will provide substance to this mandate in the NOFA. The bill requires that the NOFA include "protections and services for affected residences and performance metrics." If such metrics include a pre-award assessment of housing affordability and provisions for maintaining the long-term affordability of the neighborhood, then the initiative appears responsive to two additional resident concerns.

At the same time, the demonstration raises a significant unknown. The bill provides that "use of funds made available for this demonstration under this heading shall not be deemed to be public housing notwithstanding section 3(b)(1) of such Act". Section 3(b)(1) of the United States Housing Act of 1937[12] states that: "'public housing' means low-income housing, and all necessary appurtenances thereto assisted under this chapter other than [Section 8] [and]… includes dwelling units in a mixed finance project that are assisted by a public housing agency with capital or operating assistance." This language is ambiguous and could be interpreted to mean either that the money made available is not public housing money or that the resulting housing will not be public housing. Given the Secretary's declaration that "Public housing will remain the primary beneficiary of Choice Neighborhoods,"[13] the latter seems improbable. While it is understandable that not <u>all</u> housing resulting from the initiative will be "public housing," it seems equally unlikely that none would be public housing. We encourage Secretary Donovan to clarify the meaning and intent of this language in the NOFA or by issuing guidance or regulations.

Is This a New HUD?

Secretary Donovan's HUD offers promise of a new way of doing business, and, more optimistically, a new vision of what that business is. The November 10 Choice Neighborhoods stakeholders meeting is an example of HUD bringing together individuals and agencies who will play a role in both new and existing programs to discuss the substance, directions, objectives, resources, constraints and opportunities represented by diverse yet interrelated programs supporting affordable housing. While voucher residents were not included in that meeting, more recently HUD has initiated a process to engage a nationally representative group of public and subsidized housing residents in dialogue with HUD on these and other issues. Now, the Choice Neighborhoods demonstration project illustrates responsiveness to resident and community concerns. There is ample evidence that HUD is seeking dialogue with stakeholders. As existing programs evolve and new programs gain definition and momentum, residents and advocates should embrace this new opportunity for constructive engagement to ensure their perspectives are heard and considered by HUD. This may be the opportunity we have been seeking to influence policymaking before it is set. ■

---

[11]Consolidated Appropriations Act, 2010, HR 3288, 3288-48 (December 17, 2009), at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3288enr.txt.pdf. Except as otherwise specified in the Act, the demonstration is subject to the statutory provisions of the HOPE VI program.

[12]Codified at 42 U.S.C. § 1437a (b)(1).

[13]Note 4 supra.

Oregon Complex Returned to Rural Development Inventory

Seacrest Apartments, a 20-unit Rural Development (RD) property that was prepaid and taken out of the Section 515 program[1] more than six years ago, was returned to the RD inventory on November 30, 2009, pursuant to a settlement agreement reached by the parties in *Goldammer v. Vilsac*.[2] Under the settlement agreement, DBSI TRI IV Limited Partnership sold Seacrest to Northwest Real Estate Capital Corp., an Idaho-based nonprofit, which will rehabilitate and then operate Seacrest for the next 30 years. RD financed the sale and part of the rehabilitation and will provide a deep subsidy to all the elderly low-income residents of the development. The balance of the rehabilitation costs are being financed under the Low Income Housing Tax Credit Program (LIHTC). The loan closing brought an end to 12 years of litigation between DBSI and RD and over six years of litigation between the Seacrest residents, DBSI and RD.

Background

Goldammer was filed by several residents of Seacrest Apartments in 2003 after DBSI and RD settled an earlier case permitting DBSI to prepay the Seacrest RD loan. In that case, DBSI maintained that it was contractually entitled to prepay the loan because it predated the Emergency Low Income Housing Preservation Act of 1987[3] (ELIHPA), which restricted the right of owners to prepay their RD loans. DBSI maintained that, ELIHPA notwithstanding, it could pursue a quiet title action against RD when the agency refused to accept a prepayment offer. RD settled the case on the basis that it had lost two similar cases brought by DBSI affiliates in Idaho and had agreed to follow the results of one of the Idaho cases when a final decision was reached in that case.

When the Seacrest loan was prepaid, the RD Rental Assistance subsidy to the residents was terminated and the development sold to Northwest, which proposed to operate the development on a nonprofit basis without any deep subsidies. This meant that most residents would have been rent overburdened and would have had to leave the development before too long. Indeed, initially Northwest did not even honor the residents' existing leases, raising rents to a market level immediately upon its purchase of the property. A threatened state lawsuit forced Northwest to roll the rents back for residents whose leases remained in effect. Fortunately, due to publicity about the prepayment and the potential tenant displacement, Coos-Curry Housing Authority stepped in and provided the residents with Section 8 vouchers, which enabled them to stay in their homes.

Notwithstanding the receipt of assistance under the Section 8 voucher program, several of the Seacrest residents chose to challenge the Seacrest prepayment in federal court. They contended that ELIHPA restricted the owner's right to prepay and required DBSI to either offer the development for sale to a nonprofit or public agency for a period of six months or to protect the current residents by maintaining their subsidized rents for as long as they chose to remain in the development. They also maintained that RD's decision to accept the prepayment was reviewable under the Administrative Procedure Act[4] (APA). According to the residents, the sale of Seacrest to Northwest did not comply with the ELIHPA requirements and deprived them of RD subsidies and other favorable tenant rights.

District Court and Ninth Circuit Rulings

After filing the complaint, the Seacrest residents sought a preliminary injunction. The Oregon federal district court refused to grant the preliminary injunction based on the Ninth Circuit's earlier decision in *Kimberly Associates. v. United States*.[5] In that case, the Ninth Circuit held that the unmistakability doctrine[6] did not bar Kimberly Associates, a DBSI affiliate, from maintaining a contract-based lawsuit to quiet title against the federal government because the government, when it enacted ELIHPA, did not act in a sovereign capacity. When *Kimberly* was remanded to the Idaho district court, Kimberly Associates' motion for judgment on the pleadings was granted with respect to its quiet title claim,[7] and the government chose not to appeal that decision. Subsequently, a second Idaho district court issued an opinion against RD in another case brought by another DBSI-affiliated owner.[8]

Having lost their motion for a preliminary injunction, the Seacrest residents moved for summary judgment, which the district court denied based on its earlier preliminary injunction opinion, which concluded that the residents would not prevail on the merits of their claim.

The residents appealed to the Ninth Circuit, which reversed the district court's decision.[9] The court of appeals held that the residents were entitled to seek an APA review of the prepayment decision. Further, the court

[1] 42 U.S.C.A. § 1485 (Westlaw Dec. 2, 2009).

[2] No. 03-1749 (D. Or. Nov. 25, 2009). The case has previously been reported as *Goldammer v. Veneman* and *Goldammer v. Johanns*.

[3] The rural provisions of ELIHPA are codified at 42 U.S.C. § 1472(c) (Westlaw Dec. 2, 2009).

[4] 5 U.S.C. § 701 *et seq.*

[5] 261 F.3d 864 (9th Cir. 2001).

[6] The unmistakability doctrine is a complex doctrine beyond the scope of this article. Generally, it protects the federal government against damage claims unless the government has given up the right to be held liable for damages in unmistakable terms.

[7] No. 98-0083 (D. Id. Dec. 12, 2002).

[8] Atwood-Leisman v. United States, No. 98-416 (D. Id. Nov. 19, 2002).

[9] DBSI/TRI IV Ltd. v. United States, 465 F.3d 1031 (9th Cir. 2006).

distinguished its earlier *Kimberly* decision as a contractual case between a borrower and RD, noting that it did not address whether a decision to accept a prepayment was subject to an APA review.[10]

On remand, the Oregon district court ruled in favor of the Seacrest residents by holding that the prepayment violated ELIHPA.[11] However, it did not enter an order providing relief to the residents. Instead, it asked the parties to consider settling the case and offered the court's assistance in the process. Over the next 29 months, the parties engaged in protracted settlement discussions and pursued various financing alternatives that ultimately resulted in the settlement agreement.

Conclusion

The plaintiff residents will now be returned to the RD Rental Assistance Program, as will all other eligible residents living at Seacrest. They will also be entitled to all RD resident protections, which include a tenant grievance and appeals process. The one ineligible Seacrest household will be required to move from the development, and only low-income, RD-eligible residents will be admitted to the development for the next 30 years. Seacrest will undergo major rehabilitation, which will require residents to be relocated for a short time. The settlement agreement ensures that the residents will receive relocation and other assistance during that period.

Significantly, in the Ninth Circuit, *Goldammer* has laid to rest RD owners' claims that they can circumvent ELIHPA by making an offer to prepay their loans and, when RD does not accept their offer, that they can pursue a quiet title action that removes the RD security and regulatory lien from the property.[12]

The Seacrest residents were represented by Art Schmidt of the Oregon Law Center, who was assisted by the staff of the National Housing Law Project. The Oregon Law Center and NHLP also settled their Equal Access to Justice Act attorney's fees claim as part of the settlement agreement with RD. ■

[10]For a more detailed discussion of the *Goldammer* decision, *see* NHLP, *Victory: Ninth Circuit Allows Residents to Challenge RD Prepayment*, 36 Hous. L. Bull. 206 (Oct. 2006).
[11]No. 03-1749 (D. Or. June 14, 2007).
[12]*See* Schroeder v. United States, 569 F.3d 956 (9th Cir. 2009).

Recapitalizing the HUD-Assisted Housing Stock: Part One

Beginning in 1959, Congress created several programs designed to motivate private owners to develop affordable housing in exchange for government incentives. The owners agreed to certain affordability restrictions that usually ran with the mortgage, almost always for at least a certain period. To effectuate this minimum restricted use period, Congress also frequently restricted the owners' ability to prepay the mortgages. Unfortunately, these financing restrictions have often led to situations where owners are not able to obtain capital with which to make necessary repairs to the buildings. This has become an increasingly serious problem as the HUD-assisted stock ages and capital components wear out over time.

The past decade has witnessed many policies and proposals to address this problem for various segments of the HUD-assisted stock. This two-part article will analyze five examples of such recent efforts to address recapitalization in several of the HUD housing programs, focusing on:

- Section 236 Decoupling;
- Section 202 Supportive Housing for the Elderly;
- Section 515 Rural Rental Housing;
- properties subject to Section 250 of the National Housing Act; and
- properties with naturally maturing mortgages (commonly referred to as "The Year-40 Problem").

These examples are not intended to be comprehensive, as other recapitalization efforts have been adopted. However, the five examples discussed here are illustrative of common issues that frequently arise in and recurring principles that should govern recapitalization efforts. Part One of this article will address the first three examples. Part Two, which will be published in the next issue of the *Bulletin*, will address the final two.

A number of common impediments to responsible recapitalization exist across the HUD-assisted housing stock. Many programs operate under a rigid statutory scheme that may not allow for project owners both to engage in transactions that access capital for reinvestment into the property, while at the same time continuing in the program and protecting affordability for current and future tenants. This results in a tension between the need for recapitalization and the need to maintain long-term affordability for tenants. Owners often seek release from the use restrictions that protect long-term affordability, achieving recapitalization at the expense of affordability. Even where the existing affordability restrictions are maintained, in situations where public approvals or additional public investment is required, it is necessary to

ensure that the conferral of further public support results in an extended term of affordability.

Principles of Recapitalization Policy

To address these issues, recapitalization policy should follow specific principles that enable satisfaction of a property's long-term physical needs while preserving affordability to protect both current and future tenants. Specifically, any legislative or administrative recapitalization policy should be consistent with the following six principles, to the greatest extent possible. First, the recapitalization must meet the properties' short- and long-term physical and financial needs. Second, proceeds that exceed those needed for revitalizing the property should be retained for affordable housing needs to the extent that they are made possible by added public benefits or approvals. This has been a point of contention, especially for nonprofit owners who may want to use the proceeds for non-housing related portions of their broader charitable mission. However, given the scope of the affordable housing crisis and the long-term federal budget outlook, it is vital that excess proceeds be used for affordable housing and related social services. Third, any policy must also protect current tenants and ensure future affordability for tenants and the project. Often, legislation only considers current tenants, but does not make provisions for future tenants who will also need the same protections. Many properties have only a short period of time left on their use restrictions. If they receive recapitalization incentives, Congress must require extended use restrictions that ensure preservation of the affordable units for the long term. Fourth, the policy should weed out poorly performing owners and managers who lack the capacity or the will to provide high-quality, responsive stewardship for the property and its tenants. Fifth, the policy must provide mechanisms for tenants to participate in the decision-making process. This participation must be meaningful—tenants should be given proper notice, provided all relevant documentation, and be afforded a chance to comment, and the owner and HUD must respond to such comments within a defined timeframe. Finally, the policy should be clear to minimize confusion as to the requirements and protections, and should attempt to minimize unnecessary complexity.

Prior Recapitalization Efforts

In addition to the five examples discussed in this article, Congress has previously addressed these issues with other segments of HUD-subsidized and assisted housing. First, with respect to troubled properties experiencing mortgage default and foreclosure, Congress passed the Housing and Community Development Amendments of 1978, which was later strengthened in 1988 and revised again in 1994.[1] This law established a framework for preserving such properties, including both planning requirements and resources to fund property rehabilitation and preservation. Second, for certain properties with HUD-subsidized mortgages that could otherwise unilaterally prepay their loans, Congress adopted the Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA).[2] LIHPRHA generally required such properties to be preserved for their useful lives, either by owners staying in the program or selling to nonprofit preservation purchasers, in exchange for federal financial incentives. However, Congress reduced funding in 1995 and completely withdrew it in 1998. Another policy designed to address this issue is called the Mark-to-Market mortgage restructuring program, which Congress passed in 1997. Mark-to-Market allows properties with expiring project-based Section 8 assistance and above-market rate Section 8 contract rents to bifurcate their debt in a manner that allows HUD to reduce the necessary rental assistance while renewing the Section 8 contracts and extending the term of affordability.[3] Two years later, Congress and HUD adopted the Mark-up-to-Market program for properties with below-market rate Section 8 rents, and a similar Mark-up-to-Budget program for nonprofit owners.[4] In contrast to Mark-to-Market, these programs offered a mechanism for Section 8 properties with below-market rents to increase the contract rents in exchange for extended affordability restrictions. All of these efforts contained certain elements of a responsible recapitalization policy, including ownership capacity requirements, physical needs assessments and rehabilitation requirements, extended use restrictions, planning processes involving affected tenants and communities, as well as the necessary financial resources.

Section 236 Decoupling

Over the past decade, HUD has utilized Interest Reduction Payment (IRP) decoupling as a recapitalization tool for Section 236 properties. Under Section 236, HUD provided an IRP directly to the lender, thus effectively reducing the interest rate on the underlying loan to 1%. In exchange, owners agreed to various restrictions on the property, including budget-based rent limitations and low-income occupancy, so long as the mortgage and regulatory agreement remain in effect.

---

[1]Now codified at 12 U.S.C.A. § 1701z-11 (Westlaw Nov. 10, 2009).

[2]Pub. L. No. 101-625, tit. VI, 104 Stat. 4079, 4275 (Nov. 28, 1990) (codified at 12 U.S.C.A. §§ 4101 *et seq.*) [hereinafter LIHPRHA]. LIHPRHA was passed after Congress initially enacted a temporary program restricting prepayments.

[3]Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRAA), Pub. L. No. 105-65, Title V, 111 Stat. 1343, 1384 (Oct. 27, 1997) (codified at 42 U.S.C.A. § 1437f note (Historical and Statutory Notes, "Multifamily Housing Assistance")), *amended by* Pub. L. No. 106-74, § 531 (Oct. 20, 1999).

[4]Pub. L. No. 106-74, § 531 (Oct. 20, 1999) (amending Section 524 of MAHRAA); HUD Section 8 Renewal Policy Guide (as rev. Apr. 17, 2009), *available at* http://www.hud.gov/offices/hsg/mfh /exp/guide/s8renew.pdf.

Congress enacted the decoupling provisions for Section 236 properties in 1999 as Section 236(e)(2) of the National Housing Act.[5] Decoupling severs the IRP stream from the underlying mortgage and thus allows for the complete refinancing of the project, while still retaining the already appropriated IRP subsidy. Thus, funds necessary for rehabilitation can be accessed through tapping new debt, without sacrificing the existing subsidies.[6]

As Section 236 mortgages near maturity of their 40-year terms, the decoupling tool becomes less useful, because the total amount of remaining IRP available diminishes as the remaining mortgage term decreases.

Section 236 decoupling serves as a useful early example for recapitalizing a particular segment of the HUD-assisted stock. However, the decoupling tool falls short in a number of ways.

Nuts and Bolts of IRP Decoupling

Section 236(e) authorizes the retention of IRPs upon refinancing, but only where "the project owner enters into such binding commitments as the Secretary may require…to ensure that the owner will continue to operate the project in accordance with all low-income affordability restrictions"[7] for not less than the original IRP term, *plus an additional five years*.

In 2000, HUD issued Notice H 00-8, implementing Section 236(e)(2).[8] This Notice has since been reinstated and extended a number of times,[9] and continues to set forth the guidelines governing IRP decoupling transactions.

Notice H 00-8 requires owners who engage in decoupling to enter into new IRP Agreements and Use Agreements that govern the IRP payments and extend the use restrictions (including the regulation of rents, occupancy and habitability standards, income limits and financial reporting requirements) on the project. Although project rents may be increased to include reasonable debt coverage,[10] rent increases on units not also receiving project-based Section 8 assistance are limited to 10% above current rents.[11]

In exchange for these restrictions, the owner is allowed to decouple the IRP subsidy and apply it to service the new debt. The continued IRP subsidy may not exceed the original IRP budget authority allocated to the project.[12] However, the term of the new IRP agreement may exceed the length of the original if the owner opts to receive lower monthly payments.[13] Whatever the new term, the owner must extend the use restrictions for five years beyond the IRP expiration.

Notice H 00-8 also requires the application to include a "[d]iscussion of the physical condition of the project and the cost and nature of any physical improvements that will be undertaken to address all repair needs and place [the] project in good condition for the foreseeable future."[14] The decoupling is also prohibited from causing any involuntary displacement, and the application must provide a narrative describing how tenants will be protected from any rent increases, such as through the use of other subsidies.[15]

Deconstructing Decoupling

Section 236 decoupling serves as a useful early example for recapitalizing a particular segment of the HUD-assisted stock. It does a good job of maintaining affordability limits and protections for tenants through extended affordability agreements and limits on increases in tenant rent burdens and involuntary displacement. Specifically requiring the owner to renew any existing project-based assistance during the extended restricted term is another plus. Likewise, the requirement that applications assess overall project need at least in theory compels owners to provide for responsible and sufficient recapitalization.

However, the decoupling tool falls short in a number of ways. It only provides for a five-year extension of the use restrictions, and thus cannot serve as a model for long-term preservation. Where properties lack rental assistance, the limited amount of new debt service that can be placed on the property remains a limitation. The

---

[5]Codified at 12 U.S.C.A. § 1715z-1(e)(2) (Westlaw Nov. 10, 2009).

[6]Prior to developing the decoupling scheme, Section 236(b) of the National Housing Act, 12 U.S.C. § 1715z-1(b), provided another tool, which allowed an approved public agency to purchase the 236 mortgage and retain the IRP payments, while issuing additional debt secured by the original 236 mortgage. Use of Section 236(b), however, requires consent from the original note-holder, which is often difficult to obtain. Use of this provision has significantly diminished since 1999, when decoupling was enacted.

[7]Departments of Veterans Affairs and Housing and Urban Development, Independent Agencies Appropriations Act, 2000, § 532(a), Pub. L. No. 106-74, 113 Stat. 1047 (Oct. 20, 1999).

[8]Guidelines for Continuation of Interest Reduction Payments after Refinancing: "Decoupling", HUD Notice H 00-8 (May 16, 2000).

[9]*See* HUD Notice H 07-02 (Mar. 13, 2007); Notice H 05-19 (Nov. 9, 2005); Notice H 04-20 (Nov. 9, 2004); Notice H 03-17 (Aug. 20, 2003); Notice H 02-15 (July 17, 2002); Notice H 01-05 (June 6, 2001).

[10]*See* HUD Notice H 00-8, *supra* note 8, at ¶12, stating, "Based on careful analysis, appropriate added debt service resulting from the restructuring may be included in the Basic and Market Rent calculation, if it is treated as an operating expense of the project subject to the rent increase limitations." *See also* Emily Achtenberg, Local Initiatives Support Corporation, Section 236 Decoupling 2 (2009) ("Reasonable debt coverage may also be included in the budget-based rent.") (citing Memorandum from Shaun Donovan, "Revisions, Questions, and Answers Regarding HUD Notice H 00-8" (Nov. 6, 2000)).

[11]HUD Notice H 00-8, *supra* note 8, at ¶12.

[12]*Id*. at ¶14.

[13]*Id*.

[14]*Id*. at ¶10.

[15]*Id*.

extensive amount of rehabilitation needed by many of the old Section 236 projects will not be supported by a modest increase in debt service and rents, in conjunction with principal paydown. Increased rental assistance is usually critical,[16] and successful decoupling transactions generally require leveraging of significant other public subsidies, such as state or local bond financing, Low-Income Housing Tax Credit (LIHTC) syndication proceeds, federal HOME or CDBG funds or other state or local subsidies. Not only does this layering of subsidies significantly increase the complexity of these transactions, but it also drastically limits the use of decoupling to projects where other such subsidies can actually be tapped.

Furthermore, Notice H 00-8 lacks specific requirements for tenant notice or involvement in the decision-making process about the recapitalization plan, though it does maintain the tenant participation requirements of 24 C.F.R Part 245 for input on rent increases.[17] Finally, the program does not specifically require that recapitalization proceeds be reinvested in the property, though that may well be the practical result of maintaining the same limitations on surplus cash distributions and the assessments and approvals required to use decoupling.[18]

Section 202 Supportive Housing for the Elderly

In 1959, Congress created what is now known as the Section 202 Supportive Housing Program to provide affordable housing for elderly persons.[19] By 2005, the program maintained an estimated 268,000 units designated for the elderly,[20] with approximately 4,500 new residential units created each year.[21] Owned by nonprofit organizations, the properties provide features to assist older Americans age in place, such as grab bars, ramps or emergency call systems that are not frequently available in the general market.[22] Much of this stock is aging and needs repair.

The Section 202 program has operated under different financing schemes and use restrictions over the course of its existence.[23] Initially, the program operated through direct loans with 50-year use restrictions ensuring affordability for low-income elderly families. Since 1974, the program has required only a 40-year use restriction, but has included some type of project-based rental assistance in order to make the units affordable to very low-income elderly families. Most of the Section 202 inventory now has project-based rental assistance. Between 2001 and 2009, funding for the 202 program has remained relatively stable, although only at levels sufficient to produce a small portion of the units needed. The current funding level for fiscal year 2009 is $765 million.[24]

Current Practice

In recent years, nonprofit owners of Section 202 properties have sought more responsive HUD approvals to permit prepayment of loans for refinancing. Until the FY 2009 Appropriations Act was passed, owners could only prepay a loan and refinance if it would result in lower debt service, not to raise capital to address the physical needs of the property.[25] Congress has recently responded by considering legislation amending Section 811 of the American Homeownership and Economic Opportunity Act of 2000 (the Act),[26] which provides the framework for refinancing Section 202 properties.

In 2007, H.R. 2930, a bill proposing changes to Section 811 of the Act, was introduced and eventually passed in the House.[27] H.R. 2930 laid much of the initial groundwork for creating an effective recapitalization program, but lacked some necessary tenant protections. Most importantly, the bill would have authorized project owners to refinance to address physical needs, so long as the rents for current unassisted tenants would not increase.[28] This would allow project owners to obtain the necessary capital to reinvest in the property. However, the bill failed to ensure future affordability for tenants and the project, provide mechanisms for tenants to participate in the decision-making process or adequately restrict the use of proceeds for affordable housing needs. Although the Senate version of the bill included important revisions addressing such concerns, it never left committee.

---

[16]Given the current 10% cap on non-Section 8 units, commentators have noted the limited usefulness of decoupling transactions to projects without a high proportion of project-based Section 8 contracts. *See, e.g.*, Achtenberg, *supra* note 10.

[17]HUD Notice H 00-8, *supra* note 8, at 12.

[18]*Id*.

[19]Housing Act of 1959, Pub. L. No. 86-372, 73 Stat. 667 (1959) (codified at 12 U.S.C.A. §§ 1701q *et seq*. (Westlaw Nov. 10, 2009)). At the time, the 202 program was also designated for persons with disabilities.

[20]U.S. GAO, Elderly Housing: Federal Housing Programs that Offer Assistance for the Elderly 10 (2005), *available at* http://www.gao.gov/new.items/d05174.pdf.

[21]AARP Public Policy Institute, Developing Appropriate Rental Housing for Low-Income Older Persons: A Survey of Section 202 and LIHTC Property Managers 2 (2006).

[22]*Id*. at 4.

[23]U.S. GAO, *supra* note 20. Because each project must follow the rules in existence at the time it was developed, understanding each property's financing is helpful to understand its recapitalization issues. When the 202 program began in 1959, developers received direct 50-year loans from HUD that held a 3% interest rate. For those 202 projects built between 1974 and 1990, interest rates increased to Treasury's cost of borrowing and the term of use restrictions dropped to 40 years. These projects used project-based Section 8 in conjunction with 202, making the units affordable to very low-income households, as the subsidy filled the gap between the tenant's share of rent and the approved contract rent. Finally, 202 properties built since 1990 are financed through forgivable capital advances instead of loans, and thus have no debt service so long as the 40-year use restrictions are adhered to. The program no longer uses Section 8 rental subsidy, but instead has rental assistance based on operating costs.

[24]FY 2009 Appropriations Act, Pub. L. No. 111-8, 123 Stat. 524 (2009) [hereinafter FY '09 Appropriations Act].

[25]FY '09 Appropriations Act § 234.

[26]Pub. L. 106-569, 114 Stat. 3109 (Dec. 27, 2000).

[27]Section 202 Supportive Housing for the Elderly Act of 2007, H.R. 2930, 110th Cong. (2007).

[28]H.R. 2930, tit. II.

In February 2009, several items regarding Section 202 prepayments involving refinancing made their way into the final FY '09 Appropriations Act, as enacted.[29] Under this Act, HUD may approve prepayments of Section 202 loans that involve refinancing to address the physical needs of the property after a cost-benefit analysis that includes assessing whether tenant rents will increase.[30] Additionally, the FY '09 Appropriations Act allocates $150 million for tenant protection assistance, including tenant-based or project-based assistance that could help preserve the long-term affordability of any Section 202 properties refinanced under the Act's provisions.[31] However, these provisions do not fully address all preservation concerns. Thus, the current authorizing legislation introduced in the Senate as S. 118 and now included in the draft omnibus preservation bill authored by Congressman Barney Frank is vital for a comprehensive revision of rules regarding prepayments that involve refinancing.[32]

Proposed Legislation

The Section 202 Supportive Housing for the Elderly Act of 2009, S.118 and Title VII of the omnibus House preservation legislation address many concerns raised by advocates.[33] First, the proposed bills address the need to preserve affordability in the long term, by adding a 20-year use restriction following the original maturity date of the original loan in order to receive prepayment approval.[34] This is vital, especially as an estimated 40,000 to 45,000 units of the pre-1974 Section 202 stock near the end of their use restrictions.[35] Further, the bill allows refinancing by a nonprofit owner to increase the overall cost of Section 8 rental assistance in order to mark-up-to-budget.[36] This ensures that the owner will be able to cover the recapitalization costs without increasing tenant rent burdens. Title VII also includes provisions attempting to ensure tenant participation in the prepayment decision-making process, though they fall short of providing meaningful opportunities for participation.[37] Finally, the proposed bill increases restrictions on the use of proceeds from refinancing so that they will only be used for housing or service-related purposes.[38] These new refinancing provisions are vital to protect tenants and to secure long-term affordability.

Looking forward, to fully address concerns regarding tenant protections and long-term affordability, the rules regarding refinancing must still address a number of issues. While the proposed revisions to Section 811(a)(2) of the Act would allow a requested prepayment to involve refinancing to address physical needs so long as rent charges do not increase for current unassisted residents, there is no protection for future tenants. Language must be included to ensure that future tenants are not faced with unregulated rents. Because Section 202 property owners are nonprofits and will have little opportunity to recapitalize without federal assistance, future legislation should require the maximum term of use restrictions possible in exchange for allowing prepayments with refinancing.

Looking forward, to fully address concerns regarding tenant protections and long-term affordability, the rules regarding refinancing must still address a number of issues.

Other aspects of the proposed bill which need to be improved include the fact that while Title VII would allow a project owner to refinance for the physical needs of the project, it does not create any restrictions noting that those needs must be related to the overall viability of the project and benefit the tenants. These two criteria, overall viability and benefit to the tenants, are necessary to ensure that refinancing leads to rehabilitation that will maximize the use of the building for affordable housing purposes. Additionally, the section regarding the use of proceeds should be clarified to ensure that any proceeds are used for housing and service-related needs of the project. The bill may also need to address the fact that allowing proceeds from refinancing to be used to support equity take-outs may be extremely costly. Further, if HUD agrees to subordinate current debt rather than permit prepayment and refinancing, the bill is unclear on whether the additional rental assistance or restrictions attached to such refinancing would apply. Finally, the new section on tenant participation does not provide any timeline in which such tenant participation must occur. This section should explicitly state when notice should be given, the length of the comment period and the manner in which the project owner must respond to tenant concerns. Such provisions are necessary for ensuring long-term affordability for tenants and the project.

[29] FY '09 Appropriations Act.
[30] FY '09 Appropriations Act § 234(a)(2).
[31] FY '09 Appropriations Act at General Provisions.
[32] Section 202 Supportive Housing for the Elderly Act of 2009, S.118, 111th Cong. (2009) (introduced in Senate); Housing Preservation and Tenant Protection Act of 2009, Title VII of H.R. ___, 111th Cong. (2009) (discussion draft). A June 23, 2009, version of the draft bill is available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/Flhr_061809.shtml. The draft bill incorporates a number of the suggestions contained in a package of proposals developed by the National Preservation Working Group. For a summary of these proposals, see NHLP, *Congress Considers Overdue Preservation Agenda*, 38 Hous. L. Bull. 72 (Mar. 2008).
[33] Housing Preservation and Tenant Protection Act of 2009, *supra* note 32, tit. VII.
[34] Housing Preservation and Tenant Protection Act of 2009, § 721.
[35] *The Section 202 Supportive Housing for the Elderly Act of 2007: Hearings on H.R. 2930 Before the Subcomm. on Hous. and Cmty. Opportunity of the House Comm. on Fin. Serv.*, 110th Cong. (2007).
[36] Housing Preservation and Tenant Protection Act of 2009, § 721.
[37] § 725.
[38] § 723.

Section 515 Rural Rental Housing

The United States Department of Agriculture (USDA), through its Rural Development (RD) agency, administers subsidized housing programs for rural families.[39] One such program is the Section 515 program that provides rural rental housing to low-income families. Like many of the HUD-subsidized programs, the Section 515 stock is aging and in need of physical preservation. Research conducted by the National Housing Law Project found that in 2006, 6,262 of the approximately 15,800 properties in the Section 515 program were considered troubled.[40] That figure equals 41% of the program's inventory.

Created in 1962, the Section 515 program authorized USDA to make direct loans to nonprofit organizations, government entities and private individuals or partnerships for the purpose of constructing rental housing. Over 500,000 units of Section 515 housing have been constructed since the program's inception. The average annual income of households living in Section 515 housing is approximately $10,000, and nearly 60% of the households served are elderly or headed by a person with a disability.[41]

Current Practice

Since 2006, the Rural Housing Service (RHS) has operated a demonstration revitalization program intended to identify the means and methods by which the agency can revitalize and preserve the Section 515 stock. No clear information exists regarding the details of the program. Generally, it is believed that the agency is subordinating its existing mortgages to third-party financing that enables owners to rehabilitate their developments. The agency may also be extending or deferring its mortgages to maintain rents in developments and avoid the displacement of residents who are not receiving deep rental assistance subsidies. The agency does not, however, have authority to extend additional subsidies to residents of revitalized developments and may be limiting participation in the demonstration program to developments that have RHS rental assistance or Section 8 subsidies available to most, if not all, the units.

Proposed Legislation

The proposed omnibus preservation legislation includes the Rural Housing Preservation Act of 2009. This Act would authorize RHS to offer financial incentives to owners of Section 515 housing who wish to revitalize their properties. These incentives include: reduction or elimination of interest on the existing Section 515 loan; partial or full deferral of payments; outright loan forgiveness; subordination of the Section 515 loan to third-party financing; reamortization and extension of the loan; grants (subject to appropriations); payment of the costs associated with the development of a long-term viability plan; and additional direct or guaranteed subsidized loans that are not limited by the value of the project.[42]

To secure one or more of these incentives, an owner would have to file a request with RHS to participate in the revitalization and restructuring program. In response, RHS would have to develop a long-term project viability plan that includes two elements. The first is a physical needs assessment that identifies the repairs, improvements and other changes required to preserve the development together with the cost of those repairs and changes. The second is a financial plan that reviews the financial stability of the project, takes into account the loan restructuring elements needed to preserve the project (including rent increases), provides the owner with a rate of return comparable to that received by owners under the LIHTC program, takes into account the repairs that will be made and the costs of relocating residents during the repairs, and ensures that the rents in the development, after revitalization, are affordable to the residents.[43] These provisions help ensure long-term affordability and viability for tenants and the project. Before RHS could offer the incentives to a project owner, it would have to give the owner an opportunity to review the viability plan and to discuss it with someone from the agency. In addition, the bill would ensure tenant participation by requiring RHS to provide a copy of the viability plan to the residents, with 30 days to comment. RHS would be required to respond in writing to the resident comments.[44]

If an owner and RHS were to agree on the long-term viability plan and the necessary incentives, the proposed bill sets forth provisions that would ensure affordability and tenant protections. First, RHS and the owner would enter into a long-term Use Agreement, which would obligate the owner to maintain the housing as affordable for 30 years or the remaining term of the project loan, whichever is longer. Most importantly, the Use Agreement would set the maximum household contribution to monthly rent and utilities at 30% of the family's adjusted income. This would necessarily require rental assistance, even if other funding sources, such as tax credits or publicly provided soft debt, are utilized for recapitalization. The agreement would also obligate the owner to warrant the provision of safe, healthy and clean buildings, and set out the project rent terms and any voucher assistance that might be provided to the owner. The Use Agreement could be terminated only if some material preservation incentives that were extended to the owner are no longer available,

---

[39]Note that while this stock of housing is not technically HUD-assisted, we include it in this article due to the overlap of shared issues, as well as the great importance of preserving this housing stock.

[40]NHLP, *New Data on Troubled Section 515 Properties: Information Obtained by NHLP Reveals Widespread Program Violations*, 36 Hous. L. Bull. 129 (June-July 2006).

[41]*Id.*

[42]Housing Preservation and Tenant Protection Act of 2009, tit. VIII.

[43]*Id.*

[44]*Id.*

and RHS determines that their unavailability was not due to the owner's fault.[45] As an additional affordability tool, unassisted tenants may be afforded vouchers, either attached to the unit or tenant-based, which would provide an additional subsidy to ensure that residents would not pay more than 30% of their income toward rent.[46] However, tenant-based vouchers would do nothing to preserve the affordability of the units for future tenants.

Under the draft House bill, RHS would be able to deny revitalization or restructuring assistance to any owner who has a history of poor management or maintenance of rental properties, is in default on a Section 515 loan, does not enter into a long-term Use Agreement within a reasonable amount of time, is suspended or debarred from further participation in a government contracting program, or for other good cause, as determined by RHS.[47] Additionally, an owner could not participate in the program if the owner is a party to an action against RHS that either seeks to allow the prepayment of a Section 515 loan in contravention of the ELIHPA[48] prepayment restrictions or seeks damages for the imposition of the prepayment restrictions. An owner who has previously secured damages against RHS would be able to participate in the program if the owner agreed to contribute 50% of the damage recovery, or $100,000, whichever is less, to the revitalization plan.[49]

Conclusion

The three examples of recapitalization efforts reviewed in Part One of this article represent different strategies to preserve the federally assisted housing stock, each with its own set of benefits, strengths and weaknesses. As preservation legislation moves forward in Congress, each of these schemes provides pertinent lessons for other programs facing similar impediments. Advocates must seek effective recapitalization policies that maintain properties while preserving long-term affordability for tenants. ■

[Ed. Note: Part Two of this article, covering so-called Section 250 prepayments and the Year-40 mortgage maturity problem, will appear in the next issue.]

[45]*Id.*
[46]*Id.*
[47]*Id.*
[48]42 U.S.C.A. §§ 1472 *et seq.* (Westlaw, Nov. 10, 2009).
[49]§§ 1472 *et seq.*

Hope for HAMP: One Step Back, But Two Steps Forward?*

Homeowners across the country breathed a sigh of relief when the Obama administration announced the Home Affordable Modification Program (HAMP) in February 2009.[1] The program is intended to make homeowners' monthly mortgage payments no more than 31% of gross monthly income. If a loan servicer approves an application for a trial loan modification, the servicer must perform a "waterfall" calculation to decrease the payment until it is no more than 31% of gross monthly income.[2] Unfortunately, many homeowners have encountered a variety of obstacles in seeking HAMP relief.

This article offers some hope that HAMP modifications will move forward and servicers will be more accountable for their actions. This article first revisits the Minnesota HAMP case filed in federal court, *Williams v. Geithner*.[3] It then turns to recently released federal directives and describes how these directives may ease homeowners' application processes. Lastly, it discusses a recent Michigan case where a state appellate court, relying on the language of federal statutes establishing HAMP, reversed summary judgment against the homeowners.

Williams v. Geithner: A Step Back

Homeowners have encountered a number of problems during the HAMP application process.[4] For example, many servicers have failed to notify homeowners when their modification applications are denied. When servicers do notify homeowners of a denial, many neglect to provide any explanation as to why the application was denied.[5] As a result, many homeowners assume that their applications are still under consideration and are helpless as their foreclosure cases advance toward sale.

To seek recourse for HAMP-eligible homeowners, the Housing Preservation Project in Minnesota filed a class action lawsuit against federal agencies responsible for implementing HAMP. In *Williams v. Geithner*, the plaintiffs alleged that HAMP is a federal entitlement program, and

*The author of this article is Holly E. Snow, a 2009 graduate of the University of Chicago Law School. Ms. Snow currently volunteers with the Home Ownership Preservation Project at the Legal Assistance Foundation of Metropolitan Chicago.
[1]*See* Dep't of the Treasury, Supplemental Directive 09-01, https://www.hmpadmin.com/portal/docs/hamp_servicer/sd0901.pdf.
[2]*Id.* This waterfall includes reduction of interest rate, extension of mortgage term and principal forbearance.
[3]No. 09-1959 (D. Minn. filed July 28, 2009). The complaint filed in the *Williams* case is available at http://www.hppinc.org/projects/index.php?strWebAction=resource_detail&intResourceID=112. *See also* NHLP, *Home Affordable Modification Program: Help for Homeowners or Another Dead End?*, 39 Hous. L. Bull. 221, 230-33 (Sept. 2009).
[4]*See supra* note 3.
[5]*Id.*

the agencies' failure to promulgate rules requiring notice of a denial or an appeals process violated due process. Due process, they argued, demands that homeowners receive meaningful notice from servicers. They demanded that a federal district court halt all foreclosures in Minnesota until the court decided the class's constitutional due process claims.

On November 9, 2009, the court denied the motion for preliminary injunction and dismissed the case. The court held that Congress did not create "a property interest in loan modifications for mortgages in default."[6] The court found that Congress permits the Secretary of the Treasury and servicers to use discretion in each homeowner's application. Therefore, Congress did not create a clearly identifiable, universal property interest. Because the class could not prevail on its claim if it could not show a protected property right, the court dismissed the complaint sua sponte.

Although the dismissal is disappointing, recent federal directives may address at least one setback. The plaintiffs in *Williams* hoped to force servicers to provide homeowners with actual notice of denial. As discussed next, new federal directives mandate that servicers change their behavior to be more consistent with *Williams*' vision.

Recent HAMP Directives: One Step Forward

About a week before the court's decision in *Williams*, the Department of the Treasury released Supplemental Directive 09-08.[7] The Directive re-affirmed what the Treasury Department had indicated in Supplemental Directive 09-07, released on October 8, 2009:

> A servicer must send a Borrower Notice to every borrower that has been evaluated for HAMP but is not offered a Trial Period Plan, is not offered an official HAMP modification, or is at risk of losing eligibility for HAMP because they have failed to provide required financial documentation.[8]

All homeowners who apply for HAMP must receive notice that the servicer has denied their application. Moreover, servicers *must* provide homeowners with a reason why their application was denied in "clear, non-technical language, with acronyms and industry terms such as 'NPV' explained in a manner that is easily understandable."[9]

In the end, the Treasury Department clarified a chief concern in the *Williams* complaint: servicers must provide some notice to homeowners that their application has been denied. Homeowners now have added recourse to assert their rights in court, if servicers fail to comply with the directives.

[6]Williams v. Geithner, 2009 WL 3757380 (D. Minn. Nov. 9, 2009).
[7]*See* Dep't of the Treasury, Supplemental Directive 09-08, https://www.hmpadmin.com/portal/docs/hamp_servicer/sd0908.pdf. NPV stands for Net Present Value.
[8]*Id.*
[9]*Id.*

Deutsche Bank Nat'l Trust Co. v. Hass: Another Step Forward

Another promising development has been the willingness of some courts to consider servicers' compliance with HAMP during foreclosure actions. For example, South Carolina's Supreme Court issued an order to create a uniform process for handling foreclosures on HAMP-eligible loans in May.[10] Specifically, each foreclosure complaint must state whether the loan is HAMP eligible as well as whether the HAMP modification has already been denied or whether the application has yet to be processed. If the judge finds there is a question as to whether the servicer has or has not complied, "the judge shall resolve this issue like any other contested issue in a mortgage foreclosure action."[11]

Furthermore, in *Deutsche Bank Nat'l Trust Co. v. Hass*, a Michigan state court recently found that summary judgment in a post-foreclosure eviction case was inappropriate where the lender failed to review the borrowers' qualifications for a HAMP modification.[12] The court cited clear language from an older HAMP directive to support its decision.

Susan and Robert Hass purchased their home in a northern suburb of Detroit, Michigan, in 2006. The Hasses, like many others, financed the purchase through a variable-rate loan from Home123 Corporation. Home123 immediately assigned the mortgage to Deutsche Bank National Trust Company, in trust.[13]

In spring 2008, both Susan and Robert Hass lost their jobs and fell behind on their mortgage payments. They asked their servicer, American Servicing Corporation, for a mortgage modification. The Hasses proposed to reduce their monthly payment by $1,000 for 12 months or until their income increased, whichever came sooner, and to add their arrearage to the principal. American rejected their proposal, instead notifying the Hasses that they were expected to pay the full amount of their arrearage.[14]

The Hasses were unable to meet American's demands, and Deutsche Bank filed a foreclosure action against them. On July 18, 2008, Deutsche Bank purchased the Hasses' home at a sheriff's sale for $201,000 and later filed an eviction and possession action.[15] The Hasses argued that Deutsche Bank was not entitled to possession because American's failure to agree to a modification violated federal law. Moreover, the Hasses argued that Wells Fargo, as the actual owner of the note or parent company of the

[10]Admin. Order No. 2009-05-22-01 (S.C. May 22, 2009), *available at* http://www.judicial.state.sc.us/courtOrders/displayOrder.cfm?orderNo=2009-05-22-01.
[11]*Id.*
[12]Deutsche Bank Nat'l Trust Co. v. Hass, No. 2009-2627-AV, slip op. at 1 (Mich. Cir. Ct. Sept. 30, 2009), appeal docketed, No. 294676 (Mich. Ct. App. Oct. 20, 2009).
[13]*Id.*
[14]*Id.* at 1-2.
[15]*Id.* at 2.

servicer, was required to abide by the HAMP agreement it signed with the federal government.[16]

The trial court rejected the Hasses' arguments and entered an order of possession. It held that the federal provisions were not applicable because the sheriff's sale occurred before Congress passed the legislation creating HAMP.

The Hasses appealed to the state circuit court after the trial court denied a motion to reconsider. The circuit court judge found several issues of material fact, including:

- whether Wells Fargo was the actual owner/servicer of the loan;
- the nature of the relationship, if any, between Deutsche Bank and Wells Fargo;
- the nature of the relationship between Wells Fargo and American;
- whether Wells Fargo should have been made a party to the eviction action.[17]

The court focused on the relationship between Wells Fargo, a non-party, and the other parties because if Wells Fargo was an actual owner of the loan, then it was bound by the HAMP contract entered into on April 13, 2009. Specifically, the court found that Wells Fargo would have violated its contractual agreement if it failed to offer the Hasses a modification.[18] According to the court, "a breach of contract by *any of these entities* means that foreclosure proceedings should never have been commenced and the sheriff's sale should not have been held."[19] The court held that the Hasses could assert Wells Fargo's potential breach as a defense to the eviction action.[20]

Deutsche Bank argued, and the trial court agreed, that the sheriff's sale was an eligibility "cut-off date." [21] Put differently, because the Hasses' property was sold prior to HAMP's enactment, the Hasses did not qualify for HAMP, even though the parties were still in active litigation after the government created the program. Turning to the language in federal statutes and directives, the appellate court disagreed with the trial court for two reasons. First, Congress indicated a clear intent to provide homeowners with a modification. Second, the court found that using the sale date as a cut-off date would punish Michigan residents because in Michigan, the foreclosure process is shorter, while the redemption period is longer. The appellate court held that if it agreed with the trial court, it would violate HAMP's stated goal to have a "uniform modification process."[22] The appellate court thus rejected Deutsche Bank's argument that the Hasses were ineligible for HAMP.[23]

Conclusion

The *Hass* court made two distinct holdings. First, a breach of a HAMP agreement is a defense to a post-foreclosure eviction action. Second, servicers may not punish those homeowners who live in states with shorter foreclosure processes by using the sheriff's sale as a "cut-off" date for HAMP eligibility. Furthermore, the court relied on language in HAMP directives and other federal statutes to support its conclusion. Now armed with the *Hass* decision and the new Treasury directive, advocates can take steps to make servicers more accountable in and out of litigation. ■

[16] *Id.*
[17] *Id.* at 3-4.
[18] *Id.* at 5.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 7.
[22] *Id.* at 8 (citing Treasury Department, Supplemental Directive 09-01).
[23] *Id.*

California Expands Utility Shutoff Protections

On January 1, 2010, additional protections against utility shutoffs went into effect for California tenants as a result of the passage of Senate Bill 120. These protections are especially important for tenants who unexpectedly lose their utility services as a result of foreclosure on a rental property. Prior law required utilities to give notice of a pending utility shutoff to tenants in multiunit properties where the landlord or the building owner is the customer of record for the utilities. For individually metered units, prior law required a 10-day notice prior to shutoff. For master-metered properties, a 15-day notice of shutoff was required. Prior law also allowed tenants to place the utilities under their names to avoid a shutoff without being required to pay for arrearages on the account, and allowed tenants to deduct utility payments from the rent.

Senate Bill 120 extends similar protections to tenants in single-family homes and requires that these tenants receive 10 days' notice prior to shutoff, except where the home is served by an investor-owned utility. The new law also requires notices of utility shutoffs to be in writing. Further, it mandates that shutoff notices be provided in Spanish, Chinese, Tagalog, Vietnamese and Korean in addition to English. These protections took effect on January 1, 2010, except for tenants in single-family homes served by an investor-owned utility, in which case the new provisions apply on July 1, 2010. ■

Ninth Circuit Allows Discrimination Claims in Municipal Service Provision*

In Stanislaus County, California, residents of predominately Latino unincorporated areas will be allowed to proceed to trial in their case alleging discrimination in the provision of municipal services, such as police, emergency responders, sewers and other infrastructure.

In *Committee Concerning Community Improvement v. City of Modesto*,[1] neighborhood groups and residents filed a federal suit alleging equal protection violations against the city of Modesto, Stanislaus County, and the county sheriff's office. The residents live in predominantly Latino neighborhoods, which they claim were excluded from incorporation into the city and receive disproportionately worse municipal services than predominately white neighborhoods.[2]

The Ninth Circuit Court of Appeals reversed substantial portions of the federal district court's ruling, which granted the defendants' motion for summary judgment in its entirety.[3] Perhaps most significantly, the Ninth Circuit reversed the district court in ruling that the Fair Housing Act (FHA) not only prohibits discrimination in the acquisition of a dwelling, but also during the subsequent period of inhabitation. The Ninth Circuit's decision is a welcome response to an alarming trend triggered in 2004, when the Seventh Circuit held that the FHA does not apply to post-acquisition discrimination.[4] The Seventh Circuit recently pulled back from that position in a November ruling allowing some post-acquisition claims.[5] The Ninth Circuit's ruling also set forth rules and evidentiary standards that may improve plaintiffs' chances for success in future equal protection and fair housing cases.

Factual and Procedural Background

The residents live just outside Modesto in four unincorporated "islands" with predominately Latino populations.[6] The city's "sphere of influence" contains 26 such islands.[7] The city has stated a policy encouraging annexation of these islands, which would significantly improve the municipal services available to residents.[8] Currently, the plaintiffs' neighborhoods lack vital infrastructure such as storm drains, sewers, curbs, gutters and sidewalks.[9]

To begin the annexation process, the city and county must first enter into a tax sharing agreement.[10] The city and county signed a Master Tax Sharing Agreement (MTSA) in 1983 that laid the groundwork for annexing many of the unincorporated islands, but the MTSA specifically excluded three of the four neighborhoods inhabited by the plaintiffs.[11] The MTSA was renewed in 1996 and again in 2004.[12] To complete annexation, the city requires a neighborhood to meet threshold infrastructure standards. Thus, the county has an incentive to build infrastructure in areas included in the MTSA and is discouraged from building infrastructure in the excluded areas.[13]

In 1995, Modesto voters passed Measure M, which required the city to hold an advisory vote before approving any extension of sewer infrastructure to unincorporated areas.[14] The city council adopted an implementation policy which divided unincorporated areas into "substantial" and "non-substantial" islands.[15] The substantial islands require fiscal negotiations to be completed with the county before holding an advisory vote.[16] The city has sole discretion in determining which islands are substantial, but offered no distinguishing definition, though the plaintiffs' neighborhoods are clearly included in that category.[17]

The residents initially brought causes of action under 42 U.S.C. § 1983[18] based on equal protection violations of the 14th Amendment[19] and Title VI of the Civil Rights Act,[20] under California[21] and federal[22] fair housing laws,

---

*The author of this article is Evan White, a J.D. and M.P.P. candidate at the University of California, Berkeley Law School and at the Goldman School of Public Policy. He is an intern at the National Housing Law Project.

[1]Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 2009 WL 3208728 (9th Cir. 2009).

[2]*Id.* at *1.

[3]*Id.*

[4]Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327 (7th Cir. 2004).

[5]Bloch v. Frischholz, __ F.3d __, 2009 WL 3789996 (7th Cir. 2009) (en banc). In a rehearing en banc, the *Bloch* court explicitly overruled *Halprin* in its interpretation of 42 U.S.C. § 3617, and held that claims of discriminatory coercion, intimidation, threats, or interference with the enjoyment of a dwelling are legally independent from § 3604 claims and are actionable at any point during occupation of the dwelling. The *Bloch* court also narrowly construed *Halprin*'s bar of post-acquisition § 3604 claims. The *Bloch* court agreed that 42 U.S.C. § 3604 applies only to the acquisition of a dwelling, but included in that definition all contractual obligations agreed to at the time of acquisition, including agreements to be governed by a manager or homeowners' association. These contractual obligations make actionable any post-acquisition discrimination by management, on the theory that such conduct was a term of the original acquisition agreement. For the plaintiffs in *Bloch*, this meant that the manager's frequent removal of their mezuzot (a Jewish religious symbol) was sufficient basis for both § 3604(b) and § 3617 claims under the Fair Housing Act, despite the fact that the conduct occurred after the plaintiffs bought their condominium.

[6]*Cmty. Improvement*, 2009 WL 3208728, at *1.

[7]*Id.*

[8]*Id.*

[9]*Id.*

[10]*Id.* at *2.

[11]*Id.*

[12]*Id.*

[13]*Id.*

[14]*Id.*

[15]*Id.*

[16]*Id.*

[17]*Id.*

[18]42 U.S.C.A. § 1983 (Westlaw Oct. 31, 2009).

[19]U.S. Const. amend. XIV, § 1.

[20]42 U.S.C.A. § 2000d (Westlaw Oct. 31, 2009).

[21]Cal. Gov't Code § 12955 (Westlaw Oct. 31, 2009).

[22]42 U.S.C.A. §§ 3601-3631 (Westlaw Oct. 31, 2009). For another instructive case involving the application of federal fair housing laws to the

under California Government Code § 11135,[23] and under common law and statutory nuisance. The equal protection and fair housing claims alleged that the city and county's discrimination was evidenced by (1) the exclusion of the residents from the MTSA; (2) Measure M enforcement and provision of sewers; (3) law enforcement and emergency response times; and (4) provision of infrastructure through the county's "Priorities List."[24]

The district court granted the city and county's motion for summary judgment on all claims, and awarded them costs.[25] The lower court's decision was based on two rationales. First, the court found that some of the residents' claims were barred by the statute of limitations. Second, the court found that the residents failed to prove the alleged discriminatory impact and intent necessary for their remaining claims.[26]

Summary of the Decision

On appeal, the residents dropped their nuisance claim and confined their equal protection and discrimination claims to the provision of law enforcement, emergency responders and sewers.[27] The Ninth Circuit reviewed the case *de novo*[28] and reversed many of the district court's rulings.

First, the Ninth Circuit reversed the district court's ruling that the statute of limitations barred the residents' claims regarding exclusion from the MTSA, finding that the city and county's renewal of the MTSA in 2004 restarted the limitations period.[29]

Next, the Ninth Circuit reviewed the statistical evidence for each of plaintiffs' four discrimination allegations. The court reversed prior rulings on the residents' exclusion from the MTSA and defendants' provision of police and emergency responders.[30] At issue were several evidentiary matters, including what evidence was admissible, what types of evidence should be compared to show discriminatory impact and what impact is sufficient to infer discriminatory intent.[31] The circuit court sided with the residents on all three issues.

Lastly, the Ninth Circuit reversed the district court's ruling that the FHA prohibits discrimination only in the "acquisition" of housing, and does not apply to discriminatory provision of services in an ongoing occupancy.[32] The Ninth Circuit expressly declined to follow the Seventh Circuit's decision in *Halprin v. Prairie Single Family Homes of Dearborn Park Association*.[33]

The Ninth Circuit also vacated the district court's ruling on state law claims, thereby allowing the district court to revisit claims it originally held were better decided in state court.[34]

Issues Considered

Statute of Limitations and Continuing Violations

The residents filed suit in August 2004, and their claims were based on a two-year statute of limitations.[35] The district court held that the residents' claims alleging exclusion from the MTSA had expired because the MTSA was originally signed in 1983. On appeal, the residents asserted two arguments: (1) their continued exclusion from the MTSA constituted a "continuing violation"; and (2) the 2004 renewal of the MTSA was a separate act which restarted the limitations period.[36]

The Ninth Circuit rejected the continuing violations argument. A continuing violation must show a pattern or practice of discrimination that is widespread,[37] and the court found that the residents' injuries arose from the ongoing effects of actions taken prior to the limitations period. The court left open the possibility that the city and county's conduct in applying the MTSA would constitute a continuing violation, but the residents failed to present evidence on this issue.[38]

Nonetheless, the court allowed the residents' claim to go forward based on their argument that the MTSA's renewal in 2004 was an act of "independent consideration."[39] The court cited the 2004 document's express reaffirmation of the prior MTSAs from 1983 and 1996 as evidence that it was not merely an "automatic renewal," as the district court held.[40]

Statistical Evidence Demonstrating Discriminatory Impact

The Ninth Circuit reviewed statistical evidence on all four of the residents' allegations of discrimination: (1) exclusion from the MTSA; (2) Measure M implementation and sewer provision; (3) police and emergency response times; and (4) provision of county infrastructure. These claims required a showing of discriminatory impact and of discriminatory intent. Statistics alone are rarely sufficient to satisfy the intent requirement where a defendant's policies are facially neutral, and courts must draw on other factors showing evidence of intent, including

---

provision of municipal services, see Kennedy v. City of Zanesville, 505 F. Supp. 2d 456 (S.D. Ohio 2007).

[23] Cal. Gov't Code § 11135 (Westlaw Oct. 31, 2009).

[24] *Cmty. Improvement*, 2009 WL 3208728, at *4.

[25] *Id.* at *4-5.

[26] *Id.*

[27] *Id.* at *5.

[28] *Id.*

[29] *Id.* at *6-7.

[30] *Id.* at *7-9.

[31] *Id.*

[32] *Id.* at *16-18.

[33] Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327 (7th Cir. 2004).

[34] *Cmty. Improvement*, 2009 WL 3208728, at *18.

[35] *Id.* at *5-6.

[36] *Id.* at *6.

[37] *Id.* (quoting Cherosky v. Henderson, 330 F.3d 1243, 1247 (9th Cir. 2003)).

[38] *Id.*

[39] *Id.* (quoting Knox v. Davis, 260 F.3d 1009, 1014 (9th Cir. 2001)).

[40] *Id.*

historical background, chronology of events, and legislative or administrative history.[41] Without evidence of intent, a defendant's actions need only be rationally related to a legitimate governmental interest.[42]

On the first allegation, regarding the residents' exclusion from the MTSA, the Ninth Circuit reversed the lower court's grant of summary judgment to the city and county and found that the residents' statistical analysis supported their claim.[43] According to the court, the correct comparison was the percentage of the population classified as Latino in the areas included in the MTSA (47%) and the percentage of the population classified as Latino in the areas excluded from the MTSA (71%).[44] In finding for the residents, the court also noted that one of the plaintiffs' neighborhoods had attempted annexation and was denied, whereas other neighborhoods with fewer Latinos had been annexed.[45] In its review, the Ninth Circuit examined evidence disregarded by the district court relating to the annexation of certain non-island neighborhoods, reflecting its stance that analysis of discriminatory intent should consider a variety of factors.[46] Ultimately, the Ninth Circuit found a sufficient inference of discriminatory intent to allow the residents to proceed on their claim regarding exclusion from the MTSA.

On the second allegation, regarding the city's implementation of Measure M and its provision of sewer services, the Ninth Circuit affirmed summary judgment for defendants.[47] The court noted that of the 26 islands, the residents lived in the only three that received sewer services from the city.[48] In reviewing the evidence, however, the court did express concern that the city's "infrastructure condition" was unfair and arbitrarily defined.[49]

The Ninth Circuit reversed the lower court's grant of summary judgment on the residents' allegation that response times for emergency and police personnel were disproportionately longer in their neighborhoods.[50] The Ninth Circuit took issue with the lower court's statistical analysis, which compared response times in predominantly Latino neighborhoods to response times in the rest of unincorporated Stanislaus County.[51] The court instead preferred a comparison between the residents' neighborhoods and the majority white islands.[52] Another issue was whether dispatch times, which measure the time it takes for 911 personnel to dispatch an officer, or total response times, including time in transit, were the appropriate measure for comparison. Because differences in both measures were statistically significant, the court opted against choosing one over the other.[53] However, it did conclude that even small differences in dispatch or response times could be meaningful for residents needing emergency response, and held that the issue was best submitted to a factfinder.[54]

Lastly, the Ninth Circuit affirmed summary judgment for the defendants concerning the residents' allegation that the county's provision of infrastructure disproportionately favored majority white neighborhoods.[55] The residents contended that the failing septic systems in their neighborhoods were unfairly demoted on the county's "Priorities List" of infrastructure needs.[56] Like the court below, the Ninth Circuit found no discriminatory intent in the county's prioritization scheme.[57] Likewise, the Ninth Circuit affirmed the holding below that the county's list was rational and its ranking mechanism could incorporate other factors beyond greatest need.[58]

Post-Acquisition Claims Under the Fair Housing Act

The district court rejected the residents' FHA claims on the grounds that the FHA prohibits discrimination in the acquisition of a dwelling, but not during the subsequent period of inhabitation. The statute's text makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith."[59] The district court's analysis followed the Seventh Circuit's decision in *Halprin*,[60] which held that the FHA did not apply to problems encountered after the initial sale or rental.[61]

The Ninth Circuit rejected the *Halprin* doctrine, and found that the FHA reaches post-acquisition cases of discrimination.[62] The court cited three reasons for this decision. First, a reasonable reading of the statutory language—including the use of the words "privileges" and "services"—supports the conclusion that the FHA was meant to ensure continuing protections.[63] Second, the federal regulations implementing the FHA make reference

[41]*Id.* at *7. This framework follows two 1977 Supreme Court cases, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) and Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977).
[42]*Id.* (citing Hispanic Taco Vendors v. City of Pasco, 994 F.2d 676, 680 (9th Cir. 1993)).
[43]*Id.* at *9.
[44]*Id.*
[45]*Id.* at *8-9.
[46]*Id.* at *8.
[47]*Id.* at *11.
[48]*Id.*
[49]*Id.* at *10.
[50]*Id.* at *12.
[51]*Id.*
[52]*Id.*
[53]*Id.*
[54]*Id.*
[55]*Id.* at *14.
[56]*Id.* at *13.
[57]*Id.* at *14.
[58]*Id.*
[59]42 U.S.C.A. § 3604(b) (Westlaw Oct. 31, 2009).
[60]Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004).
[61]*See supra* text accompanying note 5 for a discussion of the Seventh Circuit's recent retreat from *Halprin*'s bar of post-acquisition claims in *Bloch v. Frischholz*, __ F.3d __, 2009 WL 3789996 (7th Cir. 2009) (en banc).
[62]*Cmty. Improvement*, 2009 WL 3208728, at *16.
[63]*Id.*

to post-acquisition discriminatory acts, such as failure to repair.[64] Third, *Halprin*'s interpretation would contradict the larger purpose of the statute, which was to prohibit discrimination in housing.[65] Based on these reasons, the Ninth Circuit reversed the district court's dismissal of the residents' claims under the FHA.[66]

State Law Claims and Costs

Because the residents' state law claims involved novel matters of complex statutory construction, the district court left them for interpretation by state courts. On appeal, the Ninth Circuit vacated this decision so as to afford the lower court another opportunity to consider the state law questions.[67] However, the Ninth Circuit made clear that this reconsideration is discretionary.

The Ninth Circuit also vacated the cost award to the city and county, because they were no longer victorious on all claims.[68]

Conclusion

As a result of the Ninth Circuit's decision, the residents' case can proceed to trial on their allegations involving exclusion from the MTSA and differential response times for police and emergency personnel. The decision is also important for the plaintiffs' bar more generally. First, in its discussion of continuing violations, the court implied that conduct that renews decisions made prior to the limitations period can restart the limitations period.[69] Second, in considering the residents' statistical evidence, the Ninth Circuit was far more willing than the district court to accept circumstantial and historical evidence in determining whether the residents proved a sufficient inference of discriminatory intent to meet the prima facie standard.[70]

But most importantly, the Ninth Circuit's repudiation of the *Halprin* doctrine creates a circuit split on an essential issue in fair housing law.[71] Under *Halprin*, so long as residents acquired their dwelling in a non-discriminatory manner, their subsequent occupancy of that dwelling is not protected by the Seventh Circuit's interpretation of the FHA. Thus, a court following *Halprin* would hold that a landlord who does not fulfill repair requests from his African-American renters while making repairs for white tenants would not violate the FHA. Fortunately, *Committee Concerning Community Improvement* provides an appellate-level counterpoint to *Halprin*. ■

[64]*Id.* at *17.
[65]*Id.*
[66]*Id.* at *18.
[67]*Id.*
[68]*Id.*
[69]*Id.* at *6.
[70]*Id.* at *7-14.
[71]The Seventh Circuit's recent decision in *Bloch v. Frischholz*, __ F.3d __, 2009 WL 3789996 (7th Cir. 2009) (en banc), *see supra* text accompanying note 5, does not fully resolve this circuit split, though it significantly lessens it. The *Bloch* court still maintained that § 3604 does not apply to post-acquisition claims, except insofar as the conduct fell under a contractual agreement signed at the time of acquisition. This leaves open many questions, such as whether a tenant who does not sign a rental agreement at the time of acquisition is protected from discrimination under § 3604.

USDA National Appeals Procedure Subject to EAJA and APA

Succumbing to the decisions of three courts of appeals and one district court over a period of 12 years, the United States Deparment of Agriculture (USDA) published a final rule on November 6, 2009, stating that all National Appeals Division (NAD) proceedings carried out pursuant to regulations published in 7 C.F.R. Part 11 are subject to the Administrative Procedure Act (APA) and the Equal Access to Justice Act (EAJA).[1] The rule modifies the department's previous position that the APA and EAJA applied only in jurisdictions in which courts have required their application. However, the department limited its position by continuing to exempt informal reviews of agency decisions and NAD director's reviews of USDA agency determinations of appealability.

The rule change is significant because it makes all prevailing parties in NAD proceedings eligible for attorney's fees and costs when the appellant is the prevailing party and the agency's position is not substantially justified.

The agency's change in position appears to have been prompted by the fact that a Texas federal district court, in a May 2009 opinion,[2] followed decisions in the Seventh, Eighth and Ninth Circuits that have all held that NAD appeal hearings are subject to the APA and, by extension, EAJA.[3] All four cases were brought by farmers or farm corporations that were denied various forms of USDA farm assistance. The rule change makes NAD decisions with respect to the USDA housing programs equally subject to the APA and EAJA. ■

[1]74 Fed. Reg. 57,401 (Nov. 6, 2009).
[2]Rosenbaum v. USDA, No. 07-02808 (S.D. Tex. May 1, 2009).
[3]Five Points Rd. Joint Venture v. Johanns, 542 F.3d 1121 (7th Cir. 2008); Aageson Grain & Cattle v. USDA, 500 F.3d 1038 (9th Cir. 2007); Lane v. USDA, 120 F.3d 106 (8th Cir. 1997).

New HUD Form May Improve Communication Between Tenants and Housing Providers*

A new HUD form will enable federally subsidized tenants to include an advocate or ally in any communication between the tenant and the housing provider, potentially leading to smoother interactions and a greater understanding of the tenant's needs and obligations. Notice PIH 2009-36 transmitted Form HUD-92006, which allows applicants for public and federally assisted housing to submit the contact information of a third party whom the housing provider may contact in certain situations. The form implements Section 644 of the Housing and Community Development Act of 1992, which requires public housing agencies (PHAs) to provide applicants the option to include contact information for an individual or organization that may assist in providing services or special care to the applicant and in resolving tenancy issues.[1] The issuance of this notice came after concerted nationwide advocacy, including a lawsuit filed by Texas RioGrande Legal Aid.

Background

Section 644 requires HUD to allow applicants for federally assisted housing to include in their applications the contact information for a family member, friend, or social, health, advocacy or other organization. Communication with these third parties is to be used to assist in providing any services or special care for the tenant and to assist in resolving any relevant tenancy issues that may arise.[2] Section 644 further specifies that all such information must be kept confidential and that an owner of federally assisted housing may not require any applicant to provide this information.[3]

On September 12, 2008, Texas RioGrande Legal Aid filed a lawsuit in United States District Court alleging that HUD failed to implement Section 644.[4] The suit was filed on behalf of several individuals with mental and physical disabilities, including one person with severe degenerative bone disease whose application for public housing was terminated for failure to appear in a meeting to process his application. He did not attend the meeting because the notice had been sent to the address on the original application, which was no longer current. His application was reinstated after intervention by a legal services attorney, who requested that the PHA notify him as well as the applicant of all future appointments. The PHA did not agree to do so.[5] Responding to the suit, HUD issued a Notice of Proposed Information Collection requesting comments on a draft supplemental form that tenants applying for occupancy in HUD assisted housing could use to provide identification and contact information of a family member, friend or supportive organization.[6] Because of HUD's favorable response, the case against it was stayed and ultimately settled.

Initially, the form provided space for the contact information of only one friend or advocate and did not allow the applicant to specify the reasons or situations for which the friend or advocate was to be contacted. Advocates submitted comments that pushed HUD to use clearer language, provide a mechanism that allowed tenants to specify how third-party contact information should be used, retroactively apply the form to existing tenants via the annual recertification process, incorporate the form in the HUD Multifamily Handbook 4350.3 and the Public Housing Occupancy Handbook, and monitor for compliance. HUD was responsive to the vast majority of these comments.

Form HUD-92006

On September 15, 2009, HUD implemented the final version of Form HUD-92006, Supplement to Application for Federally Assisted Housing. The form now allows each applicant to submit the contact information for one or more persons or organizations, as well as the reason each person or organization may be contacted. Housing providers cannot require tenants who have not provided contact information to do so, and tenants may request to update, remove or change the information on the form at any time. Housing providers are urged to provide the form to residents at the time of their annual recertification to give them an opportunity to update, remove or change contact information. The form will be incorporated into future updates to the Public Housing Occupancy Guidebook, Housing Choice Voucher Program Guidebook and the Multifamily Occupancy Handbook. The housing provider must retain the contact information for as long the tenant is a resident and keep it confidential, releasing it only for stated statutory purposes, such as to seek services or special care for tenants and to resolve tenancy issues.[7]

---

*The author of this article is Julieanna Vinogradsky, a Graduate Research Fellow at the National Housing Law Project.

[1]42 U.S.C.A § 13604 (Westlaw Oct. 1, 2009).

[2]*Id*.

[3]*Id*.

[4]Alexander v. Donovan, No. 08-758 (W.D. Tex., stipulated dismissal July 16, 2009).

[5]Compl. at 7, Alexander v. Donovan, No. 08-CA-758 (W.D. Tex., stipulated dismissal July 16, 2009).

[6]Notice of Proposed Information Collection: Supplemental Information to Application for Assistance Regarding Identification of Family Member, Friend or Other Person or Organization Supportive of a Tenant for Occupancy in HUD Assisted Housing, 74 Fed. Reg. 4,048, 4,049 (Jan. 22, 2009).

[7]Supplemental Information to Application for Assistance Regarding Identification of Family Member, Friend or Other Person or Organization Supportive of Tenant for Occupancy in HUD Assisted Housing, PIH 2009-36 (Sept. 15, 2009).

Advocates should advise clients of the availability of the form. Those who are newly applying for federally assisted housing should receive the form as part of their application packet. Individuals who are already living in public and assisted housing can wait until their annual recertification process or can contact their housing provider to add the form to their files immediately.

Use of the form can potentially benefit tenants in emergency situations, such as where a tenant requires immediate assistance or where housing benefits are in danger of being terminated. Tenants with disabilities, persons with limited English proficiency (LEP) and victims of domestic violence may find the form particularly helpful. For example, LEP individuals may benefit from the form where housing providers have not implemented language access policies or have translated only a small number of documents, if any, in the tenant's language. In these cases, the form will enable the participation of a third party who can help translate, allowing the applicant or tenant to be aware of requirements and next steps in the application process. As the Texas case leading to the creation of this form demonstrates, persons with physical and mental disabilities may also benefit. Another underserved group that may utilize the forms is victims of domestic violence, dating violence and stalking who have left their abusive partners. These applicants must often keep their whereabouts confidential and frequently lack permanent, stable housing. The form will allow victims to list, as a contact, a safe organization or person, such as a domestic violence service provider, counselor or relative. This contact can safely relay information to the victim and explain why the victim may be unable to provide certain application information, such as employment, credit or tenancy history. Therefore, this simple form will allow all tenants, especially those with special needs, to better access and utilize federally assisted housing programs.

Conclusion

Form HUD-92006 should be in use nationwide by mid-December 2009. Because the form has the potential to help applicants obtain and retain housing, advocates should ensure that the form is actually being offered to applicants as well as to individuals completing their annual recertification. While the form is particularly helpful to persons with disabilities, LEP tenants and victims of domestic violence, its use can assist all tenants. Allowing friends and advocates to participate in and facilitate interactions between housing providers and tenants can ensure clear communication, increased understanding and stability in housing services. ■

Recent Cases

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

Housing Choice Voucher Program: 42 U.S.C. § 1983 Claim Against PHA Dismissed

Swift v. McKeesport Hous. Auth., 2009 WL 3856304 (W.D. Pa. Nov. 17, 2009). After a public housing agency (PHA) terminated his Section 8 voucher for failure to provide recertification documents on time, the plaintiff filed suit under 42 U.S.C. § 1983 alleging that the policies and practices of the PHA violated Section 8 of the United States Housing Act (USHA) and the Due Process Clause of the 14th Amendment. The plaintiff claimed that the PHA did not give him adequate time to submit his recertification forms and denied receipt of his recertification forms after he left the documents at the front door of the PHA. The court found that the complaint did not raise a plausible claim of municipal liability under Section 1983 because it failed to show that the PHA deprived the plaintiff of his federal rights as a result of an official policy or practice. In addition, the court noted that Section 8 of the USHA does not contain an implied private right of action, and thus to the extent that plaintiff sought to assert an implied private right of action under Section 8, dismissed his claim without prejudice.

Public Housing: Resident Participation in Selection of Property Manager

Henry Horner Mothers Guild v. Chicago Hous. Auth., 2009 WL 4066018 (N.D. Ill. Nov. 20, 2009). The plaintiffs claimed that the Chicago Housing Authority (CHA) did not involve the Horner Residents Council (HRC) in the selection of a property manager for the Horner public housing development, in violation of a consent decree issued by the court in 1995. The consent decree ordered CHA and HRC to "consult and attempt to agree" on an entity to manage and revitalize the development. To reduce the number of management firms working in public housing citywide, CHA initiated a nationwide request for proposal (RFP) in 2009. An evaluation committee composed of CHA officials and local advisory council members rated each

[1] http://www.westlaw.com.
[2] http://www.lexis.com.
[3] 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.

proposal, and CHA took the four firms with the highest scores to HRC for negotiation. HRC declined to select one of the four firms because CHA excluded it from the initial stages of the selection process. The court found that the consent decree did not require CHA to involve HRC in drafting the RFP or in screening the bidding firms, but did require CHA to provide HRC with the documents submitted by all bidding firms. The court ordered CHA and HRC to engage in meaningful consultation and discussion of the four finalist firms, and if CHA and HRC could not agree, to expand the discussion to include all of the bidding firms.

HUD-Assisted Housing: Failure of Owner to Facilitate Receipt of Section 8

437 Manhattan, LLC. v. Santos, 2009 WL 4110865 (N.Y. City Civ. Ct. Nov. 25, 2009) (unreported). A private owner filed suit against a former tenant for nonpayment of rent. The owner bought a building from HUD and signed a regulatory agreement. Under the agreement, the owner could not raise the rent until he made all necessary repairs. In addition, the owner pledged to cooperate to ensure that eligible tenants would receive a Section 8 subsidy. The owner raised the rent, but the tenant, who did not receive a Section 8 subsidy for three years despite being eligible, did not pay the increase. The court granted summary judgment for the tenant on two grounds. First, the tenant did not receive a Section 8 subsidy because the owner did not submit the required HUD certification forms to the PHA. Second, the owner did not make all necessary repairs and thus was not entitled to raise the rent. The court noted that even if the owner made all necessary repairs, the dispute over the Section 8 subsidy was between the owner and the PHA, not the owner and the tenant.

HUD-Assisted Housing: Attempt by Owner to Exit Rental Market

BSA 77 P Street LLC v. Hawkins, __ A.2d__, 2009 WL 3858378 (D.C. Nov. 19, 2009). The appeal arose out of a failed attempt by the owner of HUD-subsidized housing to sell several tenants their units. Owner BSA wanted to terminate ownership and exit the rental market at the expiration of its housing assistance payments (HAP) agreement with HUD. BSA found a prospective buyer willing to operate the units pursuant to a renewed HAP agreement in its own name and offered the tenants an opportunity to purchase their units, as required by local law. The contract between the tenants and BSA failed to close because BSA did not receive release of its mortgage. After the deal between BSA and the potential buyer fell through, BSA decided to sell the units to individual owner-occupiers and sent the tenants a notice to vacate their units within one year. The tenants filed suit, claiming that BSA breached the contract by not securing release of its mortgage and that the notice to vacate violated local law. The trial court told the jury to consider whether BSA prevented the release of its mortgage, and the jury found that BSA did not. The court upheld the verdict, finding that the trial court did not err in construing the contract language as a condition instead of a promise. In addition, the court affirmed the trial court's decision to invalidate the notice to vacate, as local law mandated that the units remain rental housing.

Lead Paint: Class Certification Ruling Against PHA Upheld

Billieson v. City of New Orleans, __So. 3d__, 2009 WL 3837372 (La. Ct. App. 2009). Children alleged to have been poisoned by lead in public housing owned by the Housing Authority of New Orleans (HANO) had successfully moved to certify the case as a class action. HANO filed a motion 8 ½ years later to decertify the class action. The court of appeal upheld the trial court's denial of the motion, holding that the children's alleged harm resulted from a common cause—HANO's alleged breach of duty to the children by allowing hazardous levels of lead to exist throughout HANO units for years. The court noted that each class member would have to prove causation based on the same set of operative facts. The court therefore held that the case was proper for class certification because common questions of law and fact predominated over individual issues of law and fact.

Lead Paint: PHA Not Immune From Tort Claim

Brooks v. Hous. Auth. of Baltimore City, __A.2d__, 2009 WL 3818447 (Md. 2009). The court reversed the lower court's decision granting summary judgment for the Housing Authority of Baltimore City (HABC) on grounds of governmental immunity. A minor public housing tenant filed a lead paint action against HABC. Relying on a prior case construing the state "Housing Authorities" law, HABC claimed that it enjoyed governmental immunity from the tort claim because it exhausted the limits of its commercial liability insurance policy before the tenant filed suit. The court found, however, that the relevant language in the prior case was dictum. To the extent that the language was not dictum, the court disavowed it, holding that the legislature intended a full waiver of governmental immunity with respect to tort actions arising out of housing authorities' performance of government functions.

Protecting Tenants at Foreclosure Act: Applicable Jurisdiction

Collado v. Boklari, __N.Y.S.2d__, 2009 WL 3734317 (N.Y. Dist. Ct. Nov. 9, 2009). A tenant sought to vacate a judgment of possession and warrant of eviction where the

petitioner was a foreclosure purchaser of the premises. The tenant alleged that the Protecting Tenants at Foreclosure Act (PTFA) required prior receipt of a 90-day notice to quit. However, the court interpreted the PTFA to apply only to those tenancies arising from dwellings in which a federally related mortgage was foreclosed. Because the record did not indicate whether the subject foreclosure involved a federally subsidized mortgage loan, the court found that the tenant was not jurisdictionally covered by the PTFA. The court therefore denied the tenant's motion and allowed the foreclosure purchaser and the sheriff to immediately proceed to eviction.

Fair Housing Act: Post-Acquisition Discriminatory Conduct

Bloch v. Frischholz, __F.3d__, 2009 WL 3789996 (7th Cir. 2009). Jewish condominium owners sued their condominium association and its president under the Fair Housing Act (FHA) because of the association's rule prohibiting owners from placing objects outside of unit entrance doors. The Blochs displayed a mezuzah on the doorposts outside of their unit in accordance with Jewish religious law for years without objection. In 2001, the association enacted a rule prohibiting owners from placing objects outside of unit entrance doors but did not enforce the rule by removing the religious object until mid-2004. The Seventh Circuit held that 42 U.S.C. § 3604(a) and (b) may reach post-acquisition discriminatory conduct that makes a dwelling unavailable to the owner or tenant. Additionally, since the agreement to be governed by the condominium association was a term or condition of sale, the court found that Section 3604(b) prohibited the association from discriminating against the owners through its enforcement of the rules.

Fair Housing Act: HUD Determination Unreviewable Under the Administrative Procedure Act

Shell v. HUD, 2009 WL 4298757 (11th Cir. Dec. 2, 2009) (unreported). The Eleventh Circuit affirmed the district court's decision to dismiss the plaintiff's complaint and to bar him from filing future pro se lawsuits based on his Section 8 benefits. After the PHA terminated his voucher, the plaintiff filed an FHA complaint with the Department of Housing and Urban Development (HUD), claiming that the PHA acted in retaliation for help he provided to another voucher recipient. HUD issued and affirmed a no-cause determination, and the plaintiff filed suit against HUD, the PHA and a PHA employee. The plaintiff alleged that HUD failed to investigate his claim, in violation of the Administrative Procedure Act (APA). The court upheld the dismissal of the APA claim, finding that no statute entitled the court to review the no-cause determination issued by HUD. The court also upheld the district court's injunction limiting the plaintiff's right to file future pro se actions, noting that the plaintiff filed seven cases against the PHA and 34 motions in the instant case alone.

Fair Housing Act: Court Unwilling to Compel HUD to Further Investigate Claims

Wilder v. Preston, 2009 WL 4062347 (D. Md. Nov. 23, 2009). The plaintiff filed six housing discrimination inquiries with HUD under the FHA. For each of the inquiries, HUD found that it lacked jurisdiction. The plaintiff filed suit and asked the court to issue a writ of mandamus compelling HUD to continue to investigate the inquiries. The court held that the plaintiff failed to allege facts that would entitle him to a writ of mandamus for three reasons. First, the plaintiff failed to show that he had a clear right to further investigation of his inquiries. Second, the plaintiff failed to show that HUD had a clear duty to continue to investigate his complaints. The court noted that HUD addressed and considered each of his complaints and made a decision not to bring enforcement actions on his behalf. Third, the court found that the plaintiff could not demonstrate that he lacked an alternative remedy. In addition, the court found that the plaintiff's mental disability did not toll the statute of limitations period under the FHA or Americans with Disability Act because the plaintiff could not show that his disability made him unable to pursue a remedy in federal court.

Fair Housing Act: Eviction Stayed Pending HUD Decision on Complaint

40 West 75th Street LLC v. Horowitz, 2009 WL 4021191 (N.Y. City Civ. Ct. Nov. 19, 2009) (unreported). A landlord filed a holdover proceeding, alleging that the tenant kept a dog in her apartment in violation of her lease and that the dog was a nuisance. The court granted the tenant's motion to dismiss the nuisance claim, holding that the complaint failed to allege a pattern or recurrence of objectionable activity by the dog. However, the court denied the tenant's motion to dismiss, finding a factual dispute as to whether the service animal provision of the New York State Civil Rights Law applied to the tenant. The court granted the tenant's motion to stay the proceeding pending the outcome of an FHA complaint she filed with HUD. The court noted that the landlord did not object to the motion and HUD had accepted the discrimination complaint for further investigation.

Fair Housing Act: Condominium Association Subject to FHA

Moore v. Club at Orlando Condo. Ass'n, Inc., 2009 WL 4015571 (M.D. Fla. Nov. 19, 2009). A prospective owner filed suit

against a condominium association and its manager for racial discrimination under the FHA, 42 U.S.C. § 1981 and 42 U.S.C. § 1982. After the property manager showed the plaintiff, an African American, a condo listed as available, the association manager told the plaintiff that the condo was not available and that the association maintained strict rules against loud parties and overnight guests. The court denied summary judgment for the defendants on the FHA claim, holding that the FHA applied to the association despite the fact that it did not own or lease the condos. The bylaws gave the association authority to reject potential lessees, putting it in a position to affect the availability of housing. In addition, the court denied summary judgment for the defendants on the Section 1981 claim, finding that a jury could conclude that race played a role in the conduct of the manager. As for the cause of action under Section 1982, the court granted summary judgment for the defendants because the plaintiff did not submit an application to rent the condo. The court noted that the futile gesture doctrine might protect a plaintiff who did not apply due to a reasonable belief that the defendants would reject the application, but found that the plaintiff declined to submit an application out of anger at the conduct of the manager.

Fair Housing Act: Evidence Required to Demonstrate Discriminatory Intent

Artisan/American Corp. v. City of Alvin, __F.3d__, 2009 WL 3789902 (5th Cir. 2009). A developer sued the city of Alvin, Texas, for violating the FHA in denying a permit to construct low-income housing. The developer alleged that the city's denial was motivated by racial animus and had a discriminatory impact on racial minorities, specifically Hispanics. The Fifth Circuit upheld summary judgment in favor of the city because the developer failed to raise a genuine issue of material fact as to whether the city's actions were motivated by discriminatory intent or caused a significant discriminatory effect. The developer failed to offer evidence that other non-protected applicants or applications were treated differently around the time of the developer's rejection. The court also found that there was no reasonable inference of racial animus in the city's interpretation of its municipal code because the interpretation was not unreasonable or arbitrary. Unlike those cases in which disparate impact has been found, the developer did not present evidence either of a waiting list for affordable housing or a demonstrated shortage of affordable housing.

Fair Housing Act: Economic Integration Can Be a Legitimate, Facially Neutral Objective

Reese v. Miami-Dade County, 2009 WL 3762994 (S.D. Fla. Nov. 10, 2009). Former residents filed a class action against Miami-Dade County and HUD alleging racial discrimination in the approval, funding and implementation of a revitalization plan for two public housing developments. The court held that there was no evidence of intentional discrimination and that the county articulated a legitimate, facially neutral objective in seeking to shift the model of public housing in the Scott-Carver Homes from that of densely clustered, low-income housing to one of economic integration. The court noted that the expression of a general intent to pursue an affirmative, integrated fair housing plan pursuant to a larger urban revitalization project does not constitute a publication of a statement indicating a preference based on race, or an intention to make such a preference. For HUD, the court held that the administrative record was consistent with the proposition that the county's application was scored favorably because the county designed its plan to attract a broad socioeconomic range of potential residents. Further, there was no indication that the HUD scoring criteria in reviewing applications included an express racial preference or other race-based criteria for replacement housing.

Reasonable Accommodation: Right to Transfer to First-Floor Unit

Solivan v. Valley Hous. Dev. Corp., 2009 WL 3763920 (E.D. Pa. Nov. 9, 2009). Due to her medical condition and because her building did not have an elevator, a tenant requested that the agency that managed her building move her to a first-floor apartment. The agency, a nonprofit created by the local PHA, leased the premises to PHA-qualified, low-income tenants. The tenant fell near the stairs and brought suit, alleging violations of the FHA, Section 504 of the Rehabilitation Act (RA), the Americans with Disabilities Act (ADA), and 42 U.S.C. §§ 1981 and 1983. The court granted summary judgment to the agency on the Section 1981 and 1983 claims, finding that the agency was a private actor and did not act under color of state law. However, the court denied summary judgment regarding the FHA, ADA and RA claims. First, the court held that the two-year statute of limitations started to run when a first-floor apartment that met the tenant's specific requirements became available for accommodation and was denied to the tenant for the first time. Second, the court held that the determination of whether the tenant had a disability within the definition of the ADA was primarily factual. Third, the tenant raised a genuine issue of material fact as to whether her requested accommodation was necessary given her medical condition. Finally, the tenant presented sufficient evidence to raise a genuine issue of material fact as to whether her requested accommodation was reasonable and as to whether the agency failed or refused to provide her such reasonable accommodation as required by law.

Civil Rights Litigation: Criminalization of Homelessness

Catron v. City of St. Petersburg, 2009 WL 3837789 (M.D. Fla. Nov. 17, 2009). Homeless individuals filed suit against the city under 42 U.S.C. § 1983, alleging that police enforcement of city ordinances constituted a policy or custom of harassment and discrimination against homeless persons, in violation of the 14th, First, Fourth and Eighth Amendments. The plaintiffs claimed that the police continually warned, cited and arrested homeless individuals for sleeping, sitting, eating, carrying personal items and alleviating "personal needs" in public. The court found that the plaintiffs had standing to challenge each ordinance as applied. The court concluded, however, that the complaint did not raise a plausible claim of municipal liability under Section 1983 because the number of homeless individuals living in the city and the number of arrests of homeless individuals did not show a custom or practice of harassment or discrimination. In addition, the court dismissed the plaintiffs' 14th and First Amendment claims but denied the city's motion to dismiss the plaintiffs' Fourth and Eighth Amendment claims, finding that the claims would benefit from a more developed record. ■

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices recently issued by the Department of Housing and Urban Development (HUD), the Department of Agriculture (USDA's Rural Housing Service/Rural Development (RD)), Federal Housing Finance Agency, Federal Emergency Management Agency (FEMA) and the Department of Veterans Affairs. For the most part, the summaries are taken directly from the summary of the regulation in the Federal Register or each notice's introductory paragraphs.

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

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

[2]http://www.hudclips.org/cgi/index.cgi.

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

[4]http://www.rdinit.usda.gov/regs.

HUD Federal Register Notices

Fed. Reg. 63,937-63,942 (Dec. 4, 2009)
Housing Trust Fund; Allocation Formula

Summary: The Housing and Economic Recovery Act of 2008 establishes a Housing Trust Fund to be administered by HUD. The purpose of the fund is to provide grants to states to increase and preserve the supply of rental housing for extremely low- and very low-income families, including homeless families, and to increase homeownership for extremely low- and very low-income families. The Housing and Economic Recovery Act of 2008 charges HUD to establish through regulation the formula for the distribution of the Housing Trust Fund to states. This proposed rule submits, for public comment, the proposed formula for allocating funds from the Housing Trust Fund.

Comment Due Date: February 2, 2010.

Fed. Reg. 62,521-62,531 (Nov. 30, 2009)
Federal Housing Administration (FHA): Continuation of FHA Reform—Strengthening Risk Management Through Responsible FHA-Approved Lenders

Summary: Through this proposed rule, HUD continues its efforts to streamline, modernize and strengthen the mortgage insurance functions and responsibilities of FHA. First, FHA proposes to no longer approve loan correspondents as approved participants in FHA programs. Mortgagees would be required to ensure that their loan correspondents meet applicable requirements. The FHA-approved mortgagee will, in turn, act as sponsor as it has in the past. However, in using a sponsor/correspondent relationship, the sponsoring mortgagee must agree to assume responsibility for any loan correspondent that works with the mortgagee in the FHA insured loan, and assume liability for the FHA-insured loan underwritten and closed in the name of the FHA-approved mortgagee. Second, this proposed rule would update the FHA regulations to incorporate criteria specified in the Helping Families Save Their Homes Act of 2009 that preclude certain lending entities from originating an FHA-insured loan, and are designed to ensure that only entities of integrity are involved in the origination of FHA-insured transactions. Third, FHA proposes to increase the net worth requirement for FHA-approved mortgagees for the purpose of ensuring that approved mortgagees are sufficiently capitalized.

Dated: November 30, 2009.

Fed. Reg. 65,781 (Dec. 11, 2009)
Public Housing Mortgage Program: Notice of Web Publication

Summary: Public housing agencies (PHAs) are authorized, by statute, to mortgage their public housing real estate assets to secure financing to undertake development and rehabilitation of low-income housing with HUD approval. To streamline this process, HUD has posted on its website a proposed Notice that proposes the terms and

conditions by which PHAs may undertake such financing with HUD approval. HUD invites PHAs and interested members of the public to review this proposed Notice and submit comments in accordance with the procedures provided in this Federal Register Notice.

Comment Due Date: January 31, 2010.

Fed. Reg. 65,137 (Dec. 9, 2009)
Revitalization Area Designation and Management

Summary: The department accepts requests from local governments or interested nonprofit organizations to designate specified geographic areas as revitalization areas. A request must describe the nominated area in terms of census block groups.

Comments Due Date: January 8, 2010.

Fed. Reg. 63,407 (Dec. 3, 2009)
Notice of Proposed Information Collection: Comment Request; Multifamily Default Status Report

Summary: Mortgagees use this information collection to notify HUD that a project owner is more than 30 days past due on a mortgage payment and to elect to assign a mortgage to the department (per regulations at 24 CFR part 207.256). To avoid an assignment of mortgage to HUD, which costs the government millions of dollars each year, HUD and the mortgagor may develop a plan for reinstating the loan since HUD uses the information as an early warning mechanism. HUD Field Office and Headquarters staff use the data to (a) monitor mortgagee compliance with HUD's loan servicing procedures and assignments; and (b) avoid mortgage assignments in the future. This information is submitted electronically via the Internet.

Comments Due Date: February 1, 2010.

Fed. Reg. 59,582 (Nov. 18, 2009)
Notice of Availability: Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2009 HOPE VI Main Street Grants Program

Summary: HUD announces the availability of the applicant information, submission deadlines, funding criteria and other requirements for HUD's HOPE VI Main Street Grants program NOFA for FY 2009. Approximately $4 million is made available through this NOFA by the Department of Housing and Urban Development Appropriations Act, 2009 for HUD's HOPE VI Main Street Grants program.

Dated: November 6, 2009.

Fed Reg. 58,973 (Nov. 16, 2009)
Notice of Fund Availability (NOFA) for Fiscal Year 2009 Neighborhood Stabilization Program 2 Under the American Recovery and Reinvestment Act of 2009; Correction

Summary: On May 4, 2009, HUD posted its NSP2 NOFA and announced the availability of approximately $1.93 billion available in competitive grants authorized under the American Recovery and Reinvestment Act of 2009. HUD has posted a Notice making further corrections to the NSP2 NOFA. Specifically, the Notice (1) corrects an inconsistency in the NSP2 NOFA regarding when the lead member of a consortium must enter into consortium funding agreements with consortium members; and (2) extends the deadline for submitting such agreements to HUD to January 29, 2010. This Notice only affects applications for funding that have already been submitted to HUD by consortium applicants.

Dated: November 9, 2009.

Fed. Reg. 58,973 (Nov. 16, 2009)
Recovery Act—Green Retrofit Program for Multifamily Housing, Notice of Closing of Application Solicitation

Summary: By Notice issued May 13, 2009, HUD announced the availability of funding for the Green Retrofit Program for Multifamily Housing, a program authorized by the American Recovery and Reinvestment Act of 2009, for the purpose of making, primarily, loans and grants to facilitate utility-saving retrofits and other retrofits that produce environmental benefits in certain existing HUD-assisted multifamily housing. This Notice announces that HUD will cease accepting applications as of November 18, 2009.

Dated: November 9, 2009.

Fed. Reg. 58,305-58,306 (Nov. 12, 2009)
Notice of Certain Operating Cost Adjustment Factors for 2010

Summary: This Notice establishes, for 2010, operating cost adjustment factors (OCAFs). OCAFs are annual factors used to adjust Section 8 rents renewed under Section 524 of the Multifamily Assisted Housing Reform and Affordability Act of 1997.

Effective Date: February 11, 2010.

Fed. Reg. 58,306-58,307 (Nov. 12, 2009)
Notice of Program Requirements for Community Development Block Grant Program Funding Under the American Recovery and Reinvestment Act of 2009: Reallocations

Summary: On May 5, 2009, HUD posted on its website its "Notice of Program Requirements for Community Development Block Grant Program Funding Under the American Recovery and Reinvestment Act of 2009." The Notice advised the public of $1 billion in Community Development Block Grant (CDBG) funds available to states and local governments to carry out, on an expedited basis, eligible activities under the CDBG program. The May 5, 2009, Notice also indicated that HUD would publish in the Federal Register criteria for reallocating and awarding CDBG-R funds that are not awarded to any eligible jurisdiction. This Notice announces the process HUD will use to reallocate this assistance.

Dated: October 13, 2009.

Federal Housing Finance Agency Federal Register Notices

Fed. Reg. 64,691-64,692 (Dec. 8, 2009)
Proposed Collection; Comment Request

Summary: The Federal Housing Finance Agency is seeking public comments concerning a currently approved information collection known as "Affordable Housing Program (AHP)." The Federal Home Loan Bank Act requires each Bank to establish an affordable housing program, the purpose of which is to enable a Bank's members to finance homeownership by households with incomes at or below 80% of the area median income, and to finance the purchase, construction or rehabilitation of rental projects in which at least 20% of the units will be occupied by and affordable for households earning 50% or less of the area median income. Banks use AHP data collection to determine whether an AHP applicant satisfies the statutory and regulatory requirements to receive AHP subsidies.

Comments Due Date: January 7, 2010

HUD Notices

H 09-20 (Dec. 7, 2009)
Enterprise Income Verification (EIV) System

Summary: This Notice provides updated instructions to owners and management agents administering Multifamily Housing's rental assistance programs. Instructions are provided on using the data in EIV for verifying, at the time of recertification, the employment and income of individuals participating in the rental assistance programs and for using reports and data available in EIV. It is anticipated that use of the EIV system for upfront income verification will become mandatory on January 31, 2010. This Notice does not apply to the Low-Income Housing Tax Credit program or the Rural Housing Service Section 515 program for certification of tenants who do not receive Section 8 assistance.

H 09-19 (Dec. 7, 2009)
Fiscal Year 2009 Policy for Capital Advance Authority Assignments, Instructions and Program Requirements for the Section 202 and Section 811 Capital Advance Programs

Summary: This Notice transmits the following for Fiscal Year 2009: Changes to Application/Selection Process; Application Processing Schedule; Submission Requirements for Selection Materials; Section 202 Allocation Chart; Section 811 Allocation Chart; Section 811 Workshop Instructions; Section 202 Funding Notification; Section 811 Funding Notification; Applications Processing and Selections Policy; Section 202 Minority Business Enterprise Goals; Section 811 Minority Business Enterprise Goals; Initial Screening for Curable Deficiencies; Technical Review Sheets; Section 202 Standard Rating Criteria Form; and Section 811 Standard Rating Criteria Form.

PIH 2009-50 (ONAP) (Dec. 3, 2009)
Statutory Changes to the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA)

Summary: On October 14, 2008, the NAHASDA Reauthorization Act of 2008 became law. In 1998, 2000, 2002, 2004 and 2005, other amendments to NAHASDA also became law. Compliance with these statutory provisions was required upon enactment. In this Notice, HUD highlights certain amendments that may be the subject of upcoming negotiated rulemaking. A negotiated rulemaking committee is being established through a series of Federal Register Notices, and will meet periodically. The dates and places of such meetings will be announced to the public through Federal Register Notices.

PIH 2009-48 (HA) (Nov. 25, 2009)
Administering the Community Service and Self-Sufficiency Requirement (CSSR)

Summary: The Department is issuing this Notice to assist public housing authorities' (PHAs) understanding and administration of the mandated Community Service and Self-Sufficiency Requirement (CSSR) and in response to an audit report issued by the Office of Inspector General on March 24, 2008. This Notice addresses:

- Statutory/Regulatory Requirements for Administering CSSR;
- Data Collection and Reporting Requirements;
- Action to take against non-compliant tenants; and,
- Penalties/sanctions against PHAs housing ineligible households.

PIH 2009-47 (HA) (Nov. 19, 2009)
Public Housing Operating Subsidy Calculations for Calendar Year 2010

Summary: This Notice provides public housing agencies (PHAs) with instructions for operating subsidy calculation submissions in Calendar Year 2010 as funded from Federal Fiscal Year 2010 appropriations.

Rural Housing Service/Rural Development Unnumbered Letters

Low-Income Housing Tax Credit, Tax Credit Assistance, and Tax Credit Exchange Program Funds for Multi-Family Housing Properties (Nov. 20, 2009)

Summary: The purpose of this unnumbered letter is to further clarify the impact on Rural Development Multi-Family Housing properties of using Tax Credit Exchange Program Grants and Tax Credit Assistance Program funds provided by state tax credit or housing finance agencies through the Low-Income Housing Tax Credit program as part of the American Recovery and Reinvestment Act. ■

INDEX

Housing Law Bulletin

January–December 2009

ARTICLES OF GENERAL INTEREST

Chasing the Justice Dream: Housing as Justice .... Jan 09 1

Court: Owner of Massive NYC Complex Wrongfully Raised Rents for Thousands of Tenants .... Mar 09 87

Philanthropy Must Turn More Attention to Housing Issues .... Apr-May 09 99

Doubling of Capital Fund Appropriations Offers Opportunities for Housing Authorities and Residents .... Apr-May 09 108

Court Will Not Close Mobile Home Park in Absence of Viable Alternative Housing .... Jul 09 172

HUD Shifts Approach to Lifetime Registered Sex Offenders .... Oct 09 257

HUD Reissues Social Security Number Rules .... Nov-Dec 09 275

CASES

This is an index of cases reported on in separate *Bulletin* articles in 2009. For cases reported on in summary form, see “Recent Housing Cases” below.

D.C. Circuit Enforces Protections for Enhanced Voucher Holders Under Federal and Local Law
(Feemster v. BSA Limited Partnership) .... Jan 09 4

Fair Housing Tax Credit Case Survives Motion to Dismiss
(Inclusive Communities Project v. Texas Dep’t. of Hous. and Cmty. Affairs) .... Jan 09 10

Arroyo Vista Tenants Continue Challenge to Proposed Public Housing Disposition
(Arroyo Vista Tenants Ass’n v. City of Dublin) .... Jan 09 14

Court: VAWA Bars Landlord from Evicting Domestic Violence Victim
(Metro North Owners, LLC v. Thorpe) .... Feb 09 51

Supreme Judicial Court of Massachusetts Upholds Rights of Tenants with Disabilities
(Boston Housing Authority v. Bridgewaters) .... Feb 09 56

Settlement Upholds Tenant’s Right to Operate Child Care Facility in Her Apartment
(Morrison v. Vineyard Creek, L.P.) .... Mar 09 86

Court: Owner of Massive NYC Complex Wrongfully Raised Rents for Thousands of Tenants
(Roberts v. Tishman Speyer Properties, L.P.) .... Mar 09 87

Federal District Court Strikes Down Independent Living and Invasive Medical Records Requirements
(Laflamme v. New Horizons, Inc.) .... Apr-May 09 105

State Appellate Court Recognizes Bankruptcy as Public Housing Eviction Defense
(Housing Authority of New Orleans v. Eason) .... Jun 09 137

Court Will Not Close Mobile Home Park in Absence of Viable Alternative Housing
(United States v. Duro) .... Jul 09 172

Quiet Title Claim Denied Following Attempted Prepayment of RHS 515 Loan
(Schroeder v. United States) .... Aug 09 199

United States Agrees that HUD Voucher Regulations Do Not Preempt Local Eviction Controls
(Barrientos v. 1801-1825 Morton, LLC) .... Aug 09 201

Seventh Circuit Rules that City Can Take HUD-Subsidized Property Over Objection of HUD, Owners and Tenants
(City of Joliet, Illinois vs. New West, L.P., et al.) .... Aug 09 209

Federal One-Strike Law Does Not Preempt PHA from Granting Tenants the Right to Cure Lease Violations
(Housing Authority of Covington v. Turner) .... Aug 09 211

Cities' Suits Seek Foreclosure-Related Damages
(Mayor and City Council of Baltimore v. Wells Fargo Bank) (City of Cleveland v. Ameriquest Mortgage Secs., Inc.) .... Sep 09 235

Historic Settlement Reached in Desegregation Case Against Westchester County
(United States v. Westchester County) .... Oct 09 260

Court Blocks HUD Contract Termination for Due Process Violations
(Roundtree v. HUD) .... Oct 09 262

Nonprofit Obtains Mixed Ruling on Fair Market Rents
(Inclusive Cmtys. Project, Inc. v. HUD) .... Oct 09 265

Ninth Circuit: HUD Voucher Regulations Do Not Preempt Local Eviction Controls
(Barrientos v. 1801-1825 Morton LLC) .... Nov-Dec 09 278

Court Upholds Rent Control on Thousands of Units at Massive NYC Complex
(Roberts v. Tishman Speyer Properties, L.P.) .... Nov-Dec 09 293

HUD Enjoined From Relocating Tenants and Emptying Building
(Cheatham v. Donovan) .... Nov-Dec 09 295

DOMESTIC VIOLENCE

HUD Publishes Violence Against Women Act Interim Rule .... Jan 09 7

Court: VAWA Bars Landlord from Evicting Domestic Violence Victim .... Feb 09 51

EVICTIONS

(see also FORECLOSURE; HOUSING CHOICE VOUCHER PROGRAM; PUBLIC HOUSING)

L.A. Acts to Prevent Arbitrary Evictions from Foreclosed Units .... Jan 09 13

Will Fannie Mae's Lead in REO Rental Policy Set the Standard for the Private Market? .... Feb 09 53

State Appellate Court Recognizes Bankruptcy as Public Housing Eviction Defense .... Jun 09 137

Court Will Not Close Mobile Home Park in Absence of Viable Alternative Housing .... Jul 09 172

Foreclosure and Section 8 Tenancy: Federal Legislative Developments .... Aug 09 193

United States Agrees that HUD Voucher Regulations Do Not Preempt Local Eviction Controls .... Aug 09 201

Federal One-Strike Law Does Not Preempt PHA from Granting Tenants the Right to Cure Lease Violations .... Aug 09 211

California Cities Take Steps to Protect Tenants in Foreclosed Properties .... Sep 09 234

Agencies Begin Implementing the Protecting Tenants at Foreclosure Act .... Oct 09 249

Ninth Circuit: HUD Voucher Regulations Do Not Preempt Local Eviction Controls .... Nov-Dec 09 278

HUD Enjoined From Relocating Tenants and Emptying Building .... Nov-Dec 09 295

FAIR HOUSING/DESEGREGATION/REASONABLE ACCOMMODATION

Fair Housing Tax Credit Case Survives Motion to Dismiss .... Jan 09 10

Supreme Judicial Court of Massachusetts Upholds Rights of Tenants with Disabilities .... Feb 09 56

Settlement Upholds Tenant's Right to Operate Child Care Facility in Her Apartment .... Mar 09 86

Federal District Court Strikes Down Independent Living and Invasive Medical Records Requirements .... Apr-May 09 105

Historic Settlement Reached in Desegregation Case Against Westchester County .... Oct 09 260

Nonprofit Obtains Mixed Ruling on Fair Market Rents .... Oct 09 265

FORECLOSURE

L.A. Acts to Prevent Arbitrary Evictions from Foreclosed Units .... Jan 09 13

Will Fannie Mae's Lead in REO Rental Policy Set the Standard for the Private Market? .... Feb 09 53

San Francisco and Oakland Issue Declarations Protecting Tenants from Utility Shutoffs .... Mar 09 89

Obama Signs Law Protecting Renters in Foreclosed Properties .... Jun 09 133

RD Foreclosures Delayed in Twenty-Two States .... Jun 09 143

Oakland Alleges that Post-Foreclosure Evictions Violated Just Cause Ordinance .... Jul 09 170

Foreclosure and Section 8 Tenancy: Federal Legislative Developments .... Aug 09 193

Courts Find Private Right of Action Under the Servicemembers Civil Relief Act .... Aug 09 205

Home Affordable Modification Program: Help for Homeowners or Another Dead End? .... Sep 09 230

California Cities Take Steps to Protect Tenants in Foreclosed Properties .... Sep 09 234

Cities' Suits Seek Foreclosure-Related Damages .... Sep 09 235

Agencies Begin Implementing the Protecting Tenants at Foreclosure Act .... Oct 09 249

HUD Enjoined From Relocating Tenants and Emptying Building .... Nov-Dec 09 295

HOPE VI PROGRAM AND CHOICE NEIGHBORHOODS INITIATIVE

(see also HUD; PUBLIC HOUSING)

Obama Administration Rolls Out Choice Neighborhoods Initiative .... Sep 09 223

HOUSING AND URBAN DEVELOPMENT, DEPARTMENT OF (HUD)

(see also ARTICLES OF GENERAL INTEREST; HOUSING CHOICE VOUCHER PROGRAM; PUBLIC HOUSING; PRESERVATION OF LOW-INCOME HOUSING STOCK)

HUD-VASH Notice Reaffirms PHAs' Obligations Regarding Issuance of Vouchers .... Feb 09 58

Public Housing Plan Requirements Continue to Erode .... Feb 09 60

HUD Appropriations for FY 2009 .... Mar 09 75

Delayed HUD Rule Would Alter Social Security Number Requirements .... Mar 09 80

Doubling of Capital Fund Appropriations Offers Opportunities for Housing Authorities and Residents .... Apr-May 09 108

HUD Implements Homelessness Prevention and Rapid Re-Housing Program .... Apr-May 09 112

HUD-VASH Notice Guides PHAs in Project-Basing Vouchers .... Apr-May 09 116

Administration Releases More Detailed Proposed FY 2010 HUD Budget .... Jun 09 134

Stimulus Funding Seeks to Improve Energy Efficiency of Multifamily Housing ... Jun 09 146
Obama Administration Rolls Out Choice Neighborhoods Initiative ... Sep 09 223
HUD Delays Effective Date of Social Security Number Rule ... Sep 09 226
HUD, PHAs and Advocates Respond to Voucher Funding Shortfalls ... Sep 09 227
HUD Shifts Approach to Lifetime Registered Sex Offenders ... Oct 09 257
Court Blocks HUD Contract Termination for Due Process Violations ... Oct 09 262
Nonprofit Obtains Mixed Ruling on Fair Market Rents ... Oct 09 265
HUD Reissues Social Security Number Rules ... Nov-Dec 09 275
Recent Developments Show Promise for Enforcing Section 3 ... Nov-Dec 09 289
HUD Enjoined From Relocating Tenants and Emptying Building ... Nov-Dec 09 295

HOUSING CHOICE VOUCHER PROGRAM

HUD Issues New Guidance to Ensure Full Implementation of Voucher Portability ... Feb 09 59
NHLP Survey of Northern California Utility Allowances Reveals Potential Deficiencies ... Jun 09 139
Foreclosure and Section 8 Tenancy: Federal Legislative Developments ... Aug 09 193
United States Agrees that HUD Voucher Regulations Do Not Preempt Local Eviction Controls ... Aug 09 201
HUD, PHAs and Advocates Respond to Voucher Funding Shortfalls ... Sep 09 227
Nonprofit Obtains Mixed Ruling on Fair Market Rents ... Oct 09 265
Ninth Circuit: HUD Voucher Regulations Do Not Preempt Local Eviction Controls ... Nov-Dec 09 278
The Section 8 Voucher Reform Act: Comparing the 2007 and 2009 Versions ... Nov-Dec 09 281

LIHTC

Fair Housing Tax Credit Case Survives Motion to Dismiss ... Jan 09 10
Section 504 Protections Apply to ARRA-funded LIHTC Projects ... Jul 09 182

PRESERVATION OF LOW-INCOME HOUSING STOCK

(see also HUD; PUBLIC HOUSING; RURAL HOUSING SERVICE/RURAL DEVELOPMENT/USDA)

D.C. Circuit Enforces Protections for Enhanced Voucher Holders Under Federal and Local Law ... Jan 09 4
Arroyo Vista Tenants Continue Challenge to Proposed Public Housing Disposition ... Jan 09 14
Court: Owner of Massive NYC Complex Wrongfully Raised Rents for Thousands of Tenants ... Mar 09 87
MacArthur Foundation Launches Preservation Initiatives in Twelve Selected Cities and States ... Apr-May 09 101
Public Housing Demolition in Galveston, Texas Is Subject to One-for-One Replacement ... Jun 09 144
Court Will Not Close Mobile Home Park in Absence of Viable Alternative Housing ... Jul 09 172
Frank and Waters Renew Their Call for Moratorium on Public Housing Demolition and Disposition ... Jul 09 175
Fifth Circuit Holds Public Housing Demolition Law Unenforceable ... Jul 09 178
Quiet Title Claim Denied Following Attempted Prepayment of RHS 515 Loan ... Aug 09 199
Seventh Circuit Rules that City Can Take HUD-Subsidized Property Over Objection of HUD, Owners and Tenants ... Aug 09 209
Court Blocks HUD Contract Termination for Due Process Violations ... Oct 09 262

PUBLIC HOUSING

(see also FAIR HOUSING/DESEGREGATION; HUD)

Public Housing Demolition in Galveston, Texas Is Subject to One-for-One Replacement .... Jun 09 144

Frank and Waters Renew Their Call for Moratorium on Public Housing Demolition and Disposition .... Jul 09 175

Fifth Circuit Holds Public Housing Demolition Law Unenforceable .... Jul 09 178

Federal One-Strike Law Does Not Preempt PHA from Granting Tenants the Right to Cure Lease Violations .... Aug 09 211

Obama Administration Rolls Out Choice Neighborhoods Initiative .... Sep 09 223

RECENT CASES

This is an index of the cases listed in the Recent Housing Cases section of each issue of the *Bulletin*. For cases reported on in separate articles, see the "Cases" heading above.

Constitutional Claims

Due Process: No Cognizable Property Right Found Where Housing Authority Dramatically Increased Rents
Lowe v. S. Delta Reg'l Hous. Auth., 2009 WL 3297186 (N.D. Miss. Oct. 9, 2009) .... Nov-Dec 09 300

Housing Authority Employees Not State Actors Subject to the Fourth Amendment
State v. Brittingham, __P.3d__, 2009 WL 3489407 (Kan. Ct. App. 2009) .... Nov-Dec 09 299

Takings: Mobile Home Rent Control Ordinance Held a Compensable Taking
Guggenheim v. City of Goleta, __ F.3d __, 2009 WL 306815 (9th Cir. 2009)................ Nov-Dec 09 301

Fair Housing Act

Administrative Remedies Need Not Be Exhausted
Carter v. Hamilton Affordable Hous., LLC, 2009 WL 3245483 (D.N. J. Oct. 6, 2009) (unreported).... Nov-Dec 09 300

Applicability to Older Multifamily Units Undergoing Renovations
Reyes v. Fairfield Props., __ F. Supp. 2d __, 2009 WL 3063082 (E.D.N.Y. 2009) .... Nov-Dec 09 300

Application to Emergency Shelter
Community House v. City of Boise, 2009 WL 2382428 (D. Idaho July 29, 2009) .... Sep 09 240

Challenge to Curfew Provisions in Leases Dismissed
City of Kansas City v. Yarco Co., 2009 WL 3379096 (W.D. Mo. Oct. 19, 2009) .... Nov-Dec 09 300

Conclusory Allegations of Sex Discrimination Insufficient to State a Claim
Willis v. Buckner, 2009 WL 2382771 (E.D. Mo. July 31, 2009) .... Sep 09 240

Disabled Tenant Obtains Temporary Restraining Order Halting Eviction
Gwin v. Pyros, 2009 WL 1269075 (W.D. Pa. May 6, 2009) .... Jun 09 151

Discriminatory Enforcement of Rental Ordinance
Raab Family P'ship v. Borough of Magnolia, 2009 WL 361135 (D.N.J. Feb. 13, 2009) .... Mar 09 93

Establishing Prima Facie Case of Discrimination
Lindsay v. Yates, __ F.3d __, 2009 WL 2568196 (6th Cir. 2009) .... Oct 09 269

False Claims Act: Failure to Analyze Impediments to Fair Housing
United States v. Westchester County, 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009) .... Mar 09 92

Habitability Complaints Do Not Constitute Protected Activities for Purposes of Fair Housing Act Retaliation Claim
Williams v. N.Y. City Hous. Auth., 2009 WL 804137 (S.D.N.Y. Mar. 26, 2009) .... Apr-May 09 118

Landlord Not Required to Make a Reasonable Accommodation to Criminal History Policy
Evans v. UDR Inc., 2009 WL 875321 (E.D.N.C. Mar. 24, 2009) .... Apr-May 09 118

Minimum Floor Space Requirement Was Not Discriminatory
Homebuilders Ass'n v. City of Brandon, __ F. Supp. 2d __, 2009 WL 2151144 (S.D. Miss. 2009) ...... Oct 09 267

No Reasonable Accommodation Required Where Tenant Failed to Prove that Condominium Association Knew of His Disability
Davis v. Shoreline Towers Phase I Condo. Ass'n, 2009 WL 691378 (N.D. Fla. Mar. 12, 2009) .... Apr-May 09 120

Owner Vicariously Liable for Property Manager's Sexual Harassment
Boswell v. Gumbaytay, 2009 WL 1515872, slip op. (M.D. Ala. June 1, 2009) .... Jul 09 187

Pattern or Practice of Race Discrimination; Vicarious Liability
United States v. Sturdevant, 2009 WL 1211051 (D. Kan. May 1, 2009) .... Jun 09 151

Policy of Assessing Applicants' Disabilities Constitutes Discrimination
Laflamme v. New Horizons, Inc., __ F. Supp. 2d __, 2009 WL 840758 (D. Conn. Mar. 31, 2009) ...... Apr-May 09 116

Preliminary Injunction Denied for Failure to Establish Prima Facie Case of Disparate Impact
Mt. Holly Citizens in Action, Inc. v. Twp. of Mt. Holly, 2009 WL 387753 (D.N.J. Feb. 13, 2009) .... Mar 09 93

Reasonable Accommodation to Pet Policy
Echeverria v. Krystie Manor, L.P., 2009 WL 857629 (E.D.N.Y. Mar. 30, 2009) .... Apr-May 09 117

Reasonable Accommodation: University Not Required to Grant Waiver to Campus Housing Policy
Fialka-Feldman v. Oakland Univ. Bd. of Trs., 2009 WL 275652 (E.D. Mich. Feb. 5, 2009) .... Mar 09 94

Rejection of Disabled Applicant Based on Poor Credit History Upheld
Sutton v. Piper, 2009 WL 2341491 (6th Cir. July 30, 2009) .... Oct 09 268

Organization Had Standing to Sue
Metro. St. Louis Equal Hous. Opportunity Council v. Lighthouse Lodge, LLC, 2009 WL 1576735, slip op. (W.D. Mo. June 4, 2009) .... Jul 09 187

Statute of Limitations

Metro. St. Louis Equal Hous. Opportunity Council v. Lighthouse Lodge, LLC, 2009 WL 1576735, slip op. (W.D. Mo. June 4, 2009) .... Jul 09 187

N.D. Dep't of Labor v. Matrix Props. Corp., __ N.W.2d __, 2009 WL 2168747 (N.D. 2009) .... Sep 09 240

Sentell v. RPM Mgmt. Co., 2009 WL 2601367 (E.D. Ark. Aug. 24, 2009) .... Oct 09 269

Summary Judgment Upheld Where Tenant Failed to Establish Disability
Hawn v. Shoreline Towers Phase 1 Condo. Ass'n, Inc., 2009 WL 3004036 (11th Cir. Sept. 22, 2009) (per curiam) (unreported) .... Nov-Dec 09 300

Temporary Restraining Order Granted to Tenant Seeking Extra Keys as a Reasonable Accommodation
Stross v. Gables Condo. Ass'n, 2009 WL 1770129 (W.D. Wash. June 18, 2009) .... Aug 09 215

Tenant and Sublessee Entitled to Damages from Race-Based Discrimination
Ho v. Donovan, __ F.3d __, 2009 WL 1751490 (7th Cir. 2009) .... Aug 09 215

Tenant's Testimony Alone Sufficient to Establish Disability, Request for Accommodation
Powers v. Kalamazoo Breakthrough Consumer Hous. Coop., 2009 WL 2922309 (W.D. Mich. Sept. 9, 2009) .... Oct 09 268

Testers Not Required to Complete Applications in Order to Establish Prima Facie Case
Fair Hous. Center of Washtenaw County v. Town & Country Apartments, 2009 WL 497402 (E.D. Mich. Feb. 26, 2009) .... Apr-May 09 121

Vicarious Liability
United States v. Rathbone Retirement Cmty. Inc., 2009 WL 2147878 (S.D. Ind. July 15, 2009) .... Sep 09 240

Voucher Tenant Stated a Disability Discrimination Claim by Alleging that Landlord Refused to Provide Key to Elevator
Dinapoli v. DPA Wallace Ave II, LLC, 2009 WL 755354 (S.D.N.Y. Mar. 23, 2009) .... Apr-May 09 119

Foreclosure

Court Finds No Property Interest in Loan Modifications
Williams v. Geithner, 2009 WL 3757380 (D. Minn. Nov. 9, 2009) .... Nov-Dec 09 301

Court Invalidates Foreclosures Based on Post-Sale Assignments
U.S. Bank Nat'l Ass'n v. Ibanez, 2009 WL 3297551 (Mass. Land Ct. Oct. 14, 2009) (unreported) ... Nov-Dec 09 301

Homeowner Could Not Be Evicted Because Trial Court Could Not Adjudicate Title In a Forcible Detainer Action
Mortgage Elec. Registration Sys. v. Young, 2009 WL 1564994 (Tex. App. June 4, 2009) (unreported).. Jul 09 187

Order Confirming Foreclosure Sale Sufficient to Confer Possession Upon Purchaser
Chase Manhattan Bank v. Robert-Surzano, 2009 WL 1871467 (D.V.I. June 22, 2009) .... Aug 09 216

Housing Opportunities for Persons with AIDS

Case Found Moot Where City Voluntarily Rescinded Rent Increase
Rivers v. Doar, __ F. Supp. 2d __, 2009 WL 2253193 (E.D.N.Y. July 29, 2009) .... Sep 09 239

Eviction for Drug Possession
Garden View, LLC v. Fletcher, __ N.E.2d __, 2009 WL 2707594 (Ill. App. Ct. Aug. 27, 2009) .... Oct 09 269

Housing Choice Voucher Program

Acceptance of Section 8 Vouchers Does Not Constitute Receipt of Federal Assistance
Echeverria v. Krystie Manor, L.P., 2009 WL 857629 (E.D.N.Y. Mar. 30, 2009) .... Apr-May 09 117

Breach of Consent Decree Was Immaterial
NAACP v. Donovan, 2009 WL 792301 (D. Mass. Mar. 17, 2009) .... Apr-May 09 119

Class Certification Granted in Disability Discrimination Case
Taylor v. Hous. Auth. of New Haven, __ F. Supp. 2d__, 2009 WL 650381 (D. Conn. Mar. 9, 2009)... Apr-May 09 121

Criminal Activity Terminations

Fyksen v. Dakota County Cmty. Dev. Agency, 2009 WL 605663 (Minn. Ct. App. Mar. 10, 2009) .. Apr-May 09 120

Costa v. Fall River Hous. Auth., 903 N.E.2d 1098 (Mass. 2009) .... Jun 09 153

Eviction Must Comply with State Law Evidentiary Requirements
Miles v. Fleming, __ P.3d __, 2009 WL 2096216 (Colo. 2009) .... Oct 09 268

Exception Payment Standard and Utility Allowances as Reasonable Accommodations
Spieth v. Bucks County Hous. Auth., 2009 WL 197559 (E.D. Pa. Jan. 28, 2009) .... Feb 09 64

Housing Authority Entitled to Recover All Payments Made While Owner Was in Breach of Housing Assistance Payments Contract
Thirty LLC v. Omaha Hous. Auth., __N.W.2d__, 2009 WL 1763128 (Neb. Ct. App. June 23, 2009).. Aug 09 214

Inability to Comply with Program Requirement Due to Limited English Proficiency Did Not Constitute Failure to Cooperate
Hassan v. Dakota County Cmty. Dev. Agency, 2009 WL 749033 (Minn. Ct. App. Mar. 24, 2009) (unreported) .... Apr-May 09 118

Increase in Tenant's Share of Utilities Not a Rent Increase
Winterfield Properties LLC v. Wood, 2009 WL 467071 (Wis. Ct. App. Feb. 26, 2009) .... Mar 09 92

Landlord's Failure to Complete Housing Assistance Payments Contract
Anthony v. Cole, 2009 WL 26688 (N.Y. Dist. Ct. Jan. 5, 2009) (unreported) .... Feb 09 65

Missing Appointment Does Not Constitute Per Se Failure to Cooperate
Ali v. Dakota County Cmty. Dev. Agency, 2009 WL 511158 (Minn. Ct. App. Mar. 3, 2009) (unreported) .... Mar 09 91

Motion to Enjoin Retaliatory Eviction
Johnson v. Iowa Dist. Ct., 2009 WL 142543 (Iowa Ct. App. Jan. 22, 2009) (unreported) .... Feb 09 64

Overstaying Lease Term Constitutes Serious Lease Violation
Wilhite v. Scott County Hous. & Redev. Auth., __N.W.2d__, 2009 WL 65595 (Minn. Ct. App. 2009).. Feb 09 65

Private Landlord Was Not a State Actor
Visintini v. Hayward, 2009 WL 2413356 (N.D. Cal. Aug. 5, 2009) .... Sep 09 239

Rent Overcharge after Holdover Proceeding
Paris v. Oyesanya, 22 Misc. 3d 141(A), 2009 WL 679504 ....
(N.Y. App. Term Mar. 12, 2009) (unreported) Apr-May 09 120

Repayment of Funds No Defense in Government Theft Action
United States v. Fields, 2009 WL 1090059 (11th Cir. Apr. 23, 2009) (per curiam) (unreported) ...... Jun 09 152

Rooker-Feldman Doctrine; Res Judicata
Pondexter v. Allegheny County Hous. Auth., 2009 WL 1144022
(3d Cir. Apr. 29, 2009) (unreported) .... Jun 09 151

Source of Income Discrimination

Doe v. WCP I, LLC, 2009 WL 1564909 (Cal. Ct. App. June 4, 2009) (unreported) .... Jul 09 187

Tapia v. Successful Mgmt. Corp., 2009 WL 2163595 (N.Y. Sup. Ct.)(July 20, 2009)(unreported).. Sep 09 239

Timkovsky v. 56 Bennett, LLC, __ N.Y.S.2d __, 2009 WL 445097 (N.Y. Sup. Ct. 2009) .... Mar 09 93

Tenant Entitled to Damages for Owner's Collection of Illegal Side Payments
Ray v. Thirty LLC, 2009 WL 1819288 (Neb. Ct. App. June 23, 2009) (unreported) .... Aug 09 214

Tenant May Not Withhold Rent
Gandy v. Hous. Auth. of San Diego, 2009 WL 1154281 (Cal. Ct. App. Apr. 29, 2009) (unreported) .... Jun 09 152

Tenant Was Obligated to Report All Changes in Income Regardless of the Duration and Time of Employment
Larsen v. Dakota County Cmty. Dev. Agency, 2009 WL 982124
(Minn. Ct. App. Apr. 14, 2009) (unreported)........ Jun 09 153

Termination for Failure to Report Income
Sandstrom v. Dakota County Cmty. Dev. Agency, 2009 WL 437785
(Minn. Ct. App. Feb. 24, 2009) (unreported) .... Mar 09 92

Termination for Unauthorized Occupant
Jones v. Dakota County Cmty. Dev. Agency, 2009 WL 2151158
(Minn. Ct. App. July 21, 2009) (unreported) .... Sep 09 239

Termination Hearings: Procedural Protections

Augusta v. Cmty. Dev. Corp. of Long Island, 2008 WL 5378386 (E.D.N.Y. 2008)........ Jan 09 16

Bouie v. New Jersey Dep't of Cmty. Affairs, ___ A.2d ___, 2009 WL 1543838
(N.J. Super. Ct. App. Div. 2009)........ Jul 09 186

Brantley v. W. Valley City Hous. Auth., 2009 WL 301820 (D. Utah Feb. 4, 2009........ Mar 09 94

Bush v. Mulligan, 869 N.Y.S.2d 569 (N.Y. App. Div. 2008) .... Jan 09 17

Costa v. Fall River Hous. Auth., 903 N.E.2d 1098 (Mass. 2009)........ Jun 09 153

Gandy v. Hous. Auth. of San Diego, 2009 WL 1154281
(Cal. Ct. App. Apr. 29, 2009) (unreported) .... Jun 09 152

Hassan v. Dakota County Cmty. Dev. Agency, 2009 WL 437775
(Minn. Ct. App. Feb. 24, 2009) (unreported)........ Mar 09 92

Loving v. Brainerd Hous. & Redev. Auth., 2009 WL 294289 (D. Minn. Feb. 5, 2009)........ Mar 09 94

Pittman v. Dakota County Cmty. Dev. Agency, 2009 WL 112948
(Minn. Ct. App. Jan. 20, 2009) (unreported) .... Feb 09 64

Vann v. Dakota County Cmty. Dev. Agency, 2009 WL 982117
(Minn. Ct. App. Apr. 14, 2009) (unreported)........ Jun 09 153

Williams v. Hous. Auth. of Raleigh, 2009 WL 321628 (4th Cir. Feb. 10, 2009)
(per curiam) (unreported) .... Mar 09 93

Termination Unwarranted Where Tenant Failed to Recertify Due to Incarceration
Gist v. Mulligan, __ N.Y.S.2d __, 2009 WL 3048404 (N.Y. App. Div. 2009) .... Nov-Dec 09 298

HUD-Subsidized Housing: Failure to Demonstrate Substantial or Repeated Lease Violations
Millennium Hills Hous. Dev. Fund Corp. v. Patterson, 2009 WL 3321432 (N.Y. Dist. Ct. Oct. 16, 2009) (unreported) .... Nov-Dec 09 299

Preemption

Inclusionary Zoning: State Law Preempts City's Affordable Housing Requirements
Palmer/Sixth St. Props., L.P. v. City of Los Angeles, 96 Cal. Rptr. 3d 875 (Cal. Ct. App. 2009).......... Sep 09 240

Limited English Proficiency: California Law Regarding Translation of Loan Documents Not Preempted by Federal Law
Reyes v. Premier Home Funding, Inc., 2009 WL 1704574 (N.D. Cal. June 17, 2009) .... Aug 09 216

Megan's Law: County Ordinance Restricting Residency of Sex Offenders Preempted by State Law
Fross v. County of Allegheny, 2009 WL 763557 (W.D. Pa. Mar. 20, 2009) .... Apr-May 09 119

Preservation

No Statutory Authorization Required for Prepayment of Mortgage Subsidized by State Program
Johnson v. N.Y. State Urban Dev. Corp., ___ N.Y.S.2d ___, 2009 WL 1740816 (N.Y. Sup. Ct. 2009)... Aug 09 215

Section 207 Program: Right to Prepayment Can Be Conditioned Upon HUD Approval
St. Mark's Place Hous. Co. v. HUD, 2009 WL 1543688, slip op. (D.D.C. June 3, 2009) .... Jul 09 187

Procedural Issues

Administrative Procedures Act: Reviewability of HUD Decision
Copeland v. United States, 2008 WL 5349904 (S.D. Fla. Dec. 22, 2008) .... Jan 09 17

Forcible Eviction: Jury Properly Considered Circumstances as Part of Compensatory Damage Award
Johns v. Stillwell, 2009 WL 2390991 (W.D. Va. Aug. 4, 2009).......... Sep 09 240

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).......... Jan 09 17

Servicemembers Civil Relief Act: Implied Right of Action
Hurley v. Deutsche Bank Trust Co. Americas, 2009 WL 701006 (W.D. Mich. Mar. 13, 2009) .... Apr-May 09 120

Project-Based Section 8

Agency's Action Against HUD Must Be Filed in Court of Federal Claims
Cathedral Square Partners v. S.D. Hous. Dev. Auth., 2009 WL 873998 (D.S.D. Mar. 30, 2009) ..... Apr-May 09 117
Greenleaf Ltd. v. Ill. Hous. Dev. Auth., 2009 WL 449100 (N.D. Ill. Feb. 23, 2009).......... Apr-May 09 117

Eviction Reversed for Failure to Provide Evidence of Proper Termination Notice
Timber Ridge v. Caldwell, 672 S.E.2d 735 (N.C. Ct. App. 2009) .... Mar 09 92

HUD Enjoined from Relocating Tenants
Cheatham v. Donovan, 2009 WL 2922150 (E.D. Mich. Sept. 8, 2009).......... Oct 09 268

Notice Requirements and Termination for Material Noncompliance
New Greenwich Gardens Assocs. v. Saunders, __ N.Y.S.2d __, 2009 WL 175013 (N.Y. Dist. Ct. 2009)... Feb 09 65

Requirements for Recertification Notices
Starrett City, Inc. v. Brownlee, __ N.Y.S.2d __, 2008 WL 5147073 (N.Y. App. Div. 2008) .... Jan 09 17

Review of Eviction Decision Barred by Rooker-Feldman Doctrine; Applicants Not Entitled to Due Process Hearing
Fincher v. S. Bend Hous. Auth., 2009 WL 790184 (N.D. Ind. Mar. 20, 2009) .... Apr-May 09 119

Stipulation to Vacate
Kings Ct. Hous. LLC v. Hudson, 2009 WL 175031 (N.Y. Civ. Ct. Jan. 23, 2009) (unreported) .... Feb 09 65

Tenant Evicted for Failure to Comply with Recertification Procedures
Clay Hill Assocs. v. Irizarry, 2009 WL 1353760 (Conn. Super. Ct. May 8, 2009) (unreported) .... Jun 09 150

Public Housing

Class Certification
Anderson v. HUD, __ F.3d __, 2008 WL 5412870 (5th Cir. 2008) .... Jan 09 16

Criminal Activity Evictions

Boston Hous. Auth. v. Crump, 2009 WL 3064714 (Mass. App. Ct. Sept. 28, 2009) (unreported) ... Nov-Dec 09 298

Hous. Auth. of City of New Haven v. DeRoche, __A.2d__, 2009 WL 153933 (Conn. App. Ct. 2009) .... Feb 09 63

Hous. Auth. of Covington v. Turner, ___ S.W.3d ___, 2009 WL 1491330 (Ky. Ct. App. 2009) ..... Jul 09 186

Minn. Pub. Hous. Auth. v. Vann, No. 27-CV-HC-08-10954, slip op. (Minn. Dist. Ct. Sept. 23. 2009) (unreported) .... Nov-Dec 09 299

Rolon v. N.Y. City Hous. Auth., 2009 WL 1067396 (N.Y. Sup. Ct. Apr. 8, 2009) (unreported)....... Jun 09 154

Discrimination on the Basis of Religion in Admissions and Transfers
Ungar v. New York City Hous. Auth., 2009 WL 125236 (S.D.N.Y. 2009) .... Feb 09 63

Evidence of Disability Should be Accepted Until Date of Trial
Lebanon County Hous. Auth. v. Landeck, __ A.2d __, 2009 WL 489611 (Pa. Super. Ct. 2009) .... Mar 09 91

Hearing Officer Not Required to Make Inquiries of Pro Se Tenant
Jackson v. Hernandez, 877 N.Y.S.2d 274 (N.Y. App. Div. 2009) .... Jun 09 152

Housing Authority May Deny Applicant Based on Pending Criminal Charges
Wilson v. Hous. Auth. of City of Omaha, 2009 WL 906379 (Neb. Ct. App. Mar. 31, 2009) (unreported) .... Apr-May 09 117

Housing Authority May Not Charge Rent Above Unit's Fair Market Value
Northampton Hous. Auth. v. Kahle, __ N.E.2d __, 2009 WL 1842521 (Mass. App. Ct. 2009)............ Aug 09 214

Housing Authority Not Immune to Personal Injury Suit Because Elevator Maintenance Is a Ministerial Activity
D.C. Hous. Auth. v. Pinkney, __A.2d__, 2009 WL 1227726 (D.C. May 7, 2009) .... Jun 09 150

Housing Authority's Duty to Provide Safe Premises
Giggers v. Memphis Hous. Auth., __ S.W.3d __, 2009 WL 249742 (Tenn. 2009)................................ Mar 09 94

Housing Authority's Liability for Dangerous Conditions
Spincola v. City of Union City, 2009 WL 1025165 (N.J. Super. Ct. App. Div. Apr. 17, 2009) (unreported) .... Jun 09 152

Housing Authority's Liability for Physical Defects
Moore v. Lorain Metro. Hous. Auth., __ N.E.2d __, 2009 WL 792277 (Ohio 2009) .... Apr-May 09 118

Income Exclusion for Wages Paid to Care for Disabled Family Member
Anthony v. Poteet Hous. Auth., 2009 WL 33629 (5th Cir. Jan. 7, 2009) (unreported) .... Feb 09 64

Invited Guest Cannot Be Convicted for Trespassing Despite Existing Trespass Notice
Commonwealth v. Nelson, __ N.E.2d __, 2009 WL 1929316 (Mass. App. Ct. 2009)........................... Aug 09 214

Judicial Review of Termination
Brooks v. New York City Hous. Auth.,__N.Y.S.2d__, 2009 WL 202752 (N.Y. App. Div. 2009)............ Feb 09 63

No Federal Cause of Action to Address Habitability Complaints
Brown v. Bennettsville Hous. Auth., 2009 WL 2229620 (D.S.C. July 23, 2009) .... Sep 09 239

No Sovereign Immunity in Lead Exposure Case
Bozeman v. Cleveland Metro. Hous. Auth., 2009 WL 3321402 (Ohio Ct. App. 2009) (unreported) ... Nov-Dec 09 299

Private Right of Action to Prevent Demolition; Monetary Damages Under the Administrative Procedures Act; Preliminary Injunction Standard
Anderson v. Jackson, __F.3d__, 2009 WL 162412 (5th Cir. 2009) ... Feb 09 63

Reasonable Accommodation, Direct Threat
Boston Hous. Auth. v. Bridgewaters, 898 N.E.2d 848 (Mass. 2009) ... Feb 09 64

Requirement that Residents Be Consulted Prior to Demolition
Aponte-Rosario v. Vila, __ F. Supp. 2d __, 2008 WL 5423005 (D.P.R. 2008) ... Jan 09 16

Resident Adequately Pleaded Claim for Rent Overcharges
O'Neill v. Hernandez, 2009 WL 860647 (S.D.N.Y. Mar. 31, 2009) ... Apr-May 09 116

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) ... Jan 09 16

Right of Succession

McNeal v. Hernandez, __N.Y.S.2d__, 2009 WL 22265 (N.Y. App. Div. 2009) ... Feb 09 64

Rivera v. N.Y. City Hous. Auth., __ N.Y.S.2d__, 2009 WL 673843 (N.Y. App. Div. Mar. 27, 2009).. Apr-May 09 119

Detres v. N.Y. City Hous. Auth., __ N.Y.S.2d __, 2009 WL 2431977 (N.Y. App. Div. 2009) ... Sep 09 238

Oglesby v. N.Y.City Hous. Auth., __ N.Y.S.2d __, 2009 WL 3381700 (N.Y. App. Div. 2009) ... Nov-Dec 09 299

Tenant Could Assert Bankruptcy Code as a Defense to Eviction
Hous. Auth. of New Orleans v. Eason, __ So. 2d __, 2009 WL 553303 (La. Ct. App. 2009) ... Apr-May 09 121

Tenant May Pursue Section 1983 Claims Against Housing Authority
Comer v. Hous. Auth. of Gary, __ F. Supp. 2d __, 2009 WL 1299576 (N.D. Ind. May 6, 2009) ... Jun 09 151

Tenant's Allegations that She Had Been Denied a Hearing and a Hardship Exemption Were Insufficient to State a Claim
Williams v. Hernandez, 2009 WL 2252103 (S.D.N.Y. July 28, 2009) ... Sep 09 238

Tenants Entitled to Review Relevant Information in Housing Authority Employee's Personnel File
Rogers v. Hous. Auth. of Stratford, 2009 WL 2382653 (D. Conn. July 30, 2009) ... Sep 09 239

Rural Housing

Right to Grievance Procedure
Fortner v. Farm Valley-Applewood Apartments, 898 N.E.2d 393 (Ind. Ct. App. 2008) ... Jan 09 17

Section 515 Program: Government's Burden in Establishing Need for Temporary Receiver Is Minimal
United States v. Falls Ct. Props. Co., 2009 WL 1924771 (N.D.N.Y. July 1, 2009) (slip op.)... Aug 09 215

Section 3

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) ... Jan 09 16

Right to Monetary Damages for Violation of Contracting Requirements
Mannarino v. HUD, 2009 WL 918355 (W.D. Pa. Apr. 2, 2009) ... Jun 09 154

Section 8 Homeownership Program: Housing Authority Lacked Statutory Basis to Terminate Lifetime Sex Offender Registrant
Miller v. McCormick, __ F. Supp. 2d __, 2009 WL 792833 (D. Me. 2009) ... Apr-May 09 117

Uniform Relocation Assistance Act

Resident Adequately Pleaded Procedural Due Process Claim
Faylor v. Szupper, 2009 WL 1034696 (W.D. Pa. Apr. 15, 2009) .... Jun 09 152

Statute Does Not Provide a Private Right of Action
Delancey v. City of Austin, ___ F.3d ___, 2009 WL 1532967 (5th Cir. 2009).......... Jul 09 186

Application to Emergency Shelter
Community House v. City of Boise, 2009 WL 2382428 (D. Idaho July 29, 2009) .... Sep 09 240

Utilities

State Law Required Landlord to Disclose Formula for Determining Charges
Am. Mgmt. Consultant, LLC v. Carter, ___ N.E.2d ___, 2009 WL 1706889 (Ill. App. Ct. 2009)........ Aug 09 216

RECENT REGULATIONS AND NOTICES

A summary of recent regulations and notices appears at the end of each issue of the *Bulletin*.

RURAL HOUSING SERVICE (RHS)/RURAL DEVELOPMENT (RD)/USDA

Rural Housing Service Modifies Operation of Rural Voucher Program.......... Jun 09 142

RD Foreclosures Delayed in Twenty-Two States.......... Jun 09 143

Quiet Title Claim Denied Following Attempted Prepayment of RHS 515 Loan .... Aug 09 199

SECTION 3

New Opportunities for Section 3 Job Creation Under the Recovery Act and the Neighborhood Stabilization Program .... Jul 09 163

Earnings and Living Opportunities Act Would Strengthen Section 3.......... Oct 09 252

Recent Developments Show Promise for Enforcing Section 3 .... Nov-Dec 09 289

SECTION 8 PROGRAMS

(see HOUSING CHOICE VOUCHER PROGRAM; HUD; PRESERVATION OF LOW-INCOME HOUSING STOCK)

STIMULUS PROGRAMS AND LEGISLATION

Congress Considers Affordable Housing Funding in Stimulus Package .... Feb 09 47

Obama Signs Stimulus Bill Providing Major Support for Affordable Housing .... Mar 09 71

HUD Implements Homelessness Prevention and Rapid Re-Housing Program .... Apr-May 09 112

Stimulus Funding Seeks to Improve Energy Efficiency of Multifamily Housing .... Jun 09 146

President Obama Signs Serve America Act.......... Jun 09 149

New Opportunities for Section 3 Job Creation Under the Recovery Act and the Neighborhood Stabilization Program .... Jul 09 163

Section 504 Protections Apply to ARRA-funded LIHTC Projects.......... Jul 09 182

UTILITY AND ENERGY ISSUES

San Francisco and Oakland Issue Declarations Protecting Tenants from Utility Shutoffs.......... Mar 09 89

NHLP Survey of Northern California Utility Allowances Reveals Potential Deficiencies .... Jun 09 139

Stimulus Funding Seeks to Improve Energy Efficiency of Multifamily Housing .... Jun 09 146

HOUSING JUSTICE NETWORK NATIONAL MEETING

Advancing Housing Justice: Event Basics

Fees

Fees include materials, lunch each day, and refreshments.

	BY 2/1	AFTER 2/1	SPONSORED CLIENT*
Training only: March 6	$ 230	$ 280	$ 230
Meeting only: March 7-8	$ 460	$ 560	$ 350
Meeting + Training	$ 595	$ 725	$ 565

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

CANCELLATION/REFUND POLICY

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

Registration

Space is limited, so register early! You may register via mail, fax, or online. Online registration will be available on our website, www.nhlp.org, in mid-December. **The deadline for early registration is February 1, 2010**. Mailed forms must be postmarked by that date; faxed forms must be received by that date. Forward registration with payment to:

FAX (CREDIT CARD ONLY)
510.451.2300

MAIL
NHLP
Attn: Registration
614 Grand Avenue, Suite 320
Oakland, CA 94610

Site Information

Washington Court Hotel
525 New Jersey Avenue, NW, Washington, D.C. 20001
800.321.3010 or 202.268.2100

Washington Court Hotel, located in the Capitol Hill neighborhood, is a five-minute walk to the U.S. Capitol Building and the National Mall and is just two blocks away from an array of shopping, dining and entertainment options. Washington Court Hotel is a union hotel.

Washington Court Hotel is the site for the training, meeting and guest accommodations. Please call the hotel directly to make reservations (last session will end at 5 p.m. on Monday, March 8, so please plan accordingly). Mention that you are attending the Housing Justice Network conference to receive a conference room rate of $199. Rate is single/double occupancy plus tax. **Please make your reservations early! Rooms at the conference rate are more limited than usual this year and are available on a first-come, first-served basis through February 1, 2010.**

Questions

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

HOUSING JUSTICE NETWORK NATIONAL MEETING

Advancing Housing Justice: Registration

PLEASE PRINT CLEARLY

1 PERSONAL INFORMATION

NAME ______ NAME ON BADGE (IF DIFFERENT) ______

ORGANIZATION ______

MAILING ADDRESS ______

CITY ______ STATE ______ ZIP ______

PHONE ______ FAX ______

EMAIL ______ ORGANIZATION'S WEB SITE ______

Housing Experience: [ ] years. What issues have you worked on? ______

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

Do you require special arrangements? (Please attach a description)
○ access ○ visual ○ audio ○ vegetarian ○ other dietary

2 FEES

	BEFORE 2/1	AFTER 2/1	CLIENT
○ Federal Housing Program: One Day Training	$ 230	$ 280	$ 230
○ Housing Justice Network Meeting only	$ 460	$ 560	$ 350
○ One Day Training + Meeting	$ 595	$ 725	$ 565

3 PAYMENT

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

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

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

○ Please bill my ○ Mastercard ○ Visa for $ ______

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

NAME OF CARDHOLDER ______ AUTHORIZED SIGNATURE ______

BILLING ADDRESS (REQUIRED FOR CREDIT CARD ORDERS) ______

CITY ______ STATE ______ ZIP ______

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

2010 Supplement to HUD Housing Programs: Tenant's Rights

Now Available! Order Before February 15 and Save!

description	per unit price	quantity	extended price
2010 Supplement to HUD Housing Programs: Tenants' Rights	**$125 (before February 15)** $150 (after February 15)	______	$ ______
HUD Housing Programs: Tenants' Rights (3rd Edition, 2004)	**$250 (before February 15)** $350 (after February 15)	______	$ ______
Combined Set Extra Savings: HUD Housing Programs: Tenants' Rights (3rd Edition, 2004) and 2010 Supplement	**$325 (before February 15)** $425 (after February 15)	______	$ ______

Bulk Order Discount $ ______
(5 or more) deduct 10%

California Sales Tax $ ______
(8.25% for CA residents; Alameda County sales tax 8.75%)

Shipping + Handling $ ______
($5 per book)

Total Amount Due $ ______

shipping information

name

organization

street address

city / state / zip

telephone / fax

email

☐ Please send me information on staying current month-to-month with NHLP's **Housing Law Bulletin.**

billing information

☐ I've enclosed a check payable to **National Housing Law Project** $ ______

☐ Please bill my
☐ MasterCard ☐ Visa $ ______

card number

exp date

name on card

billing address

street address

city / state / zip

signature

All orders must be prepaid. Billing name, address and signature required for all credit card orders. Books will be shipped USPS Media Rate. Please allow 4 to 6 weeks for delivery from date of publication. **Estimated publication date is February 26, 2010** and is subject to change.

Special offer expires February 15, 2010. For questions about your order, please contact **Wendy Mahoney** at **510.251.9400 x3108** or **wmahoney@nhlp.org**. Thank you.

Mail order form with payment to:
National Housing Law Project Publications
614 Grand Avenue, Suite 320 Oakland CA 94610

Fax order form (credit card orders only) to
510.451.2300

National Housing Law Project
614 Grand Avenue, Suite 320
Oakland, California, 94610

NONPROFIT ORG.
U.S. POSTAGE
PAID
OAKLAND CA
PERMIT NO. 612