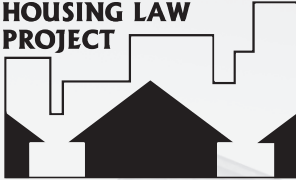


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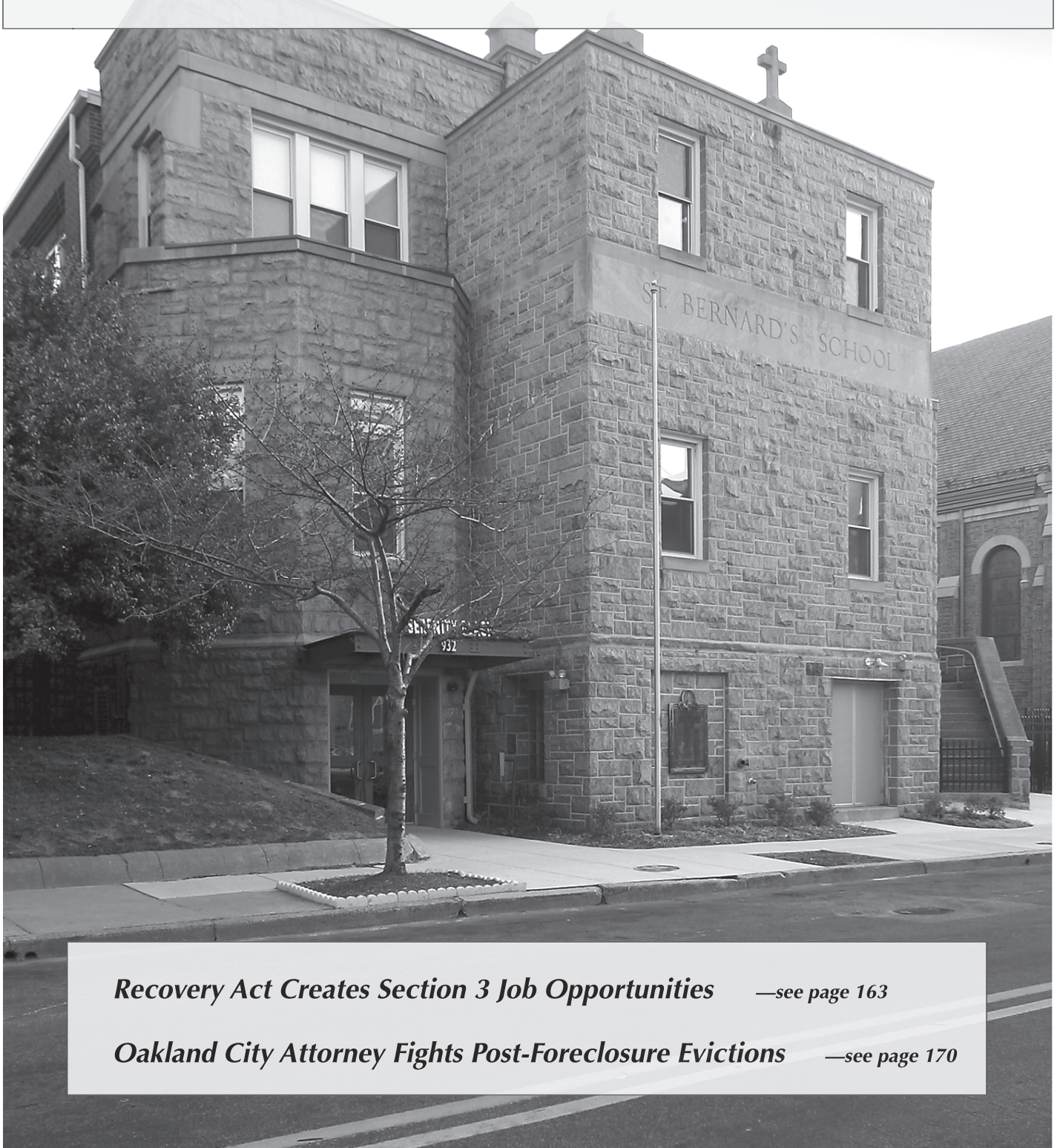


advancing housing justice

# Housing Law Bulletin

Volume 39 • July 2009

Published by the National Housing Law Project



*Recovery Act Creates Section 3 Job Opportunities* —see page 163

*Oakland City Attorney Fights Post-Foreclosure Evictions* —see page 170

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## Table of Contents

	Page
New Opportunities for Section 3 Job Creation Under the Recovery Act and the Neighborhood Stabilization Program.....	163
Oakland Alleges that Post-Foreclosure Evictions Violated Just Cause Ordinance .....	170
Court Will Not Close Mobile Home Park in Absence of Viable Alternative Housing .....	172
Frank and Waters Renew Their Call for Moratorium on Public Housing Demolition and Disposition .....	175
Fifth Circuit Holds Public Housing Demolition Law Unenforceable.....	178
Section 504 Protections Apply to ARRA-funded LIHTC Projects .....	182
Recent Cases .....	186
Recent Housing-Related Regulations and Notices..	188
<b>Announcements</b>	
Publication List/Order Form.....	191

**Cover:** Serenity Place, a 19-unit apartment community in Baltimore, Maryland with one- and two-bedroom apartments for formerly homeless women and their children. Developed by nonprofit Homes for America, the building is a former Catholic school. All residents receive assistance through Shelter Plus Care; the average annual household income is \$13,303.

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## New Opportunities for Section 3 Job Creation Under the Recovery Act and the Neighborhood Stabilization Program\*

This article discusses the applicability of Section 3 of the Housing and Urban Development Act of 1968 to programs of the Department of Housing and Urban Development (HUD) funded under the American Recovery and Reinvestment Act of 2009 (ARRA), including the Neighborhood Stabilization Program. With the unprecedented funding levels of ARRA comes significant opportunity to apply Section 3 with new vigor to create jobs for low- and very low-income individuals and businesses. For Section 3 to succeed, HUD must make Section 3 obligations and terms clear to fund recipients, and advocates will need to monitor compliance at the local level. This article therefore provides recommendations to HUD and advice to advocates to increase compliance and assist with implementation.

### ARRA Policies and Goals

ARRA included \$13.6 billion in funds to be administered through HUD. This funding, distributed across several existing and newly created HUD programs through formula and competitive allocations, will help advance a number of ARRA goals. These goals include promoting job creation and retention, modernizing the country's infrastructure, creating long-term impacts through increased energy efficiency, and providing opportunities for those most impacted by the economic crisis.<sup>1</sup> In its *Guidance on ARRA and Section 3*, HUD states that "[s]ince ARRA funding is specifically intended to create jobs and other economic opportunities for those most impacted by the recession, compliance with the requirements of Section 3 is critical."<sup>2</sup>

Section 3 targets training and jobs to public housing residents and other low-income residents living in areas where HUD funds are expended so as to multiply the benefit of the funds for low- and very-low income individuals. As discussed below, the underlying policy rationale of Section 3 is consistent with much of the driving

\*The author of this article is Erin Liotta, a J.D. candidate at the University of California, Berkeley, and a summer intern at the National Housing Law Project.

<sup>1</sup>See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 116 (2009); Memorandum Ensuring Responsible Spending of Recovery Act Funds, 74 Fed. Reg. 12,531 (Mar. 20, 2009).

<sup>2</sup>HUD Economic Stimulus Funding and the Creation of Jobs, Training, and Contracting Opportunities, <http://www.hud.gov/recovery> [hereinafter *Guidance on ARRA and Section 3*].

force behind ARRA. By applying Section 3 requirements to its programs, HUD can ensure that ARRA funds create broad and lasting impact.

Subsequent guidance issued by the Office of Management and Budget (OMB) echoes the potential that HUD programs have to carry out ARRA's goals. In addition to ARRA's general objectives of job creation, infrastructure building and community impact, OMB cites more specific policy goals of "promoting local hiring," "providing maximum practicable opportunities for small businesses," "engaging in sound labor practices" and "providing equal opportunity for Disadvantaged Business Enterprises."<sup>3</sup> Recognizing that federal agencies have overlapping goals under ARRA, HUD Secretary Shaun Donovan issued a statement and Memorandum of Understanding, respectively, with his counterparts in the Department of Labor and the Department of Energy announcing HUD's intent to coordinate its efforts with these agencies.<sup>4</sup> Secretary Donovan may be the first HUD Secretary to take seriously the congressional directive that the Secretary *shall* consult with other federal agencies and their Secretaries to carry out Section 3.<sup>5</sup> Such coordination will increase job training and job opportunities, ease access to weatherization funds for low-income households, and promote long-term economic stability.

## Section 3 Overview

The policy goals articulated by ARRA and OMB reflect the same concerns that motivated Congress to enact Section 3 over four decades ago.<sup>6</sup> Section 3 aims to create a multiplier effect by targeting low- and very-low income individuals for the jobs created in the course of providing affordable housing or other public works. Where Section 3 applies, fund recipients must show that 30% of newly hired employees each year are Section 3 residents, which include public housing residents, residents (including the homeless) of the neighborhoods in which Section 3 projects are located, participants in the YouthBuild program, and other low- and very-low income individuals.<sup>7</sup> Recipients must also commit to allocate at least 10% of the total dollar amount of building trade contracts and 3% of all

other contracts to businesses controlled by public housing residents or other low- and very-low income individuals, or to businesses that largely employ such individuals.<sup>8</sup>

Recipients demonstrate their compliance with the provisions in several ways. Federal regulations require recipients "to comply with Section 3 in its own operations, and ensure compliance in the operations of its contractors and subcontractors."<sup>9</sup> Such compliance includes implementing procedures to notify Section 3 residents of related training and job opportunities, notifying potential contractors of Section 3 requirements and the need to incorporate Section 3 language into all solicitations and contracts,<sup>10</sup> and documenting actions taken to comply with Section 3, along with the results of those actions and any obstacles faced in the course of implementation.<sup>11</sup> In addition, applicants that receive funds subject to Section 3 are required to submit reports on Section 3 activities on an annual basis.<sup>12</sup> Failure to meet reporting requirements can result in sanctions that limit the ability to receive HUD funds in the future.<sup>13</sup>

As a general matter, Section 3 applies to all HUD funding received by public and Indian housing agencies, including capital fund and operating subsidy programs.<sup>14</sup> Beyond public and Indian housing, Section 3 also applies to rehabilitation, lead paint abatement, housing construction and other public construction projects funded by HUD programs providing housing and community development assistance.<sup>15</sup> While there are no minimum thresholds for Section 3 applicability on public and Indian housing programs and their contractors and subcontractors,<sup>16</sup> thresholds apply for other housing and community development work. Recipients of funds to perform such other housing and community development work must comply with Section 3 only if they receive more than \$200,000 for Section 3 covered projects.<sup>17</sup> Section 3 then applies to their individual contractors and subcontractors who receive more than \$100,000 for work on Section 3 covered projects.<sup>18</sup>

<sup>8</sup>§ 135.5.

<sup>9</sup>§ 135.32 (2009).

<sup>10</sup>The required Section 3 clause is somewhat extensive and can be found at § 135.38.

<sup>11</sup>§ 135.32; *see also* § 135.30(d)(2).

<sup>12</sup>§ 135.90 (2009); *see also* Form HUD-60002 Section 3 Summary Report, Economic Opportunities for Low- and Very Low-Income Persons (6/2001).

<sup>13</sup>Notice of HUD's Fiscal Year (FY) 2009 Notice of Funding Availability (NOFA); Policy Requirements and General Section to HUD's FY2009 NOFAs for Discretionary Programs; Notice, 73 Fed. Reg. 79,548, 79,552 (Dec. 29, 2008) [hereinafter NOFA General Section].

<sup>14</sup>12 U.S.C.A. § 1701u(c)(1)(A) (Westlaw June 17, 2009).

<sup>15</sup>§ 1701u (c)(2)(A).

<sup>16</sup>24 C.F.R. § 135.3(a)(3)(i) (2009).

<sup>17</sup>§ 135.3(a)(3)(ii)(A). A Section 3 covered project is defined as "the construction or rehabilitation of housing (including reduction and abatement of lead-based paint hazards), other public construction which includes buildings or improvements (regardless of ownership) assisted with housing or community development assistance." § 135.7

<sup>18</sup>§ 135.7(a)(3)(ii)(B).

<sup>3</sup>Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009, M-09-15 (Apr. 3, 2009). Though the Department of Transportation administers the Disadvantaged Business Enterprises program, the requirements it imposes on grantees are similar to those that HUD imposes under Section 3.

<sup>4</sup>*See* DOL-HUD Green Jobs Letter to PHAs and WIBs (May 27, 2009), [http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/TRANS\\_PARENCE\\_RESOURCES/DOL%20-%20HUD%20WIB%20PHA%20LE\\_TTER%20FINAL.PDF](http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/TRANS_PARENCE_RESOURCES/DOL%20-%20HUD%20WIB%20PHA%20LE_TTER%20FINAL.PDF) [hereinafter DOL-HUD Letter]; Memorandum of Understanding Between Department of Energy and Department of Housing and Urban Development: Coordinating Recovery Act Funds for Home Energy Retrofits (May 6, 2009), <http://www.hud.gov/recovery/doemoucombined.pdf> [hereinafter DOE MOU].

<sup>5</sup>12 U.S.C.A. § 1701u(f) (Westlaw June 17, 2009).

<sup>6</sup>*See* § 1701u.

<sup>7</sup>24 C.F.R. § 135.5 (2009).

Recipients and contractors that meet the numerical goals are considered to have met the preference requirements, unless there is evidence to the contrary.<sup>19</sup> The safe harbor provisions are tempered by the fact that recipients and contractors are required to the “greatest extent feasible” to direct jobs and other economic opportunities to low- and very-low income persons, especially those who are recipients of federal housing assistance.<sup>20</sup> Thus, recipients of HUD funds subject to Section 3 must take “every affirmative action that . . . could [be] properly taken”<sup>21</sup> to achieve the goals of Section 3, as Section 3 “emphasizes results.”<sup>22</sup> Accordingly, meeting the letter of the regulations may not be sufficient if the spirit of the law is ignored.<sup>23</sup>

## ARRA Funds and Section 3 Compliance

ARRA allocated \$13.6 billion to HUD for distribution, of which \$7.8 billion carries a Section 3 obligation in either of two ways. In the interest of expediting fund distribution, HUD allocated roughly 75% of its ARRA funds through a traditional formula process.<sup>24</sup> For formula allocation recipients, the rules regarding Section 3 compliance have not changed. The remaining ARRA funds are being distributed through a competitive process. For these programs, advocates should look to the General Section to HUD’s FY2009 NOFAs,<sup>25</sup> the individual NOFAs for the particular program, and HUD’s *Guidance on ARRA and Section 3*<sup>26</sup> for information on how Section 3 applies.

### Formula Allocations

HUD programs receiving funding by formula include the Public Housing Capital Fund Program (\$3 billion), Community Development Block Grant Programs (\$1 billion), and Native American Housing Block Grants (\$255 million).<sup>27</sup> For these programs, Section 3 strictly applies as laid out in the Section 3 regulations<sup>28</sup> and in the rules applicable to the individual programs.

The Public Housing Capital Fund program, as part of its routine fund administration, requires recipients to certify that they will comply with Section 3<sup>29</sup> and also requires that every PHA include a statement on Section 3 activities in its annual plan.<sup>30</sup>

The Community Development Block Grant (CDBG) program specifically requires Section 3 compliance.<sup>31</sup> However, in its CDBG Notices, HUD has been less vigilant in communicating Section 3’s applicability. For example, the HUD website does not contain a Section 3 link through its CDBG program webpage. More significantly, the Notice of Program Requirements, calling on grantees to amend their consolidated plans post-ARRA, also makes no mention of Section 3.<sup>32</sup> If not for the annual reports<sup>33</sup> and certifications<sup>34</sup> required of CDBG grants, grantees might mistakenly believe that the Secretary will not vigorously enforce Section 3 compliance for CDBG ARRA funds.

It is similarly unclear how Section 3 applies to the Native American Housing Block Grant (NAHBG) program. Though HUD’s Formula Program Plan for the NAHBG funds does not mention Section 3,<sup>35</sup> subsequent HUD guidance makes clear that Section 3 applies to these funds.<sup>36</sup> Despite the lack of clear language, Section 3 requirements apply to NAHBG projects as outlined in HUD’s regulations, which state that Section 3 applies to Indian housing authorities and other construction and development programs “to the maximum extent consistent with, but not in derogation of, compliance with section 7(b) of the Indian Self-Determination and Education Assistance Act.”<sup>37</sup>

### Competitive Allocations

HUD funds allocated through competitive processes are governed by the General Section to HUD’s FY2009 NOFAs published in the Federal Register.<sup>38</sup> The General Section applies to all NOFAs released for the competitive distribution of FY2009 funds, unless otherwise stated.<sup>39</sup> It

<sup>19</sup>§ 135.30(d).

<sup>20</sup>12 U.S.C.A. § 1701u(b) (Westlaw June 17, 2009).

<sup>21</sup>Ramirez, Leal & Co., v. City Demonstration Agency, 549 F.2d 97, 105 (9th Cir. 1976).

<sup>22</sup>Letter from Carolyn Peoples, Assistant Secretary for Fair Housing and Equal Opportunity to Heather A. Mahood (Apr. 26, 2004) (Section 3 Complaint: Determination of Non-Compliance Carmelitos Tenants Ass’n v. City of Long Beach, Case No. 09-98-07-002-720) (emphasis in original).

<sup>23</sup>*Id.* at 12-13 (“Although it may appear that Recipient may have come close to meeting the numerical percentage goals set forth in the Section 3 regulations by relying on the hiring of individuals for only a limited number of work hours/days after the complaint filing, the City failed to meet its “greatest extent feasible” standard when analyzing the payroll data in “full time” hours worked.)

<sup>24</sup>HUD Allocates More than \$10 Billion of Recovery Act Funding One Week After Bill Signing, HUD No. 09-014 (Feb. 25, 2009).

<sup>25</sup>See NOFA General Section, *supra* note 15.

<sup>26</sup>See Guidance on ARRA and Section 3, *supra* note 4.

<sup>27</sup>HUD Allocates More than \$10 Billion of Recovery Act Funding One Week After Bill Signing, HUD No. 09-014 (Feb. 25, 2009).

<sup>28</sup>24 C.F.R. § 135.5.

<sup>29</sup>PHA Certification of Compliance with PHA Plans and Related Regulations, <http://www.hud.gov/offices/adm/hudclips/forms/files/50077.pdf>.

<sup>30</sup>§ 903.7(l)(1)(ii).

<sup>31</sup>§ 570.607.

<sup>32</sup>Notice of Program Requirements for Community Development Block Grant Program under the American Recovery and Reinvestment Act of 2009, [http://www.hud.gov/offices/cpd/pdf/5309\\_N\\_01.pdf](http://www.hud.gov/offices/cpd/pdf/5309_N_01.pdf).

<sup>33</sup>§ 135.90.

<sup>34</sup>§ 570.303; § 91.225 (Local Governments Certifications); § 91.325 (State Governments Certifications); § 91.425 (2009) (Consortia Certifications).

<sup>35</sup>American Recovery and Reinvestment Act of 2009, Department of Housing and Urban Development, Program-Level Plan, Native American Housing Block Grants (Formula), [http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/PLANS/NATIVE%20AMERICAN%20HOUSING%20BLOCK%20GRANTS%20\(FORMULA\).PDF](http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/PLANS/NATIVE%20AMERICAN%20HOUSING%20BLOCK%20GRANTS%20(FORMULA).PDF).

<sup>36</sup>Guidance on ARRA and Section 3, *supra* note 4.

<sup>37</sup>§ 135.3(c). For information on job training, employment, and contracting preferences required by the Indian Self-Determination and Education Assistance Act, see 25 U.S.C.A. § 405e(b) (Westlaw June 22, 2009).

<sup>38</sup>NOFA General Section, *supra* note 15, at 79,552.

<sup>39</sup>*Id.* at 79,549.

discusses Section 3 extensively, providing a brief overview of its requirements and purpose, a statement on annual reporting requirements, instructions on report submissions, and a description of sanctions for failure to comply with reporting requirements.<sup>40</sup> These requirements apply to the following competitively funded HUD programs:

- Neighborhood Stabilization Program (\$2 billion);
- Public Housing Capital Funds (\$1 billion);
- Green Retrofit Program for Multifamily Housing (\$250 million);
- Native American Housing Block Grants (\$242 million); and
- Indian Community Development Block Grants (\$10 million).

As discussed below, applicants for the \$100 million in ARRA funds under the Lead Hazard Control programs applied for those funds in the FY2008 cycle.<sup>41</sup> The General Section for FY2008 NOFAs mirrors that of 2009, with the exception that HUD was then taking under consideration, but had not yet included, reference to the sanctions that are now reiterated in FY2009 NOFA.<sup>42</sup>

Beyond the General Section requirements, however, the funding notices for individual programs vary widely in their discussions of Section 3. Further, HUD has not been consistent in its own compliance with the requirements placed on it by federal regulations. With every applicable NOFA, HUD must include a provision that Section 3 applies to the project, a certification for applicants regarding intent to comply with Section 3, a statement of purpose on Section 3, and evaluation criteria that consider the extent to which an applicant has demonstrated that it will comply with Section 3.<sup>43</sup> The General Section meets two of these requirements, but does not address the certification or the evaluation criteria.

#### *Public Housing Capital Funds*

The NOFA for the Public Housing Capital Funds contains the most extensive language regarding Section 3, repeating much of the Section 3 language found in the

General Section. The notice also indicates that in judging applications for one of the four funding categories, HUD will award five of 105 points to those that address job creation.<sup>44</sup> HUD will award one point for certification that the applicant complied with Section 3 during the most recent fiscal or calendar year, with an additional two points for certifying that the applicant has completed and kept on file a “feasible” Section 3 plan. The NOFA lists seven criteria that it expects such Section 3 plans to address. Applicants also receive one point each for certifying that they will partner with the area Workforce Investment Board and with other organizations to connect public housing residents to job and training opportunities.<sup>45</sup> Applicants for these funds should have no difficulty understanding the importance of Section 3 and the need to comply with its requirements.

#### *Lead Hazard Control (LHC) Grants*

The LHC grants,<sup>46</sup> though allocated immediately after ARRA’s enactment in February 2009, were not distributed by formula. These funds were distributed to those groups who had applied for funding through the competitive FY2008 cycle, but who did not receive awards at that time due to limited funding availability.<sup>47</sup> As such, no specific ARRA NOFA exists, but the applicable FY2008 LHC NOFA made Section 3 requirements clear. That NOFA contained a brief Section 3 description, awarded two out of 102 application points to Section 3 feasibility, and addressed Section 3 reporting.<sup>48</sup> The FY2009 NOFA, though not directed at distributing ARRA funds, contains the same language.<sup>49</sup> The HUD website also lists Section 3 reporting in its chart of required reports for LHC grantees.<sup>50</sup>

<sup>44</sup>HUD’s Fiscal Year (FY) 2009 Notice of Funding Availability (NOFA) for the Capital Fund Recovery Competition Grants, <http://www.hud.gov/recovery/recovery-comp-grants.pdf>.

<sup>45</sup>See also DOL-HUD Green Jobs Letter to PHAs and WIBs (May 27, 2009), [http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/TRANS\\_PARENCEY\\_RESOURCES/DOL%20-%20HUD%20WIB%20PHA%20LETTER%20FINAL.PDF](http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/TRANS_PARENCEY_RESOURCES/DOL%20-%20HUD%20WIB%20PHA%20LETTER%20FINAL.PDF).

<sup>46</sup>LHC, for purposes of this article, includes both the Lead Based Paint Hazard Control (LBPHC) grants and the Lead Hazard Reduction Demonstration (LHRD) grants. Under the FY2009 LHC NOFA, recipients of LBPHC funds under the FY2008 cycle may not apply for LBPHC funds in FY2009, nor may LHRD FY2008 fund recipients apply for funds in FY2009, because ARRA funds were distributed based on the FY2008 NOFA cycle.

<sup>47</sup>Vice President Biden Announces Nearly \$100 Million in Recovery Act Funds to Clean Up Dangerous Lead in Housing, HUD No. 09-062 (May 15, 2009) (“The recipients of these Recovery Act grants were qualified applicants in the FY08 funding cycle but were not initially awarded grants because of the limited number of funds available at that time.”).

<sup>48</sup>Fiscal Year 2008 SuperNOFA for HUD’s Discretionary Programs at 27, 47-48, 60, <http://www.hud.gov/library/bookshelf12/supernofa/nofa08/leadsec.pdf>.

<sup>49</sup>LHC 2009 NOFA, *supra* note 43.

<sup>50</sup>OHHLHC Grantee Reporting Requirements at 2, <http://www.hud.gov/offices/lead/library/grants/GranteeReportingRequirements.5.5.09.pdf>.

<sup>40</sup>*Id.* at 79,552.

<sup>41</sup>Notice of Funding Availability for HUD’s Fiscal Year 2009 Lead-Based Paint Hazard Control Grant Program and Lead Hazard Reduction Demonstration Grant Program at 7, [http://www.hud.gov/offices/lead/09NOFA/FY2009\\_Lead\\_Combi\\_NOFA.pdf](http://www.hud.gov/offices/lead/09NOFA/FY2009_Lead_Combi_NOFA.pdf) [hereinafter LHC 2009 NOFA].

<sup>42</sup>Compare NOFA General Section, *supra* note 15, at 79,552, with Notice of HUD’s Fiscal Year (FY) 2008 Notice of Funding Availability (NOFA); Policy Requirements and General Section to HUD’s FY2008 NOFAs for Discretionary Programs; Notice, 73 Fed. Reg. 14,882, 14,886 (Mar. 19, 2008). For more information regarding sanctions for failure to comply with Section 3, see 24 C.F.R. §§ 135.38F, 135.74(d) and 135.76(g) (2009).

<sup>43</sup>§ 135.9 (2009).

### *Green Retrofit Program for Multifamily Housing*

In implementing its newly created Green Retrofit Program (GRP), HUD's guidance on Section 3 has been inconsistent. HUD's *Guidance on ARRA and Section 3* explicitly lists GRP as one of the six programs "subject to the statutory and regulatory requirements of Section 3 of the Housing and Urban Development Act of 1968."<sup>51</sup> The notice implementing the program, however, gives the impression that Section 3 compliance is not mandatory but "optional."<sup>52</sup> The funding notice references Section 3 only in the context of an "optional targeted incentive" for property owners, whereby HUD will award up to \$25,000 to owners who contract with Section 3 residents or Section 3 business concerns.<sup>53</sup> Further, the GRP application form makes no mention of Section 3 and does not require owners to certify Section 3 compliance.<sup>54</sup> Significantly, ARRA authorized the HUD Secretary to provide incentives in distributing GRP funds to encourage job creation for low-income and very low-income individuals.<sup>55</sup> However, if this is the manner in which HUD has chosen to incentivize job creation, it may prove ineffective. Optional Section 3 compliance may fail to create jobs for low-income persons, which is inconsistent with ARRA's overriding goals and its particular objectives regarding GRP.

HUD Notice H 09-02 is the NOFA for the Green Retrofits Program.<sup>56</sup> It is subject to the same General Section (and thereby Section 3) requirements governing the release of ARRA funds for programs administered competitively.<sup>57</sup> As per federal regulations, all Section 3 NOFAs must contain a Section 3 statement of purpose, a statement that Section 3 applies to the program in question, a certification requirement and Section 3 evaluation criteria.<sup>58</sup> The GRP notice does not include any of these.<sup>59</sup>

Nevertheless, given ARRA's job creation goals, along with its job creation language specific to GRP,<sup>60</sup> HUD should use GRP toward these ends and make clear that all applicants must comply with Section 3.<sup>61</sup>

### *HUD Native American Programs*

Section 3 explicitly applies to funds distributed competitively through the Native American Housing Block Grant (NAHBG) Program and the Indian Community Development Block Grant (ICDBG) Program, to the extent that compliance does not derogate the Indian Self-Determination and Education Assistance Act.<sup>62</sup> The NOFAs for these programs, however, contain little information regarding Section 3.<sup>63</sup> Neither NOFA requires applicants to provide Section 3 certifications, and only the ICDBG NOFA awards points (2 out of 100 total) for intent to comply with Section 3.

### *Neighborhood Stabilization Program (NSP)*

NSP was originally funded through the Housing and Economic Recovery Act of 2008, and these funds are known as NSP1. ARRA authorized a second round of funding, known as NSP2. None of the NSP funding notices emphasizes Section 3. The only mention of Section 3 in the NSP1 funding notice is a requirement that applicants certify that they will comply with Section 3.<sup>64</sup> For NSP1 only, HUD waived the annual reporting requirements of the consolidated plan,<sup>65</sup> which contains Section 3 certifications and summaries.<sup>66</sup> The justification for the waiver is to allow HUD to collect quarterly reports "on various aspects of the uses of funds and of the activities funded with these grants."<sup>67</sup> The quarterly reports will require information regarding the numbers of low- and moderate-income persons or households benefited, but it is not clear whether that reporting will include Section 3 compliance. Because NSP1 is a Section 3-applicable program, NSP1 recipients are required to submit an annual

<sup>51</sup>Guidance on ARRA and Section 3, *supra* note 4.

<sup>52</sup>Green Retrofit Program for Multifamily Housing (GRP), H 09-02 (May 13, 2009).

<sup>53</sup>*Id.*

<sup>54</sup>GRP Application Form, [http://portal.hud.gov/portal/page?\\_pageid=153,7973195&\\_dad=portal&\\_schema=PORTAL](http://portal.hud.gov/portal/page?_pageid=153,7973195&_dad=portal&_schema=PORTAL).

<sup>55</sup>American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 223 (2009).

<sup>56</sup>Green Retrofit Program for Multifamily Housing: Process for Making Awards, [http://portal.hud.gov/portal/page?\\_pageid=153,7973195&\\_dad=portal&\\_schema=PORTAL](http://portal.hud.gov/portal/page?_pageid=153,7973195&_dad=portal&_schema=PORTAL). For more information about the Green Retrofit Program, see NHLP, *Stimulus Funding Seeks to Improve Energy Efficiency of Multifamily Housing*, 39 HOUS. L. BULL. 146 (2009).

<sup>57</sup>The FY2009 NOFA General Section states that "HUD's general policy requirements set forth in this notice apply to all HUD federal financial assistance made available through HUD's FY2009 NOFAs." NOFA General Section, *supra* note 15, at 79,549.

<sup>58</sup>24 C.F.R. § 135.9.

<sup>59</sup>H 09-02, *supra* note 54. It should be noted that the funding notice does not contain specific point criteria for application evaluation, but it does enumerate general requirements that applicants must meet and also outlines the "feasibility assessments" to be conducted during the application process. It does not, however, mention Section evaluation criteria or certification requirements as mandated by § 135.9.

<sup>60</sup>American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 223 (2009).

<sup>61</sup>24 C.F.R. part 135.

<sup>62</sup>*See supra* note 39.

<sup>63</sup>*See* Notice of Funding Availability (NOFA) for HUD's Indian Community Development Block Grant Program under the American Recovery and Reinvestment Act of 2009, [http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/PROGRAMS/INDIAN\\_COMMUNITY\\_DEVELOPMENT\\_RESOURCES/ICDBG%20FUNDING%20NOTICE.PDF](http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/PROGRAMS/INDIAN_COMMUNITY_DEVELOPMENT_RESOURCES/ICDBG%20FUNDING%20NOTICE.PDF); Notice of Funding Availability (NOFA) for Native American Housing Block Grant Program under the American Recovery and Reinvestment Act of 2009, [http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/PROGRAMS/NATIVE\\_PROGRAM\\_RESOURCES/NAHBC%20FUNDING%20NOTICE.PDF](http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/PROGRAMS/NATIVE_PROGRAM_RESOURCES/NAHBC%20FUNDING%20NOTICE.PDF).

<sup>64</sup>Notice of Allocations, Application Procedures, Regulatory Waivers Granted to and Alternative Requirements for Emergency Assistance for Redevelopment of Abandoned and Foreclosed Homes Grantees Under the Housing and Economic Recovery Act, 2008; Notice, 73 Fed. Reg. 58,330, 58,343 (Oct. 6, 2008).

<sup>65</sup>73 Fed. Reg. at 58,341.

<sup>66</sup>24 C.F.R. §§ 91.215(j), 91.225(a)(7), 91.325(a)(7), 91.425(a)(1)(ii).

<sup>67</sup>73 Fed. Reg. at 58,341.

Section 3 report,<sup>68</sup> and HUD retains the authority to impose sanctions for failure to report.<sup>69</sup> It would enhance compliance with Section 3 if NSP1 recipients were required to submit the Section 3 report<sup>70</sup> on a quarterly basis.

Significantly, HUD recently acted to address the sparse treatment that it gave Section 3 in the NSP1 program funding notice by posting guidance on its Section 3 webpage.<sup>71</sup> The guidance clarifies the applicability of Section 3 to NSP funding, summarizes NSP1 grantees' obligations regarding compliance and reporting, and explains how to seek technical assistance.

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*With ARRA comes a significant opportunity to apply Section 3 in a manner that addresses the current economic crisis and that meets the goals that Congress envisioned when enacting Section 3 some forty years ago.*

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As with NSP1, the NOFA for NSP2 makes little mention of Section 3 beyond the requirement that applicants certify that they will comply with Section 3.<sup>72</sup> The mandatory statement of purpose and statement of applicability, while not located in the NSP2 NOFA itself, are covered by the General Section to FY2009 NOFAs.<sup>73</sup> In derogation of federal regulations,<sup>74</sup> the NSP2 NOFA does not contain evaluation criteria related to Section 3, despite the fact that it does describe in detail a 150-point scale that HUD will use in reviewing applications.<sup>75</sup> It is unclear what reporting requirements will govern NSP2 participants. Materials available on HUD's Recovery website do not mention Section 3 in its description on NSP2 "Data Collection and Reporting."<sup>76</sup> Despite this, NSP2 recipients are still subject to the annual Section 3 reporting requirements dictated by federal regulation.<sup>77</sup>

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<sup>68</sup>§ 135.90.

<sup>69</sup>§ 135.74(d) (2009).

<sup>70</sup>Form HUD-60002 Section 3 Summary Report, Economic Opportunities for Low- and Very Low-Income Persons (6/2001).

<sup>71</sup>See Applicability of Section 3 of the Housing and Urban Development Act of 1968 to Neighborhood Stabilization Program Funding, available at <http://www.hud.gov/offices/ftheo/section3/section3.cfm>. HUD initially made this document available at NHLP's webinar on Section 3 and the NSP, which was held June 25, 2009.

<sup>72</sup>Notice of Fund Availability (NOFA) for the Neighborhood Stabilization Program 2 under the American Recovery and Reinvestment Act, 2009, [http://www.hud.gov/offices/cpd/communitydevelopment/programs/neighborhoodspg/pdf/nsp2\\_nofa.pdf](http://www.hud.gov/offices/cpd/communitydevelopment/programs/neighborhoodspg/pdf/nsp2_nofa.pdf) [hereinafter NSP2 NOFA].

<sup>73</sup>NOFA General Section, *supra* note 15, at 79,552.

<sup>74</sup>§ 135.9(c).

<sup>75</sup>NSP2 NOFA, *supra* note 74.

<sup>76</sup>American Recovery and Reinvestment Act of 2009, Department of Housing and Urban Development Program-Level Plan, Neighborhood Stabilization Program (NSP) at 7, [http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/PLANS/NEIGHBORHOOD%20STABILIZATION%20PROGRAM%20\(NSP\).PDF](http://portal.hud.gov/pls/portal/docs/PAGE/RECOVERY/PLANS/NEIGHBORHOOD%20STABILIZATION%20PROGRAM%20(NSP).PDF).

<sup>77</sup>§ 135.90.

## Recommendations for Section 3 Compliance

The ability of Section 3 to create economic opportunities for low-income persons hinges on HUD funding levels.<sup>78</sup> With ARRA comes a significant opportunity to apply Section 3 in a manner that addresses the current economic crisis and that meets the goals that Congress envisioned when enacting Section 3 some forty years ago. In the past, when funding for public housing construction and rehabilitation was nearly \$3 billion, it was estimated that 16,000 jobs would be created annually for public housing residents. Today, HUD has several times that amount at its immediate disposal—\$13.6 billion in ARRA funds alone—which should be used to create jobs for Section 3 residents and businesses. However, several challenges threaten to undermine Section 3's potential impact.

First, HUD must be consistent in the message that it sends to all recipients of HUD funds, including recipients of ARRA funds. By regulation, HUD is required to include several items in every NOFA for Section 3 programs: a statement of purpose, notice of applicability, certification statement, and application evaluation criteria.<sup>79</sup> But while the FY2009 General Section, which applies to all FY2009 NOFAs, addresses the first two items, several NOFAs for ARRA funding lack either the Section 3 certification statements, Section 3 evaluation criteria, or both.<sup>80</sup> At the very least, this creates grantee confusion as to how Section 3 applies and signals HUD's lack of interest in enforcing Section 3. Even worse, these inconsistencies and failures to address Section 3 may give grantees the impression that the statute does not apply at all. The GRP NOFA sends the harmful message that Section 3 compliance is "optional" when in fact, given HUD's guidance and General Section requirements, it should be mandatory. HUD should correct these inconsistencies by ensuring that NOFAs for all applicable programs contain, at a minimum, the components required by regulation. In addition, Section 3 links should be available on HUD's general website, its Recovery website, all applicable webpages, such as the NSP webpage, and anywhere reporting requirements are mentioned for the programs subject to Section 3.

HUD also has the opportunity to encourage Section 3 compliance in light of ARRA's emphasis on committing and expending funds in a timely fashion. For example,

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<sup>78</sup>However, once Section 3 applies to a project, its requirements apply to the entirety of that project, regardless of whether HUD funds only a portion of the overall work. See § 135.3(b). Thus, Section 3 may have an impact substantially beyond the level of HUD funding.

<sup>79</sup>§ 135.9.

<sup>80</sup>The NOFAs lacking certification statements regarding intent to comply with Section 3 include GRP and NAHBG. The Public Housing Capital Fund NOFA does not contain a specific certification section, nor does the LHC FY2008 NOFA through which ARRA funds were administered to LHC grantees. NOFAs containing point-based application evaluation criteria, but failing to allocate points for Section 3 compliance, include NAHBG and NSP2. The Public Housing Capital Fund NOFA awards Section 3 points for one out of four funding categories only. See *supra* note 59 for more detail on the GRP application criteria.

recipients of NSP2 funding must expend at least 50% of their awards within two years and 100% within three years of the award date.<sup>81</sup> Failure to meet those deadlines will result in the federal government recapturing funds. HUD should consider reallocating the recaptured funds with a preference to those recipients that satisfactorily met Section 3 requirements. While HUD has moved in a positive direction by emphasizing in NOFAs the sanctions for failure to submit Section 3 reports, HUD can further incentivize grantees by reallocating funds to those who maximized their Section 3 compliance. This could also help resolve some of the problems with Section 3 enforcement: while applicants are required to certify that a project “will comply with Section 3,” there are few consequences for those that fail to do so. Until HUD is ready to address failings on the results end, financial incentives to successful Section 3 projects can help attend to this gap.

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*HUD should consider how to further  
Section 3 through alliances with  
other federal agencies.*

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Within its own programs, HUD has not taken full advantage of the Section 3 opportunities provided. The Secretary applied the Section 3 waiver provision far more broadly than necessary. For instance, waiving Section 3 requirements for the Tax Credit Assistance Program (TCAP) means that recipients of the program’s \$2.25 billion in ARRA monies do not have to provide a preference for low-income individuals and contractors in construction and rehabilitation of tax credit properties. Because Section 3 applies to an entire project regardless of the percentage of HUD funding,<sup>82</sup> the potential for job creation would have been significant. This lost opportunity for Section 3 residents has no countervailing benefit, especially since a major purpose of TCAP funds is “to immediately create new jobs or save jobs at risk of being lost due to the current economic crisis.”<sup>83</sup>

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<sup>81</sup>Neighborhood Stabilization Stimulus Program (Competitive), [http://portal.hud.gov/portal/page?\\_pageid=153,7973319&\\_dad=portal&\\_schema=PORTAL](http://portal.hud.gov/portal/page?_pageid=153,7973319&_dad=portal&_schema=PORTAL). In addition, the NSP1 funds must be obligated within eighteen months, or they will be recaptured and reallocated. Notice of Allocations, Application Procedures, Regulatory Waivers Granted to and Alternative Requirements for Emergency Assistance for Redevelopment of Abandoned and Foreclosed Homes Grantees Under the Housing and Economic Recovery Act, 2008; Notice, 73 Fed. Reg. 58,330, 58,340 (Oct. 6, 2008).

<sup>82</sup>§ 135.3(b).

<sup>83</sup>Implementation of Tax Credit Assistance Program, CDP-09-03 (May 4, 2009).

Finally, HUD should consider how to further Section 3 through alliances with other federal agencies. While Secretary Donovan is to be commended for his recent letter to the Public Housing Agencies and Workforce Investment Boards, signed in conjunction with Secretary Solis of the Department of Labor (DOL),<sup>84</sup> the call of the letter should be expanded. It recognizes Section 3 as an important component of the employment and training opportunities now available to public housing residents, but fails to mention other intended Section 3 beneficiaries, such as voucher holders, YouthBuild participants, and recipients of other housing and community development funds. Nor does the letter emphasize the important role that Workforce Investment Boards and local community development agencies can play in identifying and working with Section 3 residents and publicizing Section 3 employment and contracting opportunities.

In addition to its collaboration with DOL, HUD should also coordinate with the Department of Energy (DOE) regarding Section 3 issues. HUD signed a Memorandum of Understanding (MOU) with DOE to streamline the use of Weatherization Assistance Program funds in federally subsidized housing.<sup>85</sup> Under the MOU, DOE will modify its eligibility guidelines to make weatherization funds more readily available for residents in public housing, federally assisted private units, and Low-Income Housing Tax Credit units. The estimated number of units impacted totals roughly 3 million. The labor that will be expended, such as weatherstripping homes and laying insulation, is ideally suited for Section 3 application. But because these funds are administered through DOE, Section 3 does not apply by law, and nowhere in the MOU is Section 3 or a Section 3-like job creation effort mentioned. Both this MOU and the DOL letter represent important opportunities to ensure that ARRA funds will create jobs for the very low-income residents who reside in the buildings and neighborhoods where these funds will be expended.

OMB has warned that the premium ARRA places on swift expenditures does not exempt agencies from following the same laws and principles that they must follow in administering non-ARRA funds. The desire for an expedited distribution process should not justify the derogation of Section 3, particularly in light of ARRA’s goals of job creation and long-term impact on communities most affected by the recession. Section 3 furthers each of the seven policy goals laid out by OMB in its guidance on ARRA implementation, which include compliance with equal opportunity principles, the provision of practicable opportunities for small businesses, and the promotion of local hiring. With nearly \$8 billion at issue, monitoring Section 3 compliance and sending a consistent

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<sup>84</sup>DOL-HUD Letter, *supra* note 6.

<sup>85</sup>DOE MOU, *supra* note 6. For more information regarding the weatherization funds, see NHLP, *Stimulus Funding Seeks to Improve Energy Efficiency of Multifamily Housing*, 39 HOUS. L. BULL. 146 (2009).

message to grantees regarding Section 3's application will be crucial in ensuring that ARRA funds are used to assist low- and very-low income residents to obtain economic opportunities.

For further information on Section 3 as it applies to these programs, advocates should consult the relevant statutes and federal regulations governing Section 3, the National Housing Law Project's *An Advocate's Guide to the HUD Section 3 Program*<sup>86</sup> and the Center on Budget and Policy Priorities' 2009 report.<sup>87</sup> ■

## Oakland Alleges that Post-Foreclosure Evictions Violated Just Cause Ordinance\*

In an effort to prevent displacement of tenants living in foreclosed properties, the Oakland, California, city attorney's office has filed five lawsuits against banks, realtors and brokers that allegedly violated a city ordinance that requires just cause for eviction.<sup>1</sup> According to the complaints, the banks sent the eviction notices to tenants after foreclosing on the rental properties' underlying mortgages, apparently believing vacant properties are easier to sell.<sup>2</sup> However, foreclosure is not good cause for eviction under the ordinance.<sup>3</sup> The lawsuits seek to prohibit future violations of the ordinance, to restore displaced tenants to their homes, and to reimburse tenants for their moving costs and any other expenses incurred as a result of the evictions.

### Background

According to the city attorney's office, the defendant banks, realtors and brokers sent tenants in foreclosed properties illegal eviction notices that provided as little as twenty-four hours' notice and sometimes threatened to bar access to the property and dispose of tenants' possessions.<sup>4</sup> For example, the city attorney's office alleges that one of the notices to vacate advised tenants that property ownership had been transferred, that they were required to vacate the premises, and that failure to contact the broker within forty-eight hours would result in legal action.<sup>5</sup> The eviction notices were often accompanied by so-called "cash-for-keys" offers that provided cash incentives for

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\*The author of this article is Adam Cowing, a J.D. candidate at the University of Michigan Law School and a summer intern at the National Housing Law Project.

<sup>1</sup>Press Release, City of Oakland, Office of the City Attorney, Oakland City Attorney Sues Major Banks, Local Agents to Stop Illegal Evictions and Abuse of Tenants' Rights (Mar. 11, 2009), [http://www.oaklandcityattorney.org/PDFS/News%20Release/Illegal%20Evictions%20media%20advisory%20\(F\)%203%2011%2009.pdf](http://www.oaklandcityattorney.org/PDFS/News%20Release/Illegal%20Evictions%20media%20advisory%20(F)%203%2011%2009.pdf). The lawsuits were filed prior to the enactment of the federal Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, §§ 701-04, 132 Stat. 1632, 1660-62 (2009), and therefore do not allege violations of this statute. The Act does not preempt state or local laws that offer tenants additional protections, such as Oakland's ordinance.

<sup>2</sup>*Id.* The complaints are available on the city attorney's website. See Oakland City Attorney, Wrongful Evictions Lawsuits, <http://www.oaklandcityattorney.org/Notable/Evictions.html>.

<sup>3</sup>See OAKLAND, CAL., MUN. CODE § 8.22.360 (2002).

<sup>4</sup>See Press Release, Office of the City Attorney, *supra* note 1. For examples of eviction notices served by the defendant brokers, see <http://www.oaklandcityattorney.org/PDFS/Eviction%20Notices%20for%20web%20site.pdf>.

<sup>5</sup>Complaint for Violation of Oakland's Just Cause Ordinance, Injunctive Relief, and Other Equitable Relief at ¶ 11, *State v. Fidelity Nat'l Fin.*, No. 09-436907 (Cal. Super. Ct. filed Feb. 19, 2009).

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<sup>86</sup>The Guide will be available at [www.nhlp.org](http://www.nhlp.org) or by contacting NHLP's publications clerk at (510) 251-9400.

<sup>87</sup>BARBARA SARD & MICAH KUBIC, CTR. ON BUDGET & POLICY PRIORITIES, REFORMING HUD'S "SECTION 3" REQUIREMENTS CAN LEVERAGE FEDERAL INVESTMENTS IN HOUSING TO EXPAND ECONOMIC OPPORTUNITY (2009), <http://www.cbpp.org/research/index.cfm?fa=topic&id=33>.

tenants to move but did not necessarily cover their moving expenses.<sup>6</sup> The complaints allege that tenants were ousted from their homes based on the perception that a vacant home is more marketable and easier to sell. For example, the notice to vacate sent by defendant Chase Home Finance, LLC stated that it was the company's policy "to maintain its properties in an unoccupied status until they are sold."<sup>7</sup>

## Applicable Law

The City of Oakland adopted Measure EE, the Just Cause for Eviction Ordinance, in 2002.<sup>8</sup> Under the ordinance, property owners must have "good cause" for evicting tenants, limited to certain circumstances such as a tenant's failure to pay rent, violations of the material terms of a rental agreement, willfully causing substantial damages to a rental property, and using the rental unit for illegal activity.<sup>9</sup> Additionally, a property owner must provide an eviction notice to the tenant which includes the just cause basis for the eviction, the just cause ordinance itself, and a statement that advice is available from the city's rent board.<sup>10</sup> Finally, a copy of the eviction notice must be filed with the rent board within ten days of service of the notice to the tenant.<sup>11</sup>

Tenants or the rent board may bring actions for injunctive relief, monetary relief and any other relief deemed appropriate,<sup>12</sup> including attorney's fees.<sup>13</sup> Complaints may be brought against landlords, as well as anyone assisting a landlord, such as an agent or broker.<sup>14</sup> The ordinance also authorizes the city attorney to bring actions for injunctive relief on behalf of the city and tenants.<sup>15</sup> The city's right to bring complaints on behalf of tenants derives from the city charter, which allows the city to bring complaints that enforce compliance with ordinances.<sup>16</sup>

<sup>6</sup>See Press Release, Office of the City Attorney, *supra* note 1.

<sup>7</sup>Chase Home Finance LLC, Notice to Occupant to Vacate Premises, <http://www.oaklandcityattorney.org/PDFS/Eviction%20Notices%20for%20web%20site.pdf>.

<sup>8</sup>OAKLAND, CAL., MUN. CODE § 8.22.360 (2002). Several other jurisdictions in California have implemented similar just cause ordinances, including Berkeley, Hayward and San Francisco.

<sup>9</sup>§ 8.22.360(A). Other good cause reasons include the tenant's being so disorderly as to destroy the peace and quiet of other tenants; the tenant denying the landlord access to the unit after written notice; and the owner seeking in good faith to recover possession of the rental unit for his or her use and occupancy, or the use and occupancy of the owner's spouse, domestic partner, child, parent or grandparent.

<sup>10</sup>§ 8.22.360(B)(6). The city's rent board oversees implementation of the ordinance's protections and hears appeals from administrative decisions. For more information on the role of the board, see <http://ceda-online.oaklandnet.com/rentadjustmentsite/index.htm> (follow "The Housing Residential Rent-Relocation Board" link).

<sup>11</sup>§ 8.22.360(B)(7).

<sup>12</sup>§ 8.22.370(A)(2).

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

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

<sup>15</sup>§ 8.22.370(C).

<sup>16</sup>Complaint for Violation of Oakland's Just Cause Ordinance, Injunctive Relief, and Other Equitable Relief at ¶ 15, *State v. McNulty*, No.

## The Complaints

The complaints named JP Morgan Chase, Fidelity, Keller Williams, Session Real Estate, and Smart Choice Realty as defendants, in addition to several agents of the banks and realty companies.<sup>17</sup> Fourteen properties were involved. The complaints allege several violations of the just cause ordinance, including: (1) the owners had no just cause to evict; (2) the actual written notices did not cite a just cause basis, did not advise tenants of the ordinance, and did not advise tenants of their rights to seek advice from the rent board; and (3) the defendants did not file copies of the eviction notices with the rent board.<sup>18</sup>

The complaints seek temporary restraining orders and other injunctive relief to prohibit future use of illegal notices.<sup>19</sup> The city also seeks an order restoring tenants to their prior residences, or, in the alternative, reimbursing tenants for moving and other expenses resulting from the attempts to evict.<sup>20</sup> The strict language of the ordinance does not authorize the city to seek damages on behalf of tenants. However, the complaints seek these damages "pursuant to the court's inherent equity powers."<sup>21</sup> The complaints also seek remedies under California Civil Code § 1942.4, which allows damages for substandard dwelling conditions, since foreclosure can lead to tenants' utilities being shut off as well as disrepair.<sup>22</sup>

## Outcomes

Thus far, the city has reached a settlement agreement with one defendant, and is in the process of reaching settlements with a majority of the other defendants.<sup>23</sup> According to the city attorney's office, the settlement agreements include damages clauses for any future violations of the ordinance. The city attorney has also provided sample notices of foreclosure to the banks and agents

09440648 (Cal. Super. Ct. filed Mar. 11, 2009). The City Charter authorizes the City Attorney to commence an action to abate or remove a violation and restrain and enjoin any person from violating any provisions of the Municipal Code. See OAKLAND CITY CHARTER § 401(6).

<sup>17</sup>Compl., *supra* note 16; Complaint for Violation of Oakland's Just Cause Ordinance, Injunctive Relief, and Other Equitable Relief, *State v. Fidelity Nat'l Fin.*, No. 09-436907 (Cal. Super. Ct. filed Feb. 19, 2009); Complaint for Violation of Oakland's Just Cause Ordinance, Injunctive Relief, and Other Equitable Relief, *State v. Murphy*, No. 09-436901 (Cal. Super. Ct. filed Feb. 19, 2009); Complaint for Violation of Oakland's Just Cause Ordinance, Injunctive Relief, and Other Equitable Relief, *State v. Session*, No. 09-436897 (Cal. Super. Ct. filed Feb. 19, 2009); Complaint for Violation of Oakland's Just Cause Ordinance, Injunctive Relief, and Other Equitable Relief, *State v. Cheung*, No. 09-436902 (Cal. Super. Ct. filed Feb. 19, 2009).

<sup>18</sup>Compl., *supra* note 16, at ¶ 17.

<sup>19</sup>*Id.* at ¶¶ 20-21.

<sup>20</sup>*Id.* at Prayer ¶ 3. CAL. CIV. CODE § 3422(1) allows injunctive relief where pecuniary compensation will not afford adequate relief.

<sup>21</sup>*Id.* at Prayer ¶ 3.

<sup>22</sup>*Id.* at Prayer ¶ 7.

<sup>23</sup>Telephone Interview with Amber Macaulay, Attorney, Office of the City Attorney, City of Oakland (June 4, 2009).

to help them avoid violations in the future.<sup>24</sup> Although the city attorney's office reports that banks have been receptive to changing their eviction policies regarding Oakland tenants, nationwide policy changes seem unlikely given that most cities do not have just cause ordinances. Further, no nationwide or companywide policy changes were included as part of the settlement agreements.<sup>25</sup>

The city is implementing further strategies in response to the foreclosure crisis and its effects.<sup>26</sup> It is distributing guidelines for tenants in foreclosed properties<sup>27</sup> and has encouraged advocates to report efforts to evict these tenants to the city attorney's office. It has also adopted a declaration to prevent utility shutoffs in foreclosed properties.<sup>28</sup> Additionally, the city is considering issuing fines under California Civil Code § 2929.3, which allows cities to impose civil penalties of up to \$1000 per day for owners who purchase foreclosed properties and fail to adequately maintain them.<sup>29</sup>

## Conclusion

Oakland's litigation represents a promising strategy for keeping tenants in their homes following foreclosure, at least for cities with similar ordinances. While the federal Protecting Tenants at Foreclosure Act (PTFA)<sup>30</sup> requires at least ninety days' notice before tenants in foreclosed properties can be evicted, just cause ordinances afford tenants additional protections that are not preempted by the Act. Specifically, these ordinances can prohibit tenants from being evicted or denied renewal of a lease, regardless of whether the PTFA's ninety-day notice requirement has been met, unless for a just cause. Further, these ordinances may provide wide-ranging injunctive relief and, in some cases, damages and attorney's fees for tenants who have been unlawfully evicted. Accordingly, advocates in cities with just cause ordinances should consider working with their city attorney's offices to enforce such ordinances against banks, realtors and brokers that seek to evict tenants post-foreclosure. Advocates in cities without such ordinances should meet with state and local government officials to determine whether it is feasible to enact tenant protections that extend beyond the PTFA. ■

<sup>24</sup>*Id.*

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

<sup>26</sup>*Id.*

<sup>27</sup>See Neighborhood Law Corps, Oakland's General Guidelines for Tenants in Foreclosed Housing, <http://www.oaklandcityattorney.org/PDFS/Guidelines%20Tenants%20in%20Foreclosed%20Housing%203%2012%2009.pdf>.

<sup>28</sup>NHLP, *San Francisco and Oakland Issue Declarations Protecting Tenants from Utility Shutoffs*, 39 HOUS. L. BULL. 89 (2009).

<sup>29</sup>CAL. CIV. CODE § 2929 (West 2009).

<sup>30</sup>Pub. L. No. 111-22, §§ 701-04, 132 Stat. 1632, 1660-62 (2009).

# Court Will Not Close Mobile Home Park in Absence of Viable Alternative Housing

In a victory for tenants and mobile home owners, a California district court, on April 30, 2009, refused to close a rural mobile home park on tribal land that is home to thousands of migrant and indigenous farm workers. In *United States v. Duro*,<sup>1</sup> Judge Stephen G. Larson blocked the federal government's efforts to close the park unless and until its tenants had safe and affordable alternative housing. The decision prevented what the court feared would have become "one of the largest forced human migrations in the history of this State."<sup>2</sup>

## Background

Desert Mobile Home Park, also known as Duroville, or "Los Duros" to many residents, is a forty-acre allotment of land on the Torres Martinez Desert Cahuilla Indian Reservation in southern California.<sup>3</sup> Duroville is home to roughly 270 mobile homes that by some estimates house 2000 to 6000 people, with peak populations during the grape harvest season in May and June of each year.<sup>4</sup> Residents first began arriving in Duroville around 1998<sup>5</sup> after the County of Riverside began closing down mobile home parks within its jurisdiction that were not meeting building code standards.<sup>6</sup> Though mobile home parks located on Indian lands must meet certain standards to obtain lease approval from the Bureau of Indian Affairs (BIA), many health and safety code provisions of local, state and federal law are preempted by laws governing jurisdiction over Indian lands.<sup>7</sup>

Harvey Duro, Sr., allottee<sup>8</sup> of the land, member of the Torres Martinez tribe, owner and operator of Duroville,

<sup>1</sup>\_\_ F. Supp. 2d \_\_, 2009 WL 1653548 (C.D. Cal. Apr. 30, 2009) (No. 07-1309). California Rural Legal Assistance, Inc. (CRLA) and private attorney Chandra Gehri Spencer represented four residents who intervened in the action.

<sup>2</sup>*Id.* at \*5.

<sup>3</sup>Declaration of James Fletcher in Support of Plaintiff's Motion for Preliminary Injunction at 2, *Duro* (No. 07-1309) [hereinafter *Fletcher Declaration*].

<sup>4</sup>Richard K. De Atley, *Decision on Duroville Expected Next Week*, THE PRESS-ENTERPRISE, Apr. 23, 2009, available at [http://www.pe.com/localnews/inland/stories/PE\\_News\\_Local\\_S\\_duroville24.3f92802.html?npn](http://www.pe.com/localnews/inland/stories/PE_News_Local_S_duroville24.3f92802.html?npn).

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

<sup>6</sup>David Kelly, *The Southland's Hidden Third World Slums*, L.A. TIMES, Mar. 26, 2007, at A1. CRLA stopped the County's targeted code enforcement with fair housing complaints to HUD resulting in a HUD-monitored enforcement agreement. By this time, however, many residents had already relocated due to feared eviction.

<sup>7</sup>Kelly, *supra* note 6.

<sup>8</sup>As allottee, Mr. Duro and his heirs enjoy use and enjoyment of the allotment, which is held in trust by the United States government. *Fletcher Declaration* at 2.

and defendant in the present suit, allowed conditions in the mobile home park to degenerate steeply over the years. The Environmental Protection Agency reported in 2003 that the soil of Duroville contained numerous deadly substances such as dioxin and asbestos, remnants of the illegal dump site that had operated next door for over a decade.<sup>9</sup> An inspection report commissioned by BIA in 2007 revealed overcrowding, numerous fire hazards, a lack of potable water, and sewage and waste disposal problems.<sup>10</sup> In addition to the unsafe physical conditions, tenants were also subjected to abusive housing practices that included regular electricity and telephone shut-offs.<sup>11</sup> Despite all this, residents remained because rent was affordable, few could pay more than the \$500 rent per month that Harvey Duro charged, and there were no other accessible places for their mobile homes.<sup>12</sup>

### Procedural History

The federal government first brought suit against Duro and the Desert Mobilehome Park corporation in July 2003 seeking elimination or abatement of the park's numerous health and safety hazards.<sup>13</sup> The case, referred to in the present suit as "Duro I," ended in a settlement stipulation requiring Duro to bring the buildings and infrastructure systems into compliance with "applicable government codes, standards and regulations" within eighteen months.<sup>14</sup> Four years later, after a fire destroyed six manufactured homes,<sup>15</sup> the United States filed motions to re-open Duro I and hold Mr. Duro in contempt of court for violation of the stipulation.<sup>16</sup> When that motion was denied, the government filed this action in October 2007.

The present suit contained four causes of action against Mr. Duro: (1) violation of the court-approved stipulation from Duro I; (2) failure to obtain a BIA lease to run a commercial operation on Indian land in violation of 25 U.S.C. 415; (3) public nuisance; and (4) private nuisance.<sup>17</sup> Finding that it would cost more than \$4.3 million to bring the park into code compliance,<sup>18</sup> the government sought money damages to return the land to its natural

state and, most significantly, injunctive relief in the form of a court order closing the park completely.<sup>19</sup> Several residents of Duroville, represented by California Rural Legal Assistance, Inc., joined the lawsuit on December 10, 2007, as Intervener-Defendants to ensure that families who would be affected by any outcome would have a voice in the litigation. After the government moved for preliminary injunction on the first and second claims, the court appointed a temporary receiver to administer and manage the park and make recommendations as to future options.<sup>20</sup> The receivership ensured that repairs would begin on hazardous health and safety conditions.

On April 1, 2009, following the government's motion for summary adjudication, the court granted the government's motion with respect to the first two claims and dismissed the nuisance claims with prejudice.<sup>21</sup> However, in its final order, issued April 30, 2009, the court vacated its prior summary judgment order regarding the breach of stipulation claim (the second cause of action) and dismissed that claim with prejudice.<sup>22</sup> The only claim for which the court found liability was that of the defendants' failure to obtain lease approval as required by 25 U.S.C. 415.

### The Court's Analysis

#### Applicable Law

The court's decision to dismiss with prejudice the claim regarding breach of the stipulation turned on an absence of applicable regulatory standards as well as ambiguities in the stipulation agreement itself. The government argued that Title 25, the California state regulations for manufactured home parks,<sup>23</sup> set the stipulation compliance standards for Duroville's operations.<sup>24</sup> The court found that Title 25 does not apply absent a lease provision or other agreement incorporating it; nor did the original parties to the stipulation manifest an intent for Title 25 regulations to apply. The remaining possible

<sup>9</sup>Kelly, *supra* note 6.

<sup>10</sup>Fletcher Declaration, *supra* note 3, at 7.

<sup>11</sup>Interveners' Brief in Support of Injunctive Relief and for the Appointment of a Receiver at 11, *Duro* (No. 07-1309) [hereinafter *Interveners' Brief*].

<sup>12</sup>Dan Barry, *Beside a Smoldering Dump, a Refuge of Sorts*, N.Y. TIMES, Oct. 21, 2007, available at <http://www.nytimes.com/2007/10/21/us/21land.html?scp=1&sq=duroville&st=cse>.

<sup>13</sup>United States v. Duro, No. 03-0754-RT (C.D. Cal. May 13, 2004) (PACER) [hereinafter *Duro I*].

<sup>14</sup>*Id.* at 2.

<sup>15</sup>Barry, *supra* note 12.

<sup>16</sup>Notice of Motion and Motion to Reopen the Case; Memorandum of Points and Authorities in Support of Motion, *Duro I* (No. 03-0754).

<sup>17</sup>*Duro*, 2009 WL 1653548, at \*1.

<sup>18</sup>David Kelly, *Duroville Mobile Home Park Will Not Close*, L.A. TIMES, May 1, 2009, available at <http://articles.latimes.com/2009/may/01/local/me-duroville1>.

<sup>19</sup>*Duro*, 2009 WL 1653548, at \*4, 6.

<sup>20</sup>The court granted the motion for preliminary injunction on May 1, 2008.

<sup>21</sup>Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment at 1-2, *Duro* (No. 07-1309). In dismissing the nuisance claims, the court agreed with the interveners' argument that Public Law 280 does not grant California jurisdiction to enforce state nuisance law over Indian lands. Citing the Supreme Court test in *California v. Cabazon Band of Mission Indians*, 408 U.S. 202 (1987), the court noted that the proper inquiry in determining Public Law 280 jurisdiction is whether an in-depth examination of the "nature and intent" of the law in question reveals the law to be criminal ("prohibitory," for the purposes of the test) or civil ("regulatory"). The court found that despite the existence of criminal nuisance remedies, "California's nuisance law is clearly but one area of law in a greater scheme of regulation of the use of land" and is therefore civil in nature for the purposes of the *Cabazon* test. As such, Public Law 280 does not authorize California to enforce nuisance law over tribal lands.

<sup>22</sup>*Duro*, 2009 WL 1653548, at \*2.

<sup>23</sup>CAL. CODE REGS. tit. 25, §§ 1000-1758 (Westlaw June 15, 2009).

<sup>24</sup>*Duro*, 2009 WL 1653548, at \*1.

regulatory law, the Torres Martinez Tribal Ordinances, also did not apply because one ordinance was inapplicable to manufactured housing and the others were inapplicable for lack of supporting evidence of code violation at trial.<sup>25</sup> The court thus had no “applicable government codes, standards and regulations” by which to determine whether Mr. Duro had brought the park into compliance as stipulated.<sup>26</sup> The only stipulation provision not subject to these unnamed codes and regulations—that of Duro’s lease submission—the court found to be ambiguous and vague, making compliance impossible to determine. The court therefore dismissed the first cause of action with prejudice.<sup>27</sup>

The court found, however, that Duro violated federal law in failing to obtain lease approval from BIA for the park’s operations. Section 415 of United States Code Title 25 authorizes the Indian allottees of their restricted lands to lease such land for business and residential purposes, subject to approval of the Secretary of the Interior.<sup>28</sup> Prior to leasing his land, Duro should have submitted a proposed lease to the Secretary for approval but did not do so.<sup>29</sup> Because the court further found Duro’s violation of the lease requirements to be knowing and willful, the court removed Duro from his managerial role, ordered the closure of almost all commercial operations in the park, and enjoined Duro from profiting further from Duroville.<sup>30</sup>

### BIA Fault

The court did not rest all blame on Duro’s shoulders, but pointed as well to inadequacies and failings of BIA. Citing the fiduciary duty that BIA owes Mr. Duro as a member of the Torres Martinez tribe, the court enumerated years’ worth of BIA shortcomings in its treatment of Duro and the park. These included several due process issues, such as failing to supply substantive information to help Duro qualify for the lease and failing to provide him with his appellate rights after denying his lease request.<sup>31</sup> BIA’s “prosecutive demeanor” and constant focus on “closure and relocation, never on rehabilitation” ultimately contributed to the court’s decision in fashioning the government’s equitable relief.<sup>32</sup>

### Tenant Displacement

What began as a case pitting the government against park management ended with the federal government and Duro on one side, and the low-income farm workers

on the other. Towards the end of trial, Duro “threw in the towel,” testifying that he no longer wished to operate the park.<sup>33</sup> But Judge Larson refused to treat Duroville as just another toxic site for which no solution except complete closure would be fitting. The court recognized instead that the park “is not a business, it is a village... It is not nearly as safe or as healthy as we would want it to be; it is, nonetheless, home for a community of people who are poor, undereducated, disenfranchised, and, in many respects, exploited.”<sup>34</sup>

The lack of alternative housing for residents steered the court’s ultimate decision to allow the park to continue operating. Despite legitimate health and safety concerns, the court refused to order closure because it found “highly unlikely” the government’s assumption that closing Duroville would somehow result in improved living situations for its thousands of residents.<sup>35</sup> According to the intervener residents, the government paid little attention to this critical and practical issue, characterizing the plaintiff’s position towards residents as “stark, candid and rather callous, . . . [that] they are only farm workers and they will simply move to other areas.”<sup>36</sup> The court found it unlikely that acceptable alternative housing would be available to park tenants for at least eighteen to twenty-four months.<sup>37</sup> This case had all the makings of a “*major humanitarian crisis*,” which Judge Larson found reminiscent of the internment of Japanese Americans during World War II, with the significant difference that here “there is not even a Manzanar for these residents to go.”<sup>38</sup> In light of these concerns, the court declared, “*Until and unless alternative housing is available—alternative housing that is safe, healthy, affordable and truly available to the residents—this Court will not close Duroville.*”<sup>39</sup>

### Equitable Remedies

The condition of the park and Duro’s violation of the BIA lease requirements necessitated equitable remedies of some kind. To oversee the management and administration of the park, the court appointed a receiver for a period of two years.<sup>40</sup> The court then identified the most immediate health and safety concerns for the receiver to address, including sewage problems, gas leaks, animal control and utility negotiations.<sup>41</sup> With respect to current tenants, the court proscribed a broad supportive role for the receiver. It will be the receiver’s duty to identify reasonable alternative housing options, to provide infor-

<sup>25</sup>*Id.* at \*2.

<sup>26</sup>*Id.*

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

<sup>28</sup>25 U.S.C.A. § 415(a) (Westlaw June 15, 2009). The lease requirements are enumerated in 25 C.F.R. Part 162.

<sup>29</sup>*Duro*, 2009 WL 1653548, at \*2.

<sup>30</sup>*Id.*

<sup>31</sup>*Id.* at \*4-5.

<sup>32</sup>*Id.* at \*4.

<sup>33</sup>De Atley, *supra* note 4.

<sup>34</sup>*Duro*, 2009 WL 1653548, at \*5.

<sup>35</sup>*Id.* at \*5 n.1.

<sup>36</sup>*Intervenors’ Brief*, *supra* note 11, at 3.

<sup>37</sup>*Duro*, 2009 WL 1653548, at \*7.

<sup>38</sup>*Id.* at \*5 (emphasis in original).

<sup>39</sup>*Id.* (emphasis in original).

<sup>40</sup>*Id.* at \*7.

<sup>41</sup>*Id.* at \*7-8.

mation on local housing programs, to assist residents with housing applications and waiting lists, and to work with local organizations to provide counseling services for residents who relocate.<sup>42</sup> The court left open the possibility that park conditions could improve so that a proper BIA lease might be issued and the park remain open long term, though no new or replacement tenants are currently permitted.<sup>43</sup> After a six-month cooling-off period, BIA and Duro are ordered to participate in a settlement conference to explore future options for the allotment.<sup>44</sup>

### Conclusion

At present, it is too soon to determine whether Duroville will remain open indefinitely. A small number of families have moved from the park since the court order was issued in April. Approximately thirty more are expected to relocate once a new manufactured home park opens in approximately one year, and a federal funding application will be filed shortly to allow the relocation of an additional 200 manufactured homes from Duroville to the new park. The court appointed receiver is also working with the county, the Coachella Valley Housing Coalition, and the Desert Alliance for Community Empowerment to explore additional alternative housing options.<sup>45</sup>

As Judge Larson recognized, the issues raised by the Duroville case were not only legal in nature. The government's desire to close the park implicated humanitarian issues far broader than those that the court could feasibly address in one decision. As such, Larson's decision included a plea, sent out to the Torres Martinez tribe, Riverside County, Governor Schwarzenegger, Senators Feinstein and Boxer, the U.S. Attorney, and more. The court encouraged these groups to work together "in resolving this crisis... to develop safe, healthy, affordable, and available housing for the residents of the Park" and others similarly situated.<sup>46</sup> The court's reasoning and underlying concern for alternative housing options should serve as a model for the pragmatic and equitable considerations inherent in any case involving tenant displacement. The case further points to the need to improve living conditions for low-income, exploited populations, particularly those residing on tribal lands. ■

<sup>42</sup>*Id.* at \*8.

<sup>43</sup>*Id.* at \*6, 9.

<sup>44</sup>*Id.* at \*9.

<sup>45</sup>Email from Arturo Rodriguez, Directing Attorney, Migrant Farmworker Project, California Rural Legal Assistance, Inc., to Erin Liotta, Law Clerk, National Housing Law Project (June 18, 2009) (on file with NHLP).

<sup>46</sup>*Duro*, 2009 WL 1653548, at \*6.

## Frank and Waters Renew Their Call for Moratorium on Public Housing Demolition and Disposition

Congressman Barney Frank (D-MA), chair of the House Committee on Financial Services, and Congresswoman Maxine Waters (D-CA), chair of the House Subcommittee on Housing and Community Opportunity, have asked the Obama administration to act to preserve public housing. The latest effort in their ongoing campaign is a letter urging Department of Housing and Urban Development (HUD) Secretary Sean Donovan to "impose a one-year moratorium on the approval of applications for the demolition or disposition of public housing units."<sup>1</sup> The letter also emphasizes that public housing represents the federal government's commitment to house the nation's most vulnerable populations and that the private sector cannot make this commitment.<sup>2</sup> Mr. Frank and Ms. Waters wrote a similar letter in August 2008 opposing HUD's policy of cooperating with housing authorities' demolition and disposition requests and arguing that the result has been a "loss of public housing units [which] has now reached epic proportions."<sup>3</sup>

### Background

The loss of public housing units stems in part from the debate regarding the relative merits of "hard" public housing units, which are owned and operated by public housing authorities (PHAs), versus the relative merits of tenant-based assistance. Some of the arguments against hard units are no longer true or are true only in limited situations. These criticisms include claims that hard units are more expensive than tenant-based assistance, they are often located in neighborhoods that are racially and economically impacted, and they are often in disrepair. The

<sup>1</sup>Letter from Barney Frank, Chair of the House Committee on Financial Services, and Maxine Waters, Chair of the House Subcommittee on Housing and Community Opportunity, to Shaun Donovan, Secretary of the Department of Housing and Urban Development (June 15, 2009), <http://www.nlihc.org/doc/Frank-Waters-Letter-to-Donovan-6-15-09-Moratorium.pdf> [hereinafter June 15, 2009 Letter].

<sup>2</sup>*Id.*

<sup>3</sup>Letter from Barney Frank, Chair of the House Committee on Financial Services, and Maxine Waters, Chair of the House Subcommittee on Housing and Community Opportunity, to Steve Preston, Secretary of the Department of Housing and Urban Development (Aug. 13, 2008), <http://www.nlihc.org/doc/Waters-Frank-Preston-8.13.08.pdf> [hereinafter Aug. 13, 2008, Letter]. The Center on Budget and Policy Priorities (CBPP) concludes that between 1995 and 2008, approximately 170,000 units of public housing have been lost and not replaced. BARBARA SARD & WILL FISCHER, CTR. ON BUDGET & POLICY PRIORITIES, PRESERVING SAFE, HIGH QUALITY PUBLIC HOUSING SHOULD BE A PRIORITY OF FEDERAL HOUSING POLICY (2008) 8.

reality is that replacing public housing units with vouchers would increase federal costs and that many units are no longer located in “extreme poverty” neighborhoods.<sup>4</sup> Moreover, public housing is often the best option for families who have difficulty utilizing tenant-based assistance, especially the elderly and disabled in high-cost areas. Although there are some “problem” developments that may not warrant preservation, these developments are the exception, not the rule.<sup>5</sup> Further, there are some drawbacks to tenant-based assistance.<sup>6</sup> Some landlords view the voucher program as creating added paperwork and obligations, without providing additional subsidies to cover those costs. Many voucher tenants encounter landlords who avoid renting to them and, in the worst cases, overtly state that they are not welcome.<sup>7</sup> There are also situations in which entire communities seek to exclude voucher tenants.<sup>8</sup> Because of the complexities of replacement housing, the increased need for affordable housing due to the economic crisis, the current condition of much of the public housing stock,<sup>9</sup> and the problems with voucher use, the moratorium on approval of all demolitions and dispositions of public housing is justified.

In 1983, Congress adopted Section 18 of the United States Housing Act, which limited HUD’s authority to approve an application for demolition or disposition.<sup>10</sup> In 1988, Congress added language requiring PHAs to provide one-for-one replacement of units in cases of demolition or disposition.<sup>11</sup> In 1995, Congress suspended the one-for-one replacement requirement<sup>12</sup> and permanently repealed it in 1998,<sup>13</sup> setting the stage for communities to jettison hard units while, in most cases, providing much of the replacement housing through the use of tenant-based assistance.

In the decade after the repeal of the one-for-one replacement rule, federal spending on low-income housing dropped dramatically.<sup>14</sup> Also, since the 1980s, no

significant numbers of public housing units have been built. Decreases in both operating and capital funds forced (or perhaps excused) PHAs to search for ways to demolish or dispose of properties they could not afford to repair or operate. The loss of affordable housing was exacerbated in 2006 by HUD’s position that replacement tenant-based assistance, known as tenant protection vouchers, need only be provided for units that were occupied at the time of the demolition or disposition application.<sup>15</sup> This policy institutionalized the loss of units resulting from significantly reduced and inadequate federal funding and harmed communities where PHAs allowed large numbers of units to become or remain empty in the run-up to demolition or disposition. Congress responded to this new HUD policy by stating in consecutive appropriations acts that HUD must provide tenant protection vouchers for all units occupied within twenty-four months of the demolition or disposition request.<sup>16</sup>

### Recent Correspondence with HUD

In 2007, recognizing the need to address statutes and departmental practices that allowed and even encouraged the demolition or disposition of thousands of public housing units, the Committee on Financial Services requested that the National Low Income Housing Coalition (NLIHC), the Housing Justice Network (HJN) and the National Training and Information Center (NTIC) submit comments on Sections 18,<sup>17</sup> 22<sup>18</sup> and 33<sup>19</sup> of the United States Housing Act. Section 18 provides that the HUD Secretary shall approve a demolition application if the PHA certifies that the property is physically and fiscally obsolete or too expensive to maintain, or a disposition application if retention is not in the best interest of the residents or the agency.<sup>20</sup> Section 22 allows PHAs to convert voluntarily a development or portion thereof to tenant-based assistance. Section 33 requires a mandatory conversion of public housing units so that they are no longer funded as public housing and the tenants receive tenant-based assistance.

HJN, NTIC and NLIHC sent a letter to the committee on January 22, 2008. They called for mandatory one-for-one replacement of demolished or disposed of public housing. They requested a guaranteed right of return for displaced residents to counter the permanent displacement of families who did not satisfy onerous move-in requirements of newly renovated or constructed developments. They explained the need for a uniform standard

<sup>4</sup>See SARD & FISCHER, *supra* note 3, at 6, 17.

<sup>5</sup>*Id.* at 19.

<sup>6</sup>Despite these drawbacks, it is important to note that many families prefer vouchers and are able to use them successfully, especially if they are provided with housing counseling.

<sup>7</sup>Three states and a number of cities across the country have laws prohibiting discrimination based upon “source of income.” For more information, see NHLP, *Courts Consider Landlord Defenses to Source of Income Laws*, 38 HOUS. L. BULL. 239 (2008).

<sup>8</sup>William Lee, *Welch, Davis Working On Bill To Disperse Section 8 Renters*, SOUTHTOWN STAR, June 25, 2009, <http://www.southtownstar.com/news/1638812,062509section8.article>.

<sup>9</sup>Much of the public housing stock is currently in good condition. See SARD & FISCHER, *supra* note 3, at 2, 6-10.

<sup>10</sup>Pub. L. No. 98-181, § 214, 97 Stat. 1153 (1983).

<sup>11</sup>Pub. L. No. 100-242, 101 Stat. 1815 (1988).

<sup>12</sup>See Pub. L. No. 104-19, § 1002(a), 109 Stat. 194, 235 (July 27, 1995).

<sup>13</sup>Pub. L. No. 105-276, Tit. V, § 531, 112 Stat. 2461, 2570 (Oct. 21, 1998), codified at 42 U.S.C.A. § 1437p (Westlaw June 22, 2009); see also NHLP, HUD HOUSING PROGRAMS: TENANTS’ RIGHTS § 15.2 (3ded. 2004).

<sup>14</sup>DOUGLAS RICE & BARBARA SARD, CTR. ON BUDGET & POLICY PRIORITIES, DECADE OF NEGLECT HAS WEAKENED FEDERAL LOW-INCOME HOUSING PROGRAMS (2009), <http://www.cbpp.org/cms/index.cfm?fa=view&id=2691>.

<sup>15</sup>See NHLP, *New HUD Relocation and Replacement Voucher Policy for Public Housing Demolition and Disposition*, 37 HOUS. L. BULL. 77 (2007).

<sup>16</sup>See, e.g., Omnibus Appropriations Act, 2009, Pub. L. No. 111-8 (Mar. 10, 2009) (formerly H.R. 1105), Tenant Based Assistance.

<sup>17</sup>42 U.S.C.A. § 1437(p) (Westlaw June 22, 2009).

<sup>18</sup>§ 1437(t).

<sup>19</sup>§ 1437z-5.

<sup>20</sup>§ 1437p(a)(1)(A).

for demolition or disposition. Further, they argued for a non-discriminatory and adequate relocation process that is enforceable by residents and for tenant participation in the decision-making process.<sup>21</sup>

Subsequently, advocates pressed members of Congress to request information from HUD regarding public housing. For example, advocates sought information regarding the number of units lost, the characteristics of those units, the number of units replaced, the income levels for eligibility and rents charged (rent affordability) for any replacement units. In addition, advocates requested information about the status of families who were displaced by demolition or disposition.

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*Mr. Frank and Ms. Waters maintain that “vouchers are not a substitute for the permanent replacement of hard public housing units, which represent a permanent commitment to providing affordable housing and services within a community.”*

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On June 4, 2008, Mr. Frank and Ms. Waters wrote to then-Acting HUD Secretary Roy A. Bernardi seeking data on the number of demolition or disposition applications submitted, approved and pending since 2000, the number and location of affected units, the identities of the responsible housing authorities, and the number and location of rebuilt units affordable to extremely low- and very-low income people.<sup>22</sup> Mr. Frank and Ms. Waters also asked for the yearly average number of applications and units that were approved for demolition or disposition and the percentage of rejected applications. Additionally, they requested information regarding the type of housing or subsidy received by displaced residents, the occupancy rates since 2000 of the properties approved for demolition or disposition, and the unmet capital needs of the developments for which demolition or disposition had been approved.

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<sup>21</sup>Letter from NLIHC, HJN & NTIC to Barney Frank, Chair of the House Committee on Financial Services, and Maxine Waters, Chair of the House Subcommittee on Housing and Community Opportunity (Jan. 22, 2008) (on file with NHLP).

<sup>22</sup>Letter from Barney Frank, Chair of the House Committee on Financial Services, and Maxine Waters, Chair of the House Subcommittee on Housing and Community Opportunity, to Roy Bernardi, Acting Secretary of the Department of Housing and Urban Development (June 4, 2008) (on file with NHLP).

In July 2008, HUD responded that since 2000, 1466 applications had been approved, allowing demolition or disposition of 99,032 units. With regard to replacement housing, 33,006 public housing units were created, 18,986 tax credit affordable units were created, 9326 mixed-income units (the latter two categories not separated by level of affordability) were constructed and 64,210 Housing Choice Vouchers (HCVs) were issued. Eighty-nine demolition applications were then pending, representing 16,672 units of public housing. From 2000 through 2008, HUD approved 162 applications per year, representing 11,000 units per year. According to the letter, HUD’s “model for replacement housing [including the issuance of large numbers of HCVs] provides a one-for-one replacement of public housing units demolished or disposed of... while creating more housing options for families beyond the traditional public housing stock.”<sup>23</sup>

By letter of August 13, 2008, Ms. Waters and Mr. Frank called upon then-Secretary Steve Preston “to immediately cease approval of all demolition and disposition applications until legislation is enacted to reform this program.”<sup>24</sup> They noted that HUD’s data reflected a loss of more than 60% of demolished or disposed of public housing units. The letter also noted that HUD continued to approve PHAs’ applications, that public housing serves “our most vulnerable populations, including the elderly and disabled” and that vouchers do not compensate families for the loss of hard units attached to a community.

The prior administration refused to accede to the moratorium request. On September 9, 2008, Secretary Preston wrote to Mr. Frank that while approval was not automatic, HUD was required by Section 18 to review applications. The Secretary gave examples of situations in which the insertion of vouchers in place of hard units had resulted in an increase in the number of assisted units, and supported vouchers as a vehicle for enabling families to transition out of public housing.<sup>25</sup>

While recognizing HCVs as “an important component of our national affordable housing policy,” in their most recent letter Mr. Frank and Ms. Waters maintain that “vouchers are not a substitute for the permanent replacement of hard public housing units, which represent a

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<sup>23</sup>Letter from Mark A. Studdert, Gen. Deputy Assistant Sec. for Cong. & Intergovernmental Relations, to Barney Frank, Chair of the House Committee on Financial Services, and Maxine Waters, Chair of the House Subcommittee on Housing and Community Opportunity (July 2, 2008) (on file with NHLP).

<sup>24</sup>See Aug. 13, 2008, Letter, *supra* note 3; see also: CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: INTRODUCTION TO PUBLIC HOUSING (2008), <http://www.cbpp.org/cms/index.cfm?fa=view&id=2528>.

<sup>25</sup>Preston Says HUD Must Consider Demolition, Disposition Applications, Effectively Rules Out Moratorium, 36 HOUS. & DEV. REP. 582 (Sept. 29, 2008).

permanent commitment to providing affordable housing and services within a community.”<sup>26</sup> They assert that the \$4 billion allocated through the American Recovery and Reinvestment Act of 2009 (ARRA)<sup>27</sup> for public housing capital funds “signals a renewed commitment to funding and preserving our public housing stock.”<sup>28</sup>

### Conclusion

The \$4 billion in capital fund investments in ARRA<sup>29</sup> and other stimulus funds represent a down payment on the public housing capital improvement backlog, which is estimated to be between \$22 billion and \$32 billion.<sup>30</sup> Accordingly, it is time to revisit HUD’s continuing deference to PHAs’ certifications that their public housing is obsolete as to physical condition and cannot be returned to useful life under any cost-effective plan.<sup>31</sup> Housing residents and advocates should consider supporting the efforts of Mr. Frank and Ms. Waters to obtain a moratorium. ■

## Fifth Circuit Holds Public Housing Demolition Law Unenforceable\*

The Court of Appeals for the Fifth Circuit handed public housing residents a crushing defeat in *Anderson v. Jackson*,<sup>1</sup> holding that, in the context of the demolition of housing developments, tenants’ notice and relocation rights under the United States Housing Act<sup>2</sup> are not enforceable under 42 U.S.C. § 1983. While the Fifth Circuit recognized that the United States Housing Act could be enforced under the Administrative Procedure Act (APA), the court held that public housing residents were not entitled to an injunction, finding that they had not met their burden of showing a likelihood of success on the merits of their APA claim. The decision takes an expansive view of the Supreme Court’s decision regarding § 1983 in *Gonzaga University v. Doe*,<sup>3</sup> which narrowed court access to enforce individual rights. The Fifth Circuit was the first circuit to rule on the enforceability of the demolition provision following the statute’s modification by Congress in 1998, and the legislative history of the provision weighed heavily in the court’s decision. Nevertheless, two district courts from other circuits have reached the opposite conclusion regarding the post-modification enforceability of the demolition provision,<sup>4</sup> suggesting the possibility of a future circuit split on this question.

### Facts

The Housing Authority of New Orleans (HANO) submitted an application to the Department of Housing and Urban Development (HUD) requesting approval to demolish and redevelop four public housing developments that were in a state of disrepair. HANO assured the federal government that it would provide comparable housing to the residents and cover relocation costs. To inform the residents, HANO sent two notices, published a notice in several newspapers, and held several meetings.<sup>5</sup>

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\*This article was written by Rochelle Broboff, Directing Attorney, Herbert Semmel Federal Rights Project, National Senior Citizens Law Center. The Federal Rights Project hosts a listserv for public interest advocates providing timely summaries of cases pertaining to access to the courts. To join, email rbobroff@nslc.org.

<sup>1</sup>556 F.3d 351 (5th Cir. 2009).

<sup>2</sup>42 U.S.C.A. § 1437p(a)(4) (West 2003).

<sup>3</sup>536 U.S. 273 (2002).

<sup>4</sup>*Arroyo Vista Tenants Ass’n v. City of Dublin*, 2008 WL 2338231 (N.D.Cal. May 23, 2008); *Givens v. Butler Metro. Hous. Auth.* 2006 WL 3759702 (S.D. Ohio 2006).

<sup>5</sup>*Anderson*, 556 F.3d at 354. Significantly, the opinion is silent on the timing of those meetings, which took place after HANO submitted to HUD the application for permission to demolish the public housing.

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<sup>26</sup>June 15, 2009 Letter, *supra* note 1.

<sup>27</sup>Pub. L. No. 111-5, 123 Stat. 115, 214 (Feb. 17, 2009).

<sup>28</sup>June 15, 2009 Letter, *supra* note 1.

<sup>29</sup>Pub. L. No. 111-5, 123 Stat. 115, 214 (Feb. 17, 2009).

<sup>30</sup>See SARD & FISCHER, *supra* note 3.

<sup>31</sup>42 U.S.C.A. § 1437p (Westlaw June 22, 2009).

In June 2006, the residents filed suit against HUD and HANO, alleging that their constructive eviction due to the poor conditions in the developments violated the Housing Act. The district court held that 42 U.S.C. § 1983 did not provide a cause of action for the residents to challenge constructive eviction under the Housing Act, and no actual eviction claim was ripe, since HUD had not ruled on HANO's application.

In September 2007, HUD approved HANO's application after finding that all the statutory criteria were met. HUD concluded that the costs of rehabilitating the properties substantially exceeded the amount required to justify demolition.

The residents then moved for a preliminary injunction to stop the demolition, amending their complaint to add an actual eviction claim. The district court denied the requested relief, holding that the tenants did not have a private right of action against either HANO or HUD to enforce an actual eviction claim based on their rights under the Housing Act. The court of appeals denied the residents' request for an expedited appeal. The appellate court reported that as it issued its decision, three of the developments had been demolished, but 621 units remained open in the fourth.<sup>6</sup>

## Development of Supreme Court § 1983 Jurisprudence

In 1980, the Supreme Court held in a case involving welfare law that 42 U.S.C. § 1983 provides a cause of action to enforce federal statutes.<sup>7</sup> In two subsequent decisions, the Court upheld a cause of action under § 1983 in cases concerning the United States Housing Act and Medicaid.<sup>8</sup> However, in all these cases, conservative Supreme Court Justices, including Chief Justice Rehnquist, fiercely dissented, initially on policy grounds and later on the ground that the statutes at issue did not have sufficient indicia of Congressional intent to create "rights."<sup>9</sup>

As the composition of the Court changed, a majority of five Justices began reining in the scope of § 1983. In 1992, Rehnquist wrote the Court's opinion in *Suter v. Artist M.*, holding that the Adoption Assistance Act was not enforceable under § 1983, because the structure of the law did not evince congressional intent to permit private enforcement.<sup>10</sup> The Court focused on the Act's inclusion of

individual rights in a list of state requirements. Rehnquist reasoned that because the "generalized duty [of] the State" was contained in a list of state plan requirements, the law did "not unambiguously confer an enforceable right upon the Act's beneficiaries."<sup>11</sup> The Court concluded that this overall structure defeated the availability of a cause of action under § 1983.

In October 1994, just weeks before Congress turned from Democratic to Republican control, Congress passed an amendment to the Social Security Act intended to overrule Rehnquist's reasoning in *Suter*.<sup>12</sup> The "Suter fix" provides that the placement of an individual right in a list of state plan requirements does not indicate congressional intent to limit individual enforcement.<sup>13</sup>

Shortly thereafter, the Supreme Court reaffirmed the standards established in the earlier, more favorable cases for evaluating claims under § 1983. In 1997, the Court reiterated the three-part test for such claims in *Blessing v. Freestone*:

First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States.<sup>14</sup>

*Blessing* also criticized the court of appeals for evaluating the statute as a whole and emphasized that the test must be applied to the specific provision at issue.<sup>15</sup>

Nevertheless, in *Gonzaga v. Doe*, decided in 2002, Justice Rehnquist authored a decision narrowing the first prong of the test.<sup>16</sup> *Gonzaga* emphasized that a mere expression of congressional intent to benefit the plaintiffs in the statute would not suffice to support a cause of action under § 1983. The Court required that the intent to confer rights be "unambiguously" expressed in "explicit rights-creating terms."<sup>17</sup> Analyzing the provisions of the Family Educational Rights and Privacy Act, the Court then concluded that the statute did not meet the requirement for rights-creating language.<sup>18</sup>

<sup>6</sup>*Id.* at 354-55.

<sup>7</sup>*Maine v. Thiboutot*, 448 U.S. 1 (1980).

<sup>8</sup>*Wright v. City of Roanoke Redev. & Housing*, 479 U.S. 418 (1987) (U.S. Housing Act); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) (Medicaid).

<sup>9</sup>Rochelle Bobroff, *Section 1983 and Preemption: Alternative Means of Court Access for Safety Net Statutes*, 10 LOY. J. OF PUB. INT. L. 27, 42, 44-45, 50-51 (2008); SEE ALSO LAUREN SANDERS, *PREEMPTION AS AN ALTERNATIVE TO SECTION 1983*, 38 CLEARINGHOUSE REV. 705 (MARCH/APRIL 2005).

<sup>10</sup>*Suter v. Artist M.*, 503 U.S. 347 (1992).

<sup>11</sup>*Id.* at 363.

<sup>12</sup>Erwin Chemerinsky & Martin A. Schwartz, *Section 1983 Litigation: Supreme Court Review, A Roundtable Dialogue*, 19 TOURO L. REV. 625, 665-66 (2003).

<sup>13</sup>42 U.S.C.A. §§ 1320a-2, 1320a-10 (Westlaw May 22, 2009).

<sup>14</sup>*Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997) (citing *Wright*, 479 U.S. at 430-32 and *Wilder*, 496 U.S. at 510-11).

<sup>15</sup>*Id.* at 342.

<sup>16</sup>*Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

<sup>17</sup>*Id.* at 283-84.

<sup>18</sup>*Id.* at 287.

## The Fifth Circuit's Rejection of the Enforceability of 42 U.S.C. § 1437p

In *Anderson*, the Fifth Circuit's analysis of a cause of action under § 1983 to enforce 42 U.S.C. § 1437p began by focusing on the "overall structure of the statute,"<sup>19</sup> rather than the specific statutory provision. The circuit court noted that the demolition provision "is introduced with the statement that '[T]he Secretary shall approve the application, if the public housing agency certifies [.]'"<sup>20</sup> The court held that because the statute is styled as a "directive" to the Secretary, "[t]here is no indication in the statute that Congress intended public housing residents to have legal recourse against local housing authorities to enforce these administrative checklist requirements."<sup>21</sup>

While the Fifth Circuit cites *Blessing* and *Gonzaga* in its § 1983 analysis,<sup>22</sup> the court's reasoning follows *Suter*. The statutory provision at issue in *Suter* listed "qualifications which state plans must contain in order to gain the Secretary's approval."<sup>23</sup> The Supreme Court held in *Suter* that "in that context" only the Secretary, and not private individuals, could enforce the listed requirements.<sup>24</sup> Similarly, in *Anderson*, the Fifth Circuit focused on the placement of tenants' rights in the midst of requirements for federal approval of a demolition application. While the *Suter* fix is contained within the Social Security Act, it clearly evinces congressional intent that Congress disapproved of the reasoning of *Suter*, which is equally applicable in the context of housing statutes. The Fifth Circuit's emphasis on the placement of the statutory requirements in a list of items for federal approval, similar to the reasoning of *Suter*, would be a basis for arguing that *Anderson* was wrongly decided.

The Fifth Circuit also based its rejection of the residents' § 1983 claims on the legislative history of the United States Housing Act. In 1987, the D.C. Circuit rejected the enforceability of § 1437p in a case involving constructive eviction, *Edwards v. District of Columbia*, where HUD had not yet approved the demolition application and the residents had not been displaced.<sup>25</sup> In response, Congress amended § 1437p, adding a provision after the checklist stating: "A public housing agency shall not take any action to demolish or dispose of a public housing project or a portion of a public housing project without obtaining the approval of the Secretary and satisfying the

conditions specified in...this section."<sup>26</sup> The legislative history included explicit repudiation of *Edwards'* holding and the statement that the demolition provision "shall be fully enforceable by tenants of and applicants for the housing that is threatened."<sup>27</sup> However, a decade later, Congress streamlined the United States Housing Act and, in the process, removed the provision that had been added in response to *Edwards*.<sup>28</sup> The legislative history of the 1998 amendment contains no discussion of whether, as amended, § 1437p contains rights enforceable by tenants.<sup>29</sup>

The Fifth Circuit found that "the logical inference" from the legislative history "is that Congress intended to remove the private right of action."<sup>30</sup> Then, perhaps recognizing the weakness of its conclusion based on Congress' silence, the Fifth Circuit stated:

The repeal of the provision added in 1987, combined with the text and structure of the current statute, makes it at least ambiguous as to whether Congress intended for the current version of § 1437p to create a federal right. Accordingly, we hold that § 1437p does not unambiguously confer individual rights enforceable through § 1983.<sup>31</sup>

The court's reasoning is easily rebutted. *Edwards* only rejected enforcement for constructive eviction, in which HUD had not yet approved the demolition application.<sup>32</sup> Even if the 1998 revision was designed to roll back the 1987 expansion of enforceability that had included constructive eviction, there was never any question, even in *Edwards*, that tenants could enforce their rights in the event of an actual eviction, following approval of the demolition application by HUD. Since Congress never contemplated that actual eviction would be unenforceable, the 1998 revision could not possibly have been meant to eliminate the enforceability of the statute in the case of an actual eviction.

*Anderson's* holding is in direct contradiction to that of *Arroyo Vista Tenants Association v. City of Dublin*,<sup>33</sup> from a district court in California.<sup>34</sup> In *Arroyo*, the court noted

<sup>26</sup>Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 121(d), 101 Stat. 1815, 1838-39 (1988).

<sup>27</sup>H.R. Conf. Rep. 100-426, 1987 U.S.C.C.A.N. 3458 at 3469.

<sup>28</sup>Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, § 531, 112 Stat. 2461, 2570-73 (1998).

<sup>29</sup>See *Anderson*, 556 F.3d at 357; *Arroyo*, 2008 WL 2338231 at \*9.

<sup>30</sup>*Anderson*, 556 F.3d at 358.

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

<sup>32</sup>*Edwards v. Dist. of Columbia*, 821 F.2d 651, 659-60 (D.C. Cir. 1987); see also *id.* at 664 (Williams, J., concurring) (addressing possible "actual demolition" claims is "quite unnecessary to our holding"); *id.* at 666 ("I further agree with Chief Judge Wald that § 1437p provides a private cause of action against PHAs that engage in actual demolition without obtaining prior HUD approval").

<sup>33</sup>2008 WL 2338231 (N.D.Cal. May 23, 2008).

<sup>34</sup>For a detailed review of the *Arroyo* decision, see NHLP, *Tenants Can Sue for Violation of Public Housing Demolition Law*, 38 HOUS. L. BULL. 125 (2008).

<sup>19</sup>556 F.3d at 358.

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

<sup>21</sup>*Id.*

<sup>22</sup>*Id.* at 365.

<sup>23</sup>*Suter*, 503 U.S. at 351.

<sup>24</sup>*Id.* at 363.

<sup>25</sup>*Edwards v. Dist. of Columbia*, 821 F.2d 651, 652 (D.C.Cir.1987).

that in the process of revising § 1437p in 1998, Congress expanded the notification requirements, evincing the intent to expand, rather than contract, tenants' rights.<sup>35</sup> Two post-1998 cases from a district court in Ohio held that § 1437p contains enforceable rights without discussion of the 1998 legislative history.<sup>36</sup> This conflict creates hope that other courts will not follow *Anderson*. In the interim, unfortunately, the unpublished decisions of two district courts may not have the persuasive power of even a poorly reasoned case from a circuit court.

Other circuit courts and other cases from the Fifth Circuit have generally not imported the *Suter* reasoning and have permitted enforcement under § 1983 of statutory provisions containing the words "individuals," "person," "family," or comparable language in setting forth a specific right.<sup>37</sup> This has held true in the context of Medicaid<sup>38</sup> as well as housing cases.<sup>39</sup> On the other hand, a recent decision concerning the No Child Left Behind Act rejected enforceability under § 1983, after concluding that the *Blessing* test had been met, based on the overall structure of the statute which was phrased in terms of federal regulation of state actors.<sup>40</sup>

### The Administrative Procedure Act Claim

In *Anderson*, the Fifth Circuit reversed the district court's holding that the residents could not bring a claim under the APA against HUD to enforce § 1437p. The court of appeals stated that regardless of the § 1983 analysis, tenants could pursue a claim for injunctive relief (though not monetary damages) under the APA for failure to comply with § 1437p.<sup>41</sup>

However, the court held that even though the APA could be used to enforce § 1437p, the residents could no longer pursue that claim. The court found that at the time of the appeal, injunctive relief was "no longer availing," since the demolition of the housing developments had already been "substantially complete[d]."<sup>42</sup> The court, in this part of the opinion, ignored the 621 units that it conceded still housed residents.

<sup>35</sup>2008 WL 2338231 at \*12.

<sup>36</sup>English Woods Civic Ass'n v. Cincinnati Metro. Hous. Auth., 2004 WL 3019505 (S.D. Ohio Dec. 17, 2004); Givens v. Butler Metro. Hous. Auth., 2006 WL 3759702 (S.D. Ohio Dec. 19, 2006).

<sup>37</sup>Bobroff, *supra* note 9, at 63.

<sup>38</sup>Ball v. Rodgers, 492 F.3d 1094, 1107-8 (9th Cir. 2007); Westside Mothers v. Olszewski, 454 F.3d 532, 539 (6th Cir. 2006); Watson v. Weeks, 436 F.3d 1152 (9th Cir. 2006); S.D. v. Hood, 391 F.3d 581 (5th Cir. 2004); Sabree v. Richman, 367 F.3d 180 (3d Cir. 2004); Bryson v. Shumway, 308 F.3d 79, 89 (1st Cir. 2002); Pediatric Specialty Care v. Ark. Dep't of Human Servs., 293 F.3d 472 (8th Cir. 2002).

<sup>39</sup>Johnson v. Hous. Auth. of Jefferson Parish, 442 F.3d 356, 360 (5th Cir. 2006); Price v. City of Stockton, 390 F.3d 1105, 1110-11 (9th Cir. 2004).

<sup>40</sup>Newark Parents Ass'n v. Newark Pub. Schs., 547 F.3d 199, 212 (3d Cir. 2008).

<sup>41</sup>Anderson v. Jackson, 556 F.3d 351, 359 (5th Cir. 2009).

<sup>42</sup>*Id.*

Moreover, the court found no error in the district court's denial of a preliminary injunction to halt the demolition. The court of appeals held that the tenants had not met their burden of demonstrating a likelihood of success on the merits. The Fifth Circuit stated that the district court reasonably concluded that the demolition application process did not violate the APA. The court based this conclusion upon HANO's certification that the requirements of § 1437p were met and upon evidence that HANO gave the residents notice, provided opportunities for consultation, and offered alternative comparable housing in New Orleans.<sup>43</sup> The court rejected the residents' contention that the expedited review of HANO's application by HUD reflected "impropriety."<sup>44</sup>

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*The Fifth Circuit was utterly unconcerned with the issuance of an injunction to preserve the remedy of repairing the developments. Indeed, the Fifth Circuit's refusal to provide temporary relief and to provide an expedited appeal contributed to the futility of injunctive relief.*

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The Fifth Circuit was utterly unconcerned with the issuance of an injunction to preserve the remedy of repairing the developments. Indeed, the Fifth Circuit's refusal to provide temporary relief and to provide an expedited appeal<sup>45</sup> contributed to the futility of injunctive relief. Finding that the APA claim was unlikely to succeed on the merits, the court did not even comment on the importance of a preliminary injunction to prevent the displacement of the residents and the concomitant harm the tenants suffered.

Nevertheless, since the court clearly held that the residents properly stated a claim under the APA, this statute would provide an avenue for relief under § 1437p in future cases, even within the Fifth Circuit. In a subsequent case, tenants would need to make a stronger showing on the merits of the APA claim, such as submitting evidence that notices regarding relocation rights or opportunities for consultation were not provided.

<sup>43</sup>*Id.* at 360.

<sup>44</sup>*Id.*

<sup>45</sup>*Id.* at 355.

## Future Steps in Other Cases

While a circuit split on the enforceability of § 1437p under § 1983 would create the possibility of an appeal to the Supreme Court, it is doubtful that such claims would have a receptive audience at the nation's highest court.<sup>46</sup> In the past, Justice Kennedy has never voted to uphold court access under § 1983 for safety net statutes,<sup>47</sup> and Chief Justice Roberts was the attorney representing Gonzaga University in *Gonzaga v. Doe* and arguing for the result adopted by the Court.<sup>48</sup>

In cases involving a state statute or regulation in conflict with federal law, preemption under the Supremacy Clause provides an alternative route to judicial review. Jurisdiction arises under federal question jurisdiction, 28 U.S.C. § 1331, and authorizes injunctive and declaratory relief, though not damages or attorneys' fees.<sup>49</sup> However, a preemption claim is less likely to succeed in the event of inaction by the state, such as failure to provide a notice or delays in compliance.<sup>50</sup>

The problem of unenforceability of specific provisions of the United States Housing Act could readily be resolved through legislative action, such as the addition of a private right of action to the statute. Advocates should explore the possibility of positive legislative changes that would overturn the court's denial of judicial enforcement of rights clearly delineated in the housing statute. It is noteworthy that the legislative fix enacted after *Edwards* was phrased in terms of the obligations of federal and state government actors, with only the legislative history referencing the rights of individuals. In order to be certain to withstand challenge following *Gonzaga*, a legislative fix should clearly enumerate the rights of individuals in the text of the statute and not merely the legislative history.<sup>51</sup> ■

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<sup>46</sup>See Lauren Saunders, *Are There Five Votes to Overrule Thiboutot?*, 40 CLEARINGHOUSE REV. 5-6 (Sept-Oct 2006); see also Nicole Huberfeld, *Bizarre Love Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements*, 42 U.C. DAVIS L. REV. 413, 452 (Dec. 2008) (*Wilder* "risks being overturned by a Court that is interested in limiting section 1983 causes of action and in limiting the scope of conditions on Spending Clause legislation.").

<sup>47</sup>Justice Kennedy joined the dissent in *Wilder* and the majority in *Suter* and *Gonzaga*.

<sup>48</sup>536 U.S. 273, 275 (2002); see also Simon Lazarus, *Federalism R.I.P.? Did the Roberts Hearings Junk the Rehnquist Court's Federalism Revolution?*, 56 DEPAUL L. REV. 1, 13 n.45 (2006).

<sup>49</sup>Bobroff, *supra* note 9, at 3-4.

<sup>50</sup>*Id.* at 62.

<sup>51</sup>See *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 304 (2006) ("Whatever weight this legislative history would merit in another context, it is not sufficient here. . . . In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds.").

## Section 504 Protections Apply to ARRA-funded LIHTC Projects\*

The Low-Income Housing Tax Credit (LIHTC) program is one of the federal government's primary methods for creating and maintaining affordable housing. However, the program has escaped compliance with Section 504 of the Rehabilitation Act, which only applies to programs receiving federal financial assistance. Section 504 provides disabled individuals with important protections by prohibiting discrimination and creating accessibility requirements. The LIHTC program has been exempted from compliance with Section 504 because the program provides tax credits and not direct financial assistance. However, the market for tax credits has declined with the economy, leading the federal government to offer direct funds to developers in exchange for unused credits through an LIHTC Exchange Program. Additionally, a Tax Credit Assistance Program (TCAP) will provide further financial assistance to help projects meet gaps in financing. Because TCAP and the Exchange Program will provide direct funding, any projects receiving funds through these programs must fully comply with the requirements of Section 504. This should spur development of affordable housing that will meet increased accessibility requirements for disabled persons.

### Background

#### Low-Income Housing Tax Credit

By any measure, the Low-Income Housing Tax Credit program is among the federal government's largest program for creating and rehabilitating affordable housing for low-income people.<sup>1</sup> In 2007, over \$790 million in program credits produced nearly 75,000 units of affordable housing.<sup>2</sup> As of 2005, the program had produced a total of 1.382 million units of affordable housing.<sup>3</sup> The program works by providing tax credits to developers and investors, on a one-for-one basis, for every dollar spent on affordable housing development. These credits are usually sold to investors in return for equity, which provides upfront capital for developers.<sup>4</sup> This initial infusion of equity reduces the level of capital required through long-term loans, which reduces debt obligations and permits developers to charge rents within levels that are restricted by the LIHTC program.<sup>5</sup>

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<sup>1</sup>NHLP, HUD HOUSING PROGRAMS: TENANTS' RIGHTS 1/64 (3d ed. 2004).

<sup>2</sup>NAT'L LOW INCOME HOUS. COAL., 2009 ADVOCATE'S GUIDE TO HOUSING AND COMMUNITY DEVELOPMENT POLICY 66 (2009).

<sup>3</sup>*Id.*

<sup>4</sup>NAT'L HOUS. LAW PROJECT, *supra* note 1, at 1/65.

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

The LIHTC program provides states with tax credits based on a per-capita formula.<sup>6</sup> Each state is then responsible for allocating the funds, which usually involves a competitive process where developers apply for credits with a state tax finance agency.<sup>7</sup> The credits are awarded both for new developments and rehabilitation projects. Because the program utilizes tax credits, the program's subsidies persist every year and do not require annual appropriations. Despite its status as the largest federal housing program, the program is administered by the Internal Revenue Service (IRS), not the Department of Housing and Urban Development (HUD), because it operates through the tax code.

### Section 504 of the Rehabilitation Act

Because LIHTC provides tax credits as opposed to direct subsidies, there has been some historical debate as to whether certain federal laws apply to the program, namely those laws that apply only to programs receiving any "federal financial assistance." One such law is Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against disabled individuals and imposes accessibility standards on housing providers.<sup>8</sup> The IRS has maintained that "federal financial assistance" does not include tax credits,<sup>9</sup> rendering Section 504 inapplicable to the LIHTC program. Courts have shown sympathy to this argument, reasoning that favorable tax treatments are not the same as subsidies<sup>10</sup> and that Congressional intent to provide more than preferential tax treatment should be

considered when defining the term.<sup>11</sup> This view has its critics, however, since the economic benefits of tax credits and exemptions are indistinguishable from the economic benefits produced by actual expenditures.<sup>12</sup> Nonetheless, the IRS view has persisted, leaving Section 504 provisions inapplicable to the LIHTC program.

Section 504 prohibits discrimination based on disability in any program, service or activity, and requires certain levels of accessibility.<sup>13</sup> Section 504 applies to a smaller number of units than the Fair Housing Act since it does not apply to private owners but its requirements are stricter.<sup>14</sup> For example, housing providers must not only allow reasonable modifications, as required by the Fair Housing Act, but also pay for them.<sup>15</sup> The statute prohibits providers from offering housing that is unnecessarily different or separate, requiring that housing for disabled individuals be as integrated as appropriate.<sup>16</sup> In order to ensure accessibility, Section 504 also mandates 5% of new building or substantial rehabilitation<sup>17</sup> be accessible to those with mobility impairments, and that an additional 2% be accessible to persons with hearing or vision impairments.<sup>18</sup> Further, the law requires not only accessibility, but also targeting, through affirmative outreach to the public.<sup>19</sup> The law also includes certain planning and evaluation practices, to ensure that these requirements are met.<sup>20</sup>

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

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

<sup>8</sup>Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 794 (Westlaw June 10, 2009).

<sup>9</sup>While the IRS does not have specific Section 504 regulations for the LIHTC program, federal financial assistance is defined under the Single Audit Act, which "sets forth standards for obtaining consistency and uniformity among Federal agencies for the audit of non-Federal entities expending Federal awards," giving some idea as to how federal financial assistance should be interpreted by the agency. See 31 U.S.C.A. §7501 (a)(5). "Federal financial assistance" means "assistance that non-federal entities receive or administer in the form of grants, loans, loan guarantees, property, cooperative agreements, interest subsidies, insurance, food commodities, direct appropriations, or other assistance, but does not include amounts received as reimbursement for services rendered to individuals in accordance with guidance issued by the Director." It is worth noting that for purposes of waiving the ten-year holding period under LIHTC regulations, the IRS defines, at 26 C.F.R. §1.42-2(2)(c), "federally assisted building" as "any building which is substantially assisted, financed, or operated under section 8 of the United States Housing Act of 1937, section 221(d)(3) or 236 of the National Housing Act, or section 515 of the Housing Act of 1949, as such acts were in effect on October 22, 1986." This definition of "federally assisted building" should not be dispositive regarding what constitutes "federal financial assistance" under Section 504 of the Rehabilitation Act of 1973.

<sup>10</sup>See, e.g., *Bachman v. American Soc. of Clinical Psychologists*, 577 F. Supp. 1257, 1263-64 (D.C.N.J. 1983) ("not every item of economic value granted by the federal government counts as financial assistance within the meaning of section 504 of the Rehabilitation Act . . . [t]he term "assistance" connotes a transfer of government funds by way of subsidy, not merely an exemption from taxation").

<sup>11</sup>See, e.g., *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 911 F.2d 1377, 1382 (10<sup>th</sup> Cir. 1990) ("in determining which programs are subject to the civil rights laws, courts should focus not on market value but on the intention of the government" to give a subsidy, as opposed to government intent to provide compensation" (quoting *Jacobson v. Delta Airlines, Inc.*, 742 F.2d 1202, 1210 (9<sup>th</sup> Cir.1984)).

<sup>12</sup>See, e.g., David A. Brennan, *Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities*, 2001 BYU L. REV. 167, 212 ("there is no logical (or legal) reason for treating the tax benefits . . . as anything other than equivalent to government grants or loans for purposes of interpreting relevant civil rights statutes"). For general analyses of the debate between proponents of expenditure analysis and constitutional analysis, see Linda Sugin, *Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L.J. 407, 410 (1999); Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379 (1998).

<sup>13</sup>Dep't of Hous. and Urban Dev., Office of Fair Hous. and Equal Opportunity, Section 504 Frequently Asked Questions, <http://www.hud.gov/offices/fheo/disabilities/sect504faq.cfm>.

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

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

<sup>16</sup>24 C.F.R. § 8.4 (2009).

<sup>17</sup>24 C.F.R. § 8.23 (2009). "Substantial rehabilitation" for a multifamily rental project is defined as involving a project with fifteen or more units, with alterations costing more than 75% of the replacement cost of the project.

<sup>18</sup>24 C.F.R. §§ 8.22-8.23 (2009).

<sup>19</sup>24 C.F.R. § 8.6 (2009) ("The recipient shall take appropriate steps to ensure effective communication with applicants, beneficiaries, and members of the public . . . [and] shall adopt and implement procedures to ensure that interested persons (including persons with impaired vision or hearing) can obtain information concerning the existence and location of accessible services, activities, and facilities").

<sup>20</sup>24 C.F.R. § 8.51 (2009).

## The Exchange Program and the Tax Credit Assistance Program

Due to the recent financial crisis, the market for tax credits has dried up, reducing the effectiveness of the LIHTC program. In response, the federal government created the Exchange Program as part of the American Recovery and Reinvestment Act (ARRA) signed by President Obama on February 17, 2009.<sup>21</sup> The Exchange Program was initially planned to offer direct grants in exchange for unused tax credits.<sup>22</sup> On June 1, Sen. Barney Frank (D-MA) sent a letter to Secretary Timothy Geithner, requesting that states be allowed to make sub-awards in the form of loans as well as grants for greater flexibility in using state funds within the confines of current state requirements.<sup>23</sup> On July 9, 2008, the Treasury Department released guidance in the form of a "Frequently Asked Questions and Answers" fact sheet indicating that it would allow states to structure award funds as no-interest, non-repayable loans if necessary.<sup>24</sup> Because loans are generally considered federal financial assistance,<sup>25</sup> this policy change will not affect Section 504 compliance requirements.<sup>26</sup>

The Exchange Program will provide state housing credit agencies funds equal to 85% of the value of states' unused low-income housing tax credits.<sup>27</sup> The funds will be allocated to housing credit agencies with sub-awards made in the form of grants or loans to qualified

low-income housing developments by these agencies.<sup>28</sup> Essentially, this means that developers who could not find investors to buy their credits will be able to turn them in for eighty-five cents on the dollar. Any funds not awarded to qualified projects by the end of 2010 will be returned to the federal government.<sup>29</sup>

The government also appropriated \$2.25 billion in HOME funds to TCAP for LIHTC projects under Title XII of ARRA.<sup>30</sup> This program will facilitate the development of LIHTC projects by providing gap financing.<sup>31</sup> ARRA allocated TCAP funds to state housing credit agencies, and the agencies will distribute the funds through a competitive process pursuant to the states' qualified allocation plans, which describe eligibility requirements and selection criteria.<sup>32</sup> Projects that received or will receive tax credits between October 1, 2006, and September 30, 2009, are eligible to apply for TCAP funds, which must be used within three years of ARRA's enactment.<sup>33</sup> Additionally, ARRA instructs states to give priority to projects that are expected to be completed within three years of the law's enactment.<sup>34</sup>

## Section 504 Compliance and ARRA-Funded LIHTC Projects

TCAP funds qualify as federal financial assistance, which makes Section 504 applicable to developments that receive any funding through the program. Under Section 504's governing regulations, "[f]ederal financial assistance means any assistance provided or otherwise made available by the Department through any grant, loan, contract or any other arrangement, in the form of: (a) Funds..."<sup>35</sup> Since TCAP grants actual funds, the program clearly qualifies as financial assistance, requiring full compliance with Section 504. Further, the statute's language specifically prohibits the HUD secretary from waiving requirements related to fair housing and nondiscrimination.<sup>36</sup> HUD has confirmed that Section 504 of the Rehabilitation Act applies to all TCAP grants.<sup>37</sup>

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

<sup>29</sup>*Id.* at 364.

<sup>30</sup>American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. A, tit. XII, § 1201, 123 Stat. 115, 220-21 (2009) (under the heading "HOME Investment Partnerships Program").

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

<sup>32</sup>*Id.* at 220.

<sup>33</sup>*Id.* Additionally, 75% of the HOME funds must be committed within one year and 75% spent within two years of the Act's enactment.

<sup>34</sup>*Id.*

<sup>35</sup>24 C.F.R. § 8.3 (2009).

<sup>36</sup>American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. A, tit. XII, § 1201, 123 Stat. 115, 221 (2009). ("the [HUD] Secretary may waive any provision of any statute or regulation that the Secretary administers in connection with the obligation by the Secretary or the use by the recipient of these funds except for . . . requirements related to fair housing, nondiscrimination . . .").

<sup>37</sup>Implementation of the Tax Credit Assistance Program (TCAP), CPD-09-03 (May 4, 2009).

<sup>21</sup>American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. B, tit. I, § 1602, 123 Stat 115, 362-64 (2009) ("Grants to States for Low-Income Housing Projects In Lieu of Low-Income Housing Credit Allocations for 2009").

<sup>22</sup>*Id.* at 362.

<sup>23</sup>Letter from Barney Frank, U.S. Senator, to Timothy Geithner, U.S. Sec'y of Treasury (June 1, 2009), available at <http://www.nlihc.org/doc/Ltr-Geithner-LIHTC-Exchange.pdf>.

<sup>24</sup>Dept of Treasury, Section 1602: Grants to States for Low-Income Housing Projects in Lieu of Low-Income Housing Credits for 2009, Frequently Asked Questions and Answers (July 9, 2009), <http://www.treas.gov/recovery/docs/FAQs.pdf>; See also Joseph P. Poduska, *Treasury Department Changes Policy On Credit Exchange Program, Will Allow Funds to Be Provided as Loans*, [Current Developments] Hous. & Dev. Rep. (West) Vol. 37, No. CD-12, at 353 (June 15, 2009). However, no official guidance on this position has been issued as of the date of this printing.

<sup>25</sup>See e.g. 31 U.S.C.A. § 7501 (a)(5); 24 C.F.R. § 8.3 (2009) ("Federal financial assistance means any assistance provided or otherwise made available by the Department through any grant, loan, contract or any other arrangement") (emphasis added).

<sup>26</sup>*Id.*; Dept of Treasury, Section 1602: Grants to States for Low-Income Housing Projects in Lieu of Low-Income Housing Credits for 2009, Frequently Asked Questions and Answers (July 9, 2009), <http://www.treas.gov/recovery/docs/FAQs.pdf>. However, because "grants" are a specific type of federal assistance that require compliance with Davis-Bacon wage and standards and environmental reviews, project owners receiving funds in the form of loans will not have to comply with such requirements.

<sup>27</sup>American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. B, tit. I, § 1602, 123 Stat 115, 362-63 (2009). States may also award funds to projects without allocated tax credits if doing so will leverage the state increased funds for affordable housing ("a State housing credit agency may make subawards to finance qualified low-income buildings without an allocation only if it makes a determination that such use will increase the total funds available to the State to build and rehabilitate affordable housing").

The Exchange Program qualifies as federal financial assistance as well, since the program will award “grants... in lieu of low-income housing credit allocations.”<sup>38</sup> This should make developments receiving funds from the Exchange Program subject to Section 504 requirements. While several state tax credit agencies have issued notices that assume Exchange Program funds do not qualify as federal assistance and are not subject to Section 504,<sup>39</sup> the Treasury Department has acknowledged that Section 504 does in fact apply.<sup>40</sup>

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*Housing advocates should work with state agencies to ensure that every project with TCAP or Exchange Program funding is fully compliant with Section 504.*

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Since most LIHTC projects were not required to comply with Section 504 at the time architectural plans were developed, these plans may have to be amended in order to comply with the law. Projects under construction at the time the owner applies for TCAP must also comply fully.<sup>41</sup> Modifications which make plans compliant with Section 504 are costs eligible for TCAP funding.<sup>42</sup> However, if compliance with Section 504 is not feasible or practical for any of these projects, they cannot receive assistance from TCAP funds.<sup>43</sup>

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<sup>38</sup>American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. B, tit. I, § 1602, 123 Stat 115, 362 (2009).

<sup>39</sup>See, e.g., Georgia Department of Community Affairs, Georgia Tax Credit Assistance Program (TCAP) and Tax Credit Monetization Program (Exchange) Application Process and Minimum Documentation Submission Requirements (May 11, 2009) available at <http://www.dca.ga.gov/housing/housingdevelopment/programs/documents/Applicationprocessfinal512.pdf>. (“Treasury staff indicates that they are not applicable as exchanged funds will not be considered federal funds”); Washington State Housing Finance Commission, ARRA Tax Credit Program Guidelines for Washington State (May 14, 2009) available at [http://www.wshfc.org/arra/ARRA\\_Final.pdf](http://www.wshfc.org/arra/ARRA_Final.pdf) (“Treasury has not placed specific restrictions on the use of Exchange funds”); Memorandum from Wisconsin Housing & Economic Development Agency, 2009 American Recovery and Reinvestment Act (ARRA) (Mar. 10, 2009) available at [http://www.wheda.com/root/uploadedFiles/Website/Wheda\\_Products/Regulations/ARRA2009memo.pdf](http://www.wheda.com/root/uploadedFiles/Website/Wheda_Products/Regulations/ARRA2009memo.pdf) (“We do not believe that the various federal funding requirements . . . apply to exchange funds but we have not received full guidance from the Treasury.”).

<sup>40</sup>Dept of Treasury, Section 1602: Grants to States for Low-Income Housing Projects in Lieu of Low-Income Housing Credits for 2009, Frequently Asked Questions and Answers (July 9, 2009), <http://www.treas.gov/recovery/docs/FAQs.pdf>.

<sup>41</sup>U.S. Dep’t of Hous. And Urban Dev., TCAP Question and Answers: Section 504 of the Rehabilitation Act of 1973, <http://www.hud.gov/recovery/tcap-504-qa.pdf>.

<sup>42</sup>Notice, *supra* note 37, at 9.

<sup>43</sup>*Id.*

## What this Means for Advocates and Agencies

Housing advocates should work with state agencies to ensure that every project with TCAP or Exchange Program funding is fully compliant with Section 504. This not only means complying with structural accessibility requirements but actually targeting disabled individuals and communicating that affected housing developments will be accessible to them.<sup>44</sup> This is particularly important since TCAP and Exchange Program funds will be sought for many projects that did not originally comply with Section 504 requirements. Because Section 504 requirements will only apply to a limited set of LIHTC projects, state housing finance agencies should flag these projects by providing lists<sup>45</sup> of affected projects that remain accessible to the public for the life of those projects. This is important for two reasons. In the short term, TCAP funds impose commitment and expenditure deadlines.<sup>46</sup> If these deadlines are not met, the federal government recaptures the funds. In the long term, lists of TCAP properties should be publicly available for the life of the project since these projects must remain compliant with Section 504 rules, unlike other LIHTC properties.

## Conclusion

In the context of previous interpretations of “federal financial assistance,” which exempted LIHTC projects from compliance with Section 504 requirements, acceptance of TCAP or Exchange Program funds clearly requires compliance with the law’s increased disability protections while promoting affordable housing development, in general. This means providing the minimum number of units accessible to those with mobility and hearing or vision impairments, ensuring that accessible units are appropriately integrated, and actually targeting disabled persons, among other requirements. Since the funds must be used promptly, advocates should work with housing finance agencies to ensure that Section 504 requirements are fully met by LIHTC projects receiving any ARRA funds—both now and in the future. ■

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<sup>44</sup>24 C.F.R. § 8.6 (2009).

<sup>45</sup>HUD maintains a list of LIHTC properties by state at <http://lihtc.huduser.org/>. Some state housing credit agencies also have website lists with the names and addresses of LIHTC properties within the state.

<sup>46</sup>American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. A., tit. XII, § 1201, 123 Stat. 115, 220 (2009).

## Recent Cases

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

### Public Housing: Federal One-Strike Law Does Not Preempt State Law Giving Tenants Right to Cure Lease Violations

*Hous. Auth. of Covington v. Turner*, \_\_\_ S.W.3d \_\_\_, 2009 WL 1491330 (Ky. Ct. App. 2009). A public housing tenant received an eviction notice after drugs were found in her apartment. The drugs belonged to the tenant's nephew, who kept belongings at the apartment. The tenant testified that she had no knowledge of the drugs until she received the eviction notice, and she subsequently ordered the nephew to stay away from the apartment. She testified that he had not returned. The lease between the housing authority and the tenant contained language from 42 U.S.C. § 1437d(l)(6), which obligates tenants to assure that guests not engage in drug-related activity. However, the lease also stated that evictions for criminal activity would be governed by the Uniform Residential Landlord and Tenant Act (URLTA) and would "not be governed by the grievance procedure of the authority." The housing authority claimed that the URLTA, which contains a right to remedy a breach of lease, was preempted by the language from the federal statute. The court held that although the federal statute allows housing authorities to evict innocent tenants who invite others into their apartments who engage in drug-related criminal activity, it does not make this policy mandatory. In this case, the court held, there was no conflict between the statutes since the housing authority had given tenants the rights conferred by the URLTA, including the right to remedy a breach of lease. The court therefore affirmed the trial court's finding that the tenant remedied the breach of the lease when she prohibited her nephew from returning to the apartment.

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

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

<sup>3</sup>For a list of courts that are accessible online, see <http://www.uscourts.gov/links.html> (federal courts) and <http://www.ncsc.dni.us/COURT/SITES/courts.htm#state> (for state courts). See also <http://www.courts.net>.

### Uniform Relocation Assistance Act: Statute Does Not Provide a Private Right of Action

*Delancey v. City of Austin*, \_\_\_ F.3d \_\_\_, 2009 WL 1532967 (5th Cir. 2009). Owners of a parcel of land located next to the city's airport transferred the land to the city in exchange for \$600,000 and relocation benefits. The plaintiffs later sued, claiming the city had not fulfilled its obligation to provide relocation assistance under the Uniform Relocation Assistance Act (URA), and that a city employee had deprived them of their URA rights under 42 U.S.C. § 1983. The Fifth Circuit affirmed the district court's grant of summary judgment in favor of the city on both claims. Holding that private rights of action must be clear and unambiguous, the court rejected the claim that the URA created a private right of action. The court found enforcement of the statute to be directed at the displacing agency rather than individuals benefited by the statute and noted an absence of rights-creating language in the URA. The Section 1983 claim failed because the municipality could not be held liable under the theory of respondeat superior as the city employee involved was not a policymaker.

### Housing Choice Voucher Program: Termination Proceedings Violated Due Process

*Bouie v. New Jersey Dep't of Cmty. Affairs*, \_\_\_ A.2d \_\_\_, 2009 WL 1543838 (N.J. Super. Ct. App. Div. 2009). A voucher holder received notice that her assistance would be terminated because she failed to make unspecified repairs, and she requested a pre-termination hearing. Two days before the hearing, the tenant received an amended termination notice, which alleged, for the first time, that the tenant had violated other voucher program regulations. The hearing officer upheld the termination, relying heavily on documentary evidence that included hearsay statements from the landlord. The statement of proceedings acknowledged that the hearing officer relied upon documents that were not provided to the tenant's counsel before the hearing, and that the only damage initially claimed to be the tenant's responsibility was soiled carpeting. The tenant appealed, arguing that the hearing officer's decision failed to provide a clear factual statement as to the reasons for termination. The court held that the proceedings violated due process because the tenant was not given an effective opportunity to deny the charges, was not given adequate and timely notice detailing the reasons for termination and was not provided an effective opportunity to challenge the evidence. The court also found that the initial hearing was a "contested case" under the state's Administrative Procedure Act that should have been heard by an administrative law judge, because the tenant disputed the factual allegations that were the basis for termination.

## **Housing Choice Voucher Program: Blanket Policy Against Renting to Voucher Holders Was Not Discriminatory on Its Face**

*Doe v. WCP I, LLC*, 2009 WL 1564909 (Cal. Ct. App. June 4, 2009) (unreported). An applicant filed suit against a landlord alleging disability discrimination based on the landlord's policy of refusing to rent to voucher holders. The applicant alleged that the policy constituted *de facto* discrimination against the disabled and minorities, who "constitute the bulk of voucher holders," and was prohibited by the Americans with Disabilities Act and the Fair Housing Amendments Act. The trial court granted the landlord's motion for nonsuit and dismissed the case. The court of appeals affirmed, finding that the applicant's complaint failed to allege facts constituting disability discrimination. According to the court, although a landlord's policy against accepting voucher tenants "does not necessarily protect a landlord against liability for a claim of discrimination" based on a refusal to accept a specific voucher tenant, the applicant failed to allege any act of discrimination specific to himself.

## **Foreclosure: 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). Mortgage Electronic Registration Systems (MERS) acts as the mortgagee of record for a variety of holders and servicers of mortgages. The property at issue was sold to MERS at a nonjudicial foreclosure sale, and was later conveyed to HUD, which in turn conveyed the property to Wells Fargo. MERS subsequently filed a forcible detainer action against the defendant homeowner. The homeowner introduced evidence disputing both MERS' interest in the property and any landlord-tenant relationship between her and MERS. This evidence would have required the trial court to determine who owned the property in order to ascertain whether MERS had the superior right to possession. However, the appellate court found that title may not be adjudicated in a forcible detainer action, and that the trial court did not have jurisdiction to determine MERS' right to possession. The court therefore dismissed the forcible detainer action.

## **Fair Housing Act: Statute of Limitations Was Tolloed During HUD Complaint Process; 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). A fair housing organization alleged that owners

failed to make a condominium development accessible to people with disabilities in violation of the Fair Housing Act (FHA) and the Americans with Disabilities Act (ADA). The owners moved to dismiss both claims, asserting that the organization lacked standing under both statutes, and that the FHA's statute of limitations had run. The court found that the organization had standing under the FHA since the diversion of resources into the investigation and testing of the property qualified as an injury in fact. The court also held that the FHA claim was within the statute of limitations because the statute was tolled during the period that the organization's HUD complaint against the owners was pending. Finally, the court held that the organization lacked standing under the ADA because it was not an individual or group of individuals subjected to discrimination, and it was not suing on behalf of such individuals.

## **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). The plaintiffs were the buyer and seller of a multifamily project. They sought to withdraw the property from the Mitchell-Lama program, a New York state program that encouraged private enterprises to provide housing for low-income people. Withdrawal from the program requires that federally assisted mortgage debts be retired. The initial loan was assisted by HUD under Section 236, and was refinanced in the 1970s and divided into two mortgages, one insured by HUD under Section 207 of the National Housing Act. The mortgage note contained a paragraph on prepayment with a footnote that read "[s]ubject to the prior approval of the Secretary of Housing and Urban Development," though Section 207 allows prepayment and says nothing of HUD approval. The plaintiffs brought the suit after HUD denied their prepayment request. They claimed that the footnote in the mortgage note conflicted with Section 207 and should be void as a result. The court granted HUD's motion to dismiss, holding that while Section 207 created a right to prepayment, this right did not preclude parties to a mortgage from creating further prerequisites for prepayment, such as HUD's approval. The court reasoned that when a statute is silent or ambiguous on an issue, agencies like HUD are entitled to "permissible construction" of the statute, noting that an agency's interpretations of its own regulations must be afforded substantial deference.

## **Fair Housing Act: Owner Vicariously Liable for Property Manager's Sexual Harassment**

*Boswell v. Gumbaytay*, 2009 WL 1515872, slip op. (M.D. Ala. June 1, 2009). A tenant previously proved that her property manager sexually harassed and retaliated against her

in violation of the Fair Housing Act, demanding sexual favors from her as a condition of not raising the rent. When she refused, the property manager raised her rent, tried to evict her, and refused to make repairs. The tenant sought to hold the owner of the property vicariously liable for the property manager's acts based on agency principles. The court found that an agency relationship existed and held that the owner was vicariously liable because he exercised sufficient control over the property manager by authorizing changes in rent as well as repairs. Though the harassment and retaliation were not within the property manager's scope of employment, the court held that the acts were committed in his capacity as property manager and enabled by it. However, the court held that the owner was not liable for punitive damages since he did not have notice of the property manager's unlawful conduct, and therefore failed to meet the intent requirement for recklessness. ■

## Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD), the Department of Agriculture (USDA's Rural Housing Service/Rural Development (RD)), Federal Housing Finance Agency, Federal Emergency Management Agency (FEMA) and the Department of Veterans Affairs issued in June of 2009. For the most part, the summaries are taken directly from the summary of the regulation in the Federal Register or each notice's introductory paragraphs.

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

### HUD Federal Register Notices

#### **74 Fed. Reg. 26,421-26,422 (June 2, 2009) Notice of Proposed Information Collection: Comment Request; Notice of Application for Designation as a Single Family Foreclosure Commissioner**

*Summary:* HUD will submit to the Office of Management and Budget for review an information collection

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

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

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

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

requirement about which it is soliciting public comments. The information collected relates to the appointment of Foreclosure Commissioners who will exercise a no judicial Power of Sale of single family HUD-held mortgages. HUD needs the notice and resulting applications for compliance with the requirements that commissioners be qualified. Most respondents will be attorneys, but anyone may apply.

*Comments Due Date:* August 3, 2009.

#### **74 Fed. Reg. 26,420 (June 2, 2009) Notice of Proposed Information Collection: Comment Request; Multifamily Housing Mortgage and Housing Assistance Restructuring Program (Mark to Market)**

*Summary:* HUD will submit to the Office of Management and Budget for review an information collection requirement about which it is soliciting public comments. The information collected relates to determine the eligibility of FHA-insured multifamily properties for participation in the Mark to Market program and the terms on which such participation should occur as well as to process eligible properties from acceptance into the program through closing of the mortgage restructure in accordance with program guidelines. The result of participation in the program is the refinancing and restructure of the property's FHA-insured mortgage and the reduction of Section 8 rent payments and establishment of adequately funded accounts to fund required repair and rehabilitation of the property.

*Comments Due Date:* August 3, 2009.

#### **74 Fed. Reg. 26,420-26,421 (June 2, 2009) Housing for Older Persons Exemption From Familial Status Discrimination Prohibitions of the Fair Housing Act**

*Summary:* HUD will submit to the Office of Management and Budget for review an information collection requirement about which it is soliciting public comments. The information collected relates to senior housing providers' ability to demonstrate eligibility for an exemption from liability for familial status discrimination otherwise prohibited under the Fair Housing Act, as amended by the Housing for Older Persons Act of 1995.

*Comments Due Date:* July 2, 2009.

#### **74 Fed. Reg. 27,340 (June 9, 2009) Notice of Availability: Notice of Funding Availability (NOFA) for American Recovery and Reinvestment Act Capital Fund Recovery Competition Grants; Corrections, Changes, and Clarifications**

*Summary:* On May 7, 2009, HUD posted on its website its Notice of Funding Availability (NOFA) for HUD's American Recovery and Reinvestment Act Capital Fund Recovery Competition (CFRC) Grants. Through this document, HUD announces that it has posted on its website a revised NOFA that corrects changes and clarifies a

number of criteria established in the posted document. To permit applicants time to prepare applications that take into account these and other changes incorporated in the revised NOFA, HUD is revising the application deadline dates for each funding category. The NOFA which reflects these changes, corrections and clarifications is available on the HUD website at <http://www.hud.gov/offices/pih/programs/ph/capfund/ocir.cfm>.

*Dated:* June 3, 2009.

**74 Fed. Reg. 28,715-28,716 (June 17, 2009)  
Notice of Availability: Notice of Fund Availability (NOFA) for Fiscal Year 2009 Neighborhood Stabilization Program2 Under the American Recovery and Reinvestment Act of 2009; Correction**

*Summary:* On May 7, 2009, HUD posted on its website its Notice of Funding Availability (NOFA) for competitive grants for the Neighborhood Stabilization Program 2 (NSP2), authorized under the American Recovery and Reinvestment Act of 2009. The purpose of the NSP2 program is to stabilize neighborhoods whose viability has been and continues to be damaged by the economic effects of properties that have been foreclosed upon and abandoned. HUD has posted a notice correcting the NSP2 NOFA on its website at <http://www.hud.gov/recovery>.

*Dated:* June 11, 2009.

**74 Fed. Reg. 29,223-29,229 (June 19, 2009)  
Notice of Allocations, Application Procedures, Regulatory Waivers Granted to and Alternative Requirements for Emergency Assistance for Redevelopment of Abandoned and Foreclosed Homes Grantees Under the Housing and Economic Recovery Act, 2008; Revisions to Neighborhood Stabilization Program (NSP) and Technical Corrections**

*Summary:* On October 6, 2008, the department published a Notice advising the public of the allocation formula and allocation amounts, the list of grantees, alternative requirements, and the waivers of regulations granted to grantees under Title III of Division B of the Housing and Economic Recovery Act of 2008, for the purpose of assisting in the redevelopment of abandoned and foreclosed homes under the Emergency Assistance for Redevelopment of Abandoned and Foreclosed Homes heading, referred to as the Neighborhood Stabilization Program (NSP). This document advises the public of substantive revisions to the October 6, 2008, Notice, primarily as a result of changes to NSP made by the American Recovery and Reinvestment Act of 2009. This document also makes a number of non-substantive technical corrections or clarifications to the October 6, 2008, Notice.

*Dates:* The effective date remains as published in the Federal Register on October 6, 2008.

**74 Fed. Reg. 29,503-29,504 (June 22, 2009)  
Notice of Availability: Notice of Funding Availability (NOFA) for Fiscal Year (FY) 2009 Capacity Building for Community Development and Affordable Housing Grants**

*Summary:* Through this notice, HUD announces the availability on its website of the application information, submission deadlines, funding criteria and other requirements for the FY 2009 Capacity Building for Community Development and Affordable Housing NOFA. The notice providing information regarding the application process, funding criteria and eligibility requirements is available on the HUD website at <http://www.hud.gov/offices/adm/grants/fundsavail.cfm>.

*Dated:* May 20, 2009.

**74 Fed. Reg. 29,510-29,511 (June 22, 2009)  
Notice of Availability: Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2009 Housing Counseling Program**

*Summary:* HUD announces the availability on its website of the applicant information, submission deadlines, funding criteria and other requirements for HUD's Housing Counseling Program NOFA for FY 2009 at <http://www.hud.gov/offices/adm/grants/fundsavail.cfm>.

*Dated:* June 12, 2009.

**74 Fed. Reg. 29,504-29,510 (June 22, 2009)  
Proposed Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2009 Rental Assistance for Non-Elderly Persons With Disabilities; Request for Comments**

*Summary:* The Omnibus Appropriations Act, 2009 makes available \$30 million for incremental Section 8 Housing Choice Vouchers (HCV) for non-elderly disabled families served by entities (which this NOFA will limit to public housing agencies) with demonstrated experience and resources for supportive services. This money should fund approximately 4000 HCVs. Approximately 25% (\$7,500,000 and 1000 HCVs) will be made available for non-elderly families transitioning out of nursing homes and other institutions into the community. To permit the department to better design the distribution of this assistance, particularly as it relates to transitioning non-elderly disabled families out of nursing homes and other institutions and the NOFA's tie-in to the Money Follows the Person (MFP) Demonstration administered by the Department of Health and Human Services, HUD is soliciting public comment. Comments addressing the threshold factors used to distribute this assistance and whether HUD should establish a more performance-based method for distributing vouchers, and how the state institutional transition programs such as the MFP Demonstration can work effectively with the PHAs that are awarded vouchers for this purpose are also welcome. All comments will be considered during the development of the final NOFA published by HUD.

*Comment Due Date:* July 13, 2009.

**74 Fed. Reg. 30,106-30,108 (June 24, 2009)**  
**Protecting Tenants at Foreclosure: Notice of Responsibilities Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property**

*Summary:* Through this notice, HUD seeks to ensure that individuals or entities that participate in HUD programs or with whom HUD interacts through its programs are aware of obligations imposed on immediate successors of interest in any residential property pursuant to a foreclosure to provide tenants residing in such property, including but not limited to tenants with Section 8 rental assistance, with at least ninety days' advance notice of the need to vacate the property, where the successor desires to have the tenants vacate. In addition, except for purchasers who will occupy the property as the primary residence, successors take their interest subject to the remaining term of any bona fide lease. These obligations are broadly imposed on immediate successors in interest by the Helping Families Save Their Homes Act of 2009. While HUD is directing this notice to entities and individuals that participate in HUD programs or with whom HUD interacts in its HUD programs these obligations are not limited to FHA-insured or HUD-assisted housing. The responsibility for meeting the new tenant protection requirements applies to all successors in interest of residential property, regardless of whether a federally related mortgage is present. The immediate successors in interest of a residential property that is being foreclosed bear direct responsibility for meeting the requirements of the law. These protections are self-executing, and became effective May 20, 2009.

*Dated:* June 18, 2009.

**74 Fed. Reg. 30,318 (June 25, 2009)**  
**Notice of Availability: Notice of Funding Availability (NOFA) for American Recovery and Reinvestment Act Capital Fund Recovery Competition Grants; Correction to Deadline in June 9, 2009 Federal Register Notice**

*Summary:* On June 9, 2009, HUD published a notice in the Federal Register to announce that a revised version of the Capital Fund Recovery Competition NOFA had been issued and posted to the HUD website. That brief notice stated that the deadline date for Category 4 (Creation of Energy Efficient, Green Communities) applications is July 29, 2009. In fact, the correct deadline date for Category 4 applications is July 21, 2009.

*Dated:* June 19, 2009.

**74 Fed. Reg. 31,290-31,291 (June 30, 2009)**  
**Housing Choice Voucher Program**

*Summary:* HUD will submit to the OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to records public housing authorities maintain on Section 8 voucher participant eligibility, unit acceptability, lease and/or housing assistance payments, and budget and payment documentation.

*Comments Due Date:* July 30, 2009.

**74 Fed. Reg. 31,292-31,303 (June 30, 2009)**  
**Notice of Regulatory Waiver Requests Granted for the First Quarter of Calendar Year 2009**

*Summary:* HUD is required to publish quarterly Federal Register notices of all regulatory waivers that HUD has approved. Each notice covers the quarterly period since the previous Federal Register notice. This notice contains a list of regulatory waivers granted by HUD during the period beginning on January 1, 2009, and ending on March 31, 2009.

*Date Granted:* January 6, 2009,

## HUD Notices

**Notice H 09-04 (June 9, 2009)**  
**Closing Costs Paid by the U.S. Department of Housing and Urban Development**

*Summary:* This Notice supersedes Notice H 2006-12, which identified allowable closing costs paid in connection with the sale of a HUD-owned single family property. The allowable closing costs identified in this Notice will be in effect for sales contracts executed on or after the effective date of this Notice.

**Notice PIH 2009-18 (HA)(June 22, 2009)**  
**State and Local Law Applicability to Lease Terminations in the Housing Choice Voucher (HCV) Program.**

*Summary:* This notice provides clarification on the applicability of state and local laws in the Housing Choice Voucher (HCV) Program regarding termination of tenancies by the owner for other good cause at 24 CFR 982.310. In summary, nothing in 24 CFR 982.310(d)(1) pre-empts any applicable state or local laws that restrict or prohibit the termination of tenancy. This applies to all HCV vouchers.

**Notice PIH-2009-19 (HA) (June 30, 2009)**  
**Extension of PIH Notice 2008-26 (HA) - Income Exclusion Under Temporary Employment by U.S. Census Bureau**

*Summary:* This Notice extends Notice PIH 2008-26 (HA), same subject, which expires on June 30, 2009, for another year until June 30, 2010. Notice 2008-26 clarifies the exclusion of temporary employment payments by the U.S. Census Bureau pursuant to 24 CFR 5.609(c)(9). ■

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HUD Housing Programs: Tenants' Rights 2006-2007 Supplement	\$ 130	<input type="checkbox"/>	<input type="text"/>
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The Family Self-Sufficiency Program: An Advocate's Guide (1994)	\$ 10	<input type="checkbox"/>	<input type="text"/>
A Passage from Poverty: Self-Sufficiency Policies and the Housing Programs (1991)	\$ 10	<input type="checkbox"/>	<input type="text"/>
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